

U-Turn in Place of Provision of Online Information and Database Access or Retrieval Services



Place of Provision in case of Online Information and data base access or retrieval services has been shifted from the 'location of the service provider' to the 'location of service receiver'. All such services received in India from outside India shall now be liable to service tax. The meaning of such services expanded to include all services whose delivery is mediated through internet and the nature of which renders their supply essentially automated and involving minimum human intervention. The definition of online services has been amended and Place of Provision in case of online services has been reversed resulting in taxation of services in India even if these are coming non-taxable territory. Towards the end, the author asks some intelligent questions giving his readers some food for thought. Read on...

The Central Government has issued various notifications on 9th November 2016 under Service Tax law, amending the provisions of Service Tax in respect of *online information and database access or retrieval services* (hereinafter referred as online services), with effect from 1st December 2016. The said amendments have been brought in vide the notification nos. 46-49/2016-ST. Further a circular dated 9th October 2016 was also issued for clarifications in that regard.



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Consequently, there is a paradigm shift in liability for payment of Service Tax in cases of *online services*. The said amendments are on two counts with the intent to widen the scope of service tax collections. Firstly, the scope of *online services* has been widened to include many more services which were otherwise not included and secondly, there has been a change in place of provision of service.

The definition of *online services* has been amended to expand the scope. It now reads:

"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

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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;

This new definition will sprawl over various online activities that were not covered earlier in *online services*. The earlier definition only covered those activities that were in the nature of database access or retrieval services only. Advertising, e-books, music, movies or other digital content in the inclusive part have actually expanded the scope of *online services*. In addition to it, the means clause has further left open to examine various other services that can fall under the *online services*.

Another segment of assesseees has been created *vide* providing a definition of *non-assessee online recipient* to specifically exclude such persons from the liability of Service Tax. The definition of *non-assessee online recipient* reads:

"non-assessee 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.

These non-assesseees can in short be explained as general consumers or B2C transactions.

The word *taxable territory* has been defined under the Service Tax law to mean, India excluding J&K and *non-taxable territory* means any place

other than taxable territory. A service is deemed to be non-taxable if it is provided in a non-taxable territory under the Place of Provision Rules, 2012.

Rule 9 of Place of Provision Rules, 2012 used to provide that the said services were not liable to Service Tax in case they were provided from non-taxable territory to the taxable territory as the *Place of Provision of Service* was the place of the service provider. Therefore, services provided from non-taxable territory to taxable territory were to be non-taxable.

Place of Provision of Service in case of *online services* has been reversed such that services provided from the non-taxable territory in the taxable territory shall now be deemed to be provided in the taxable territory.

Currently, in terms of the Notification 25/2012-ST, any service received by the Government, a local authority, a Government authority or an individual in relation to any purpose other than commerce, industry or any other business or profession is exempt if the provider of service is located in the non-taxable territory. The said exemption has now been withdrawn to the extent such services are related to *online services*. Therefore, in case *online services* are now received by the above category of persons, the services shall be liable to Service Tax.

Place of Provision of Service in case of *online services* has now been shifted from the location of the service provider to the service receiver. Therefore, now *online services* shall be liable to Service Tax, if they are provided by the service provider located in non-taxable territory to the person located in the taxable territory (Its *vice-versa* will also hold true, i.e. *online services* provided from taxable territory shall now be not liable to Service Tax if recipient is in non-taxable territory). Further, *online services* have been omitted from the definition of *Telecommunication Services* with effect from 1st December 2016.

Further, in terms of reverse charge mechanism, *online services* provided or agreed to be provided by any person located in a non-taxable territory and received by any person located in the taxable territory, the recipient of such service shall be the person liable for paying service tax. However, in case of *non-assessee online recipients* there shall not be any reverse charge and the liability to pay Service Tax will remain on the service provider in the non-taxable territory.

Taxation

Service provider of *online services* in non-taxable territory shall be liable to pay Service Tax to the Government and would also be liable to register and file returns in case of *non-assessee online recipients*. Such service provider, may appoint an agent in the taxable territory for collecting and discharging liability of Service Tax.

Further, in case online services are provided by a service provider located in a non-taxable territory through an *intermediary* (electronic platform) located in non-taxable territory to *non-assessee online recipient* then such intermediary shall be deemed to be the service provider except when she/he satisfies all the following 4 conditions:

- Invoice or customers bill or receipt issued by the intermediary clearly indicates the service supplier in non-taxable territory and the service tax registration number of the supplier in the taxable territory;
- Intermediary does not authorise the charge to the customer or neither collects or processes any payment nor is responsible for the payment between the non-assessee online recipient and supplier of service;
- Intermediary involved in the supply does not authorise delivery; &
- General terms and conditions of the supply are not set by the intermediary.

However, if *online services* are provided by a service provider located in a non-taxable territory through an *intermediary* located in taxable territory to *non-assessee online recipient*, such *intermediary* would be liable to collect and discharge Service Tax.

Conclusion

- Services of webhosting, cloud services, online gaming, advertising, e-books, online music, online movies, subscriptions provided by Google, Apple (iTunes), etc., consumed in India by an individual or general consumer, shall now be liable to Service Tax under the forward charge. In case, such services are availed by an entity other than non-assessee in relation to business

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or commerce, the liability of Service Tax shall be under reverse charge.

- Similarly, now above services provided from India (excluding the State of J&K) to the consumers out of India shall not be liable to Service Tax.

iii. Summary

In case of *online services* provided by a service provider located in the non-taxable territory, following persons shall be liable to pay the Service Tax:

SL No.	Cases	Person Liable to pay Tax	Compliance
1	Services received by service receivers other than 'Non Assessee Online Recipients'	Service Receiver under reverse charge	Pay ST & file ST-3 returns
2	Services received directly by "Non Assessee Online Recipient"	Service provider in non taxable territory (however he may appoint an agent in India)	<ul style="list-style-type: none"> • Apply for registration under ST-1A • File Return under ST-3C
3	Services received through intermediary in non taxable territory by "Non Assessee Online Recipient"	Such Intermediary. (If Intermediary satisfies all the conditions mentioned in the notification then service provider shall be liable)	<ul style="list-style-type: none"> • Apply for registration under ST-1A • File Return under ST-3C
4	Services received through representative in taxable territory by a 'non assessee Online Recipient'	Such representative	<ul style="list-style-type: none"> • Collect & Pay ST • File ST-3 returns

Food for Thought

However, there are few questions that may expand our ambit of understanding:

- Can the Government of India levy Service Tax on service providers located in non-taxable territory? Will that have the constitutional validity?
- Can the Government of India enforce collection of such Service Tax when service providers are in non-taxable territory?
- In case of intermediaries in India, would there be a double taxation, since intermediaries would be liable to collect and pay Service Tax on behalf of foreign service providers as well as on their commission part?

Let us consider. ■