

# OIDAR Services under GST Regime



*Under Goods and Services Tax regime, separate provisions have been kept for services provided online, which may broadly be categorised into Online Information and Database Access and Retrieval (OIDAR) Services and other online services [which do not fall in the definition of OIDAR services]. Separate provisions are there under GST regime for both of these categories. The article “OIDAR services under GST regime” is an insight into status of services provided over the Internet covering the provisions contained in sections, rules, notifications and ambiguities therein. Read on...*

## Introduction

In the era of digitalisation, everything is just a click away; be it the goods or service or information. The earlier Indirect Tax regime needed a big reform particularly because it did not have proper provisions to levy and collect the taxes in relation to the online services. The new Indirect Tax reform in the form of GST has separate provisions regarding



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OIDAR services. This piece of articulation is about the provisions contained in GST law regarding OIDAR Services, ambiguities pertaining to it and reforms needed therein.

## OIDAR Services - Definition

Before moving further, it is important to understand what exactly OIDAR services mean and whether every service availed online is an OIDAR service? It must be stated here that merely because any service is availed online, it does not become OIDAR service. This term has been defined in Section 2(17) of IGST Act, 2017 as follows:-

*“OIDAR 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;”

The analysis of this definition makes it clear that to fall in the definition of OIDAR services, an online service has to satisfy the following two conditions:-

- Delivery of services should be mediated by IT over internet/ electronic network;  
AND
- Supply is automated and impossible to ensure in absence of information technology.

Every service that is availed online cannot be construed as OIDAR services. To be an OIDAR Service, the service should be automated, i.e. there should be no or minimal human intervention. Also, there are separate provisions in GST law in respect of OIDAR services which are provided by supplier located in non-taxable territory. For other online services, general provisions apply.

**An analysis of OIDAR services makes it clear that to fall in the definition of OIDAR services, an online service has to satisfy the following two conditions—(1) Delivery of services should be mediated by IT over internet/ electronic network; and (2) Supply is automated and impossible to ensure in absence of information technology.**

### **General Exemption Given Vide Notification No. 9/2017-IT(R) DT 28.6.2017**

This notification exempts the following types of services:-

“Services received from **provider of service located in non-taxable territory** by:-

- (a) Central Government, State Government, Union Territory, Local Authority or Governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession;
- (b) Trust for purpose of carrying out charitable activities; or
- (c) A person located in non-taxable territory.

This exemption shall not apply in following 2 cases:-

- (i) **OIDAR services** received by persons of entry (a) and (b) above.
- (ii) services by transport of goods by vessel from place outside India up to customs station of clearance in India received by persons specified in above clauses.”

The analysis of above notification makes it ample clear that any type of service is imported by any person specified above from a person located in non-taxable territory is exempted generally. However, this exemption is not applicable on import of OIDAR services received by specified persons or trust for the purpose of carrying out charitable activities.

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### **Special Provisions for OIDAR Services Supplied By Foreign Supplier**

Section 14(1) of IGST Act, 2017 states that where the supplier of OIDAR services located in non-taxable territory provides the OIDAR services to “Non-taxable online recipient”, the said foreign supplier shall be liable to get registered in India and pay GST thereupon. Thus, liability under section 14(1) arises only if OIDAR services are provided to “Non-taxable online recipient”. This term is defined in Section 2(16) of IGST Act, 2017 which reads as follows:-

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*“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,—*

*(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;”*

Therefore, only Government, local authority, Governmental authority and any other person who is not registered under GST and receiving OIDAR services for any purpose other than commerce, industry or business or profession (hereinafter also referred as Non-taxable online recipient) shall come under purview of definition of OIDAR services. In that case, the liability to get registered and pay GST shall rest upon the foreign supplier of OIDAR services.

In case where both supplier of OIDAR services and intermediary who is supplying the OIDAR services on behalf of supplier are located in non-taxable territory; there arises an issue as to who shall be liable to pay GST on the supply made to non-taxable online recipient – the supplier or intermediary. To avoid litigation in such cases, a proviso has been inserted in Section 14(1) which states that the intermediary shall be deemed to be the recipient of such services from supplier and shall be deemed to be further supplying the same to the non-taxable online recipient. Therefore, as per this proviso; the said intermediary shall be the person liable for paying tax under section 14(1). However, the intermediary shall not be liable if the following conditions are satisfied:-

- The invoice or bill or receipt given to customer clearly identifies the service in question and mentions that its supplier is in non-taxable territory;

- 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;
- The intermediary does not authorise delivery; and
- The general terms and conditions of the supply are not set by the intermediary involved in the supply but by the supplier of services.

Therefore, if the above conditions are satisfied, the supplier shall be person liable to pay GST and get himself registered instead of intermediary.

Section 14(2) of IGST Act, 2017 states that a simplified registration scheme shall be notified for the purpose of foreign suppliers of OIDAR services in which single registration shall be required by the person representing that supplier in the taxable territory. If there is no such person and also there is no branch or office of supplier, he shall appoint a person in taxable territory for the purpose of taking registration and paying IGST. However, no notification has been issued under this section till date.

### **Status of Various Online Services under GST**

A comparative study of Section 14 of IGST Act, 2017 and Notification no. 9/2017-IT(R) dt. 28.6.2017 and Notification no. 10/2017-IT(R) dt. 28.6.2017 makes it clear that online services, when received for non-business purpose are exempt while in case of OIDAR services received for non-business purposes are taxable. However, liability to pay tax in such a case rests on the supplier located in non-taxable territory. The taxability or exemption in case of receipt of online services from supplier located in non-taxable territory is explained in following table:-

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\*Conditions apply.

Type of service	Supplier of service	Recipient of service	Status	Remarks
OIDAR services	Any person located in non-taxable territory	Non-taxable online recipient	Taxable	Supplier is liable to take registration and pay tax under section 14 of IGST Act, 2017.
OIDAR services	Any person located in non-taxable territory	Trust	Taxable	Trust is liable to pay tax under reverse charge.
Other online services	Any person located in non-taxable territory	Non-taxable online recipient	Exempt	Exemption given under Notification no. 9/2017-IT(R) dt. 28.6.2017
Other online services	Any person located in non-taxable territory	Trust	Exempt	Exemption is available under Notification no. 9/2017-IT(R) dt. 28.6.2017 only if these are received for the purpose of carrying out charitable activities.
OIDAR services or other online services	Any person located in non-taxable territory	Any person other than non-taxable online recipient located in taxable territory	Taxable	Reverse charge is applicable under Notification no. 10/2017-IT(R) dt. 28.6.2017

### Mandatory Registration under section 24 of CGST Act, 2017

Section 24 of CGST Act, 2017 provides the list of persons, who are not allowed the benefit of threshold, i.e., they are required to obtain registration right from the beginning. Clause (xi) to this section reads as follows:

*“(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;”*

Thus, supplier of OIDAR services from non-taxable territory providing the services to an unregistered person in India is required to obtain mandatory registration under section 24 of CGST Act, 2017.

### Place of Supply In Case of OIDAR Services

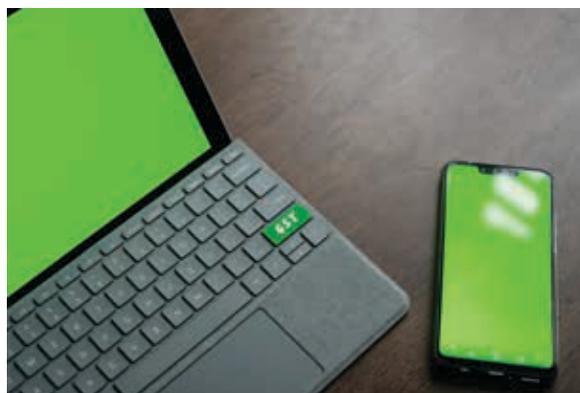
The provisions contained in Section 14 of IGST Act, 2017 impose the liability of registration on a foreign supplier if he provides the OIDAR services to non-taxable online recipient. The place of supply in such case shall be determined under section 13 of IGST Act, 2017. Sub-section 12 of Section 13 reads follows:

*“(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 subsection, 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:—*

- the location of address presented by the recipient of services through internet is in the taxable territory;*
- 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.”*

In view of above, if any two of the above conditions are satisfied, it shall be deemed that the recipient is located in India. If the said person (recipient) is not registered, the foreign supplier of OIDAR services shall be required to be registered as per provisions of Section 14 of IGST Act, 2017.

### Registration

Supplier of OIDAR services liable under section 14 of IGST Act, 2017 is required to submit registration application in form GST REG-10.

### Maintenance of Records and Payment of Tax

Rule 87 of CGST Rules, 2017 states that an Electronic Cash Ledger prescribed under section 49(1) shall be required to be maintained in FORM GST PMT-05 for each person who is liable to pay tax, interest, penalty, late fee, etc. Further, it is prescribed that the person shall generate a challan in FORM GST PMT-06 for the purpose of paying any amount due under this Act.

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It is further prescribed in respect of supplier of OIDAR services under section 14 of IGST Act, 2017 that he may pay the tax through the Board's payment system namely, Electronic Accounting System in Excise and Service Tax from the date to be notified by the Board. Therefore, special privilege has been given to such supplier under section 14 of IGST Act, 2017.

It is also prescribed that the said supplier may also make the deposit through international money transfer through Society for Worldwide Interbank Financial Telecommunication payment network, from the date to be notified by the Board.

### Returns

#### ➤ GSTR-5A:

Rule 64 of CGST Rules, 2017 states that the supplier of OIDAR services liable under section 14 of IGST Act, 2017 is required to submit return in form GSTR-5A on or before the twentieth day of the month succeeding the calendar month or part thereof.

#### ➤ Non-applicability of GSTR-1, GSTR-2 and GSTR-3:

Section 37 of the CGST Act, 2017 provides that any person other than Input service distributor, Non-resident taxable person and a person paying tax under the provisions of Section 10, Section 51 or Section 52 shall furnish statement of outward supplies of goods or services or both. This section reads as follows:-

*“(1) Every registered person, other than an Input Service Distributor, a non-resident taxable person and a person paying tax under the provisions of Section 10 or Section 51 or Section 52, shall furnish, electronically, in such form and manner as may be prescribed, the details of outward supplies of goods or services or both effected during a tax period on or before the tenth day of the month succeeding the said tax period and such details shall be communicated to the recipient of the said supplies within such time and in such manner as may be prescribed.”*

Section 37 prescribes the furnishing of details of outward supplies (GSTR-1) by EVERY REGISTERED PERSON other than –

- Input service distributor
- Non-resident taxable person (NRTP)
- Person paying tax under section 10 (Composition tax payer)
- Person liable to deduct tax at source under section 51; and
- Person liable to collect tax at source under section 52.

The language of Section 37 uses the word “shall” which means every person made liable under this section [i.e. every registered person other than five specified categories] shall mandatorily furnish the details of outward supply under this section. It further states that the form and manner of filing these details shall be prescribed. However, it nowhere prescribes that any person other than five specified persons are not required to file the details of outward supplies. It even nowhere gives power to prescribe/notify any person who shall not be required to furnish details of outward supplies other than those specified in the section.

On the other hand, rule 59 of CGST Rules, 2017 reads as follows:

***“Form and manner of furnishing details of outward supplies.-***(1) Every registered person, other than a person referred to in Section 14 of the Integrated Goods and Services Tax Act, 2017, required to furnish the details of outward supplies of goods or services or both under section 37, shall furnish such details in FORM GSTR-1 electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.”

The bare reading of above rule clarifies that the supplier of OIDAR services under section 14 of IGST Act, 2017 is also exempted from furnishing the details of outward supply besides the specified persons under section 37 of CGST Act, 2017.

On the other hand, the drafting of Section 37 is clear and unambiguous in prescribing that only the five categories of persons specified therein are not required to file GSTR-1 and all the other types of registered persons shall file these details. The rule making powers given by the Section 37 are restricted to prescribing form and manner of furnishing the details of outward supplies. Section 37 nowhere allows the rules to enhance or modify its scope/applicability. However, the rule 59 has enhanced the scope of Section 37 by adding the supplier of OIDAR services under section 14 of IGST Act to its ambit without any authority. This seems to be erroneous as Act is primary and rules are secondary. No rule can widen the scope of provisions contained in Act.

Similar issue is there in Section 38 (furnishing the details of inward supplies – GSTR-2) and Section 39 (furnishing of return – GSTR-3) read with Rule 60 and 61 respectively. While the language of Sections 38 and 39 clearly states that GSTR-2 and GSTR-3 are not to be filed by five specified persons – Input service distributor, non-resident taxable person, person liable to pay tax under section 10, person liable to deduct tax u/s 51 and person liable to collect tax under section 52. However, the respective rules namely rule 60 and 61 specifies that even the supplier of OIDAR services under section 14 of IGST Act, 2017 is not liable to file GSTR-2 and GSTR-3. Thus, there remains conflict in language of section and rule framed thereunder. Though intention of law is clear that GSTR-1, 2 and 3 should not be made applicable to supplier of OIDAR services under section 14 of IGST Act; however, the way provisions are framed are bit ambiguous.

### While Parting

The separate provisions regarding OIDAR services were the need of hour. GST law has come up with separate provisions relating to these services. Though the intention of law makers is clear, yet there are some places where the drafting requires improvement. It should be suitably amended in order to avoid the conflicts. ■