



ONLINE INFORMATION DATABASE ACCESS AND RETRIEVAL (‘OIDAR’) AN OVERVIEW

BDO IN INDIA

OVERVIEW OF ONLINE SERVICES

With technological advancement, entities incorporated outside India, are able to render services directly to Indian customers through their website or through third-party intermediaries who host the application of the service provider in their digital platforms for access to end users. Thus, levying income tax on such entities was a challenge faced by India, and most other countries. The traditional approach to tax such transactions had its limitations as these entities were able to undertake transactions virtually without effectively having any taxable presence in a particular country. In 2015, Organisation for Economic Co-operation and Development / G20 Inclusive Framework suggested 15 Actions to tackle the problem of Base Erosion and Profit Shifting (BEPS), commonly referred to as the BEPS Actions. The Equalisation Levy (EL) was one of the recommendations of Action Plan 1 of the BEPS Actions dealing with taxation on online services or the digital economy.

Accordingly, in 2016, the Indian Government introduced EL at 6% on the gross consideration paid or payable by the specified resident payer for availing of online advertisement and other specified services from a non-resident e-commerce service provider. Thereafter, with effect from 1 April 2020, the Indian Government introduced EL 2.0 at 2% to be levied on the amount of consideration received or receivable by a non-resident e-commerce operator from an online supply or service made or provided or facilitated by it to:

- a person resident in India; or
- a non-resident in the specified circumstances; or
- a person who buys such goods or services or both using an internet protocol address located in India.

Separately, from an Indirect tax perspective, tax has been levied on Online Information and Database Access or Retrieval Services (OIDAR Services) wherein services are provided digitally through the medium of the internet and received by the recipient without a physical interface with the service provider of such services. The nature of OIDAR is such that it can be provided online from a remote location outside India to a customer in India. A few key services covered under the OIDAR category from a tax perspective are provided below:

- Advertising through the internet
- Providing cloud services
- Provision of e-books, movies, music, software and other intangibles through telecommunication networks or the internet
- Data or information retrieval services
- Online supply of digital content like movies, television shows, and music
- Digital data storage
- Online gaming

Additionally, the GST law was amended in 2023-24 to widen the scope of OIDAR services and the category of service recipients. Earlier, one of the requirements of a service being treated as OIDAR was that the service provided essentially be





automated and involve minimal human intervention. The term 'minimal human intervention' was interpreted in a subjective manner. The amendment has removed the requirement of 'automated and minimal human intervention' for being treated as an OIDAR service, increasing the ambit of OIDAR services to even those services involving human intervention and eliminating the subjectiveness. Further, the definition of the term 'non-taxable online recipient' is simplified to cover all unregistered persons located in India who receive OIDAR services. These amendments have removed the ambiguities that existed earlier with respect to determining compliance requirements of the OIDAR service providers in India.

Considering the above, we have listed below a few tax challenges faced by Online service providers:

KEY TAX CHALLENGES IN INDIA

Given the complicated physical-digital position of the OIDAR services, they currently face several challenges from a tax perspective resulting in certain implications and impediments that may impact the operations or delivery of the services. We have highlighted key tax challenges faced by the OIDAR services.

▪ Wide coverage of EL and OIDAR provisions

The definition of some of the terms are either very wide or not defined and therefore the scope of EL 2.0 remains wide and ambiguous. Besides, the GST provisions specify that the place of supply for OIDAR services would be the location of

the 'Service Recipient'. Considering the fact that the services are consumed online, the manner of determining the actual location of the service recipient becomes a challenge. The GST law requires the OIDAR services provider to determine the taxability by identifying the 'location of service recipient', which acts as an additional documentation obligation on an overseas online service provider.

▪ Overlap between EL, WHT and GST

Overlapping provisions of WHT under section 194-O of the Income-tax Act, 1961 (IT Act), EL 2.0 and GST on OIDAR services is another key issue. For instance, in case of a transaction where a resident service recipient avails services from a resident e-commerce participant through a non-resident e-commerce operator, the non-resident e-commerce operator shall be required to collect TCS on the payment for the supply of such services to the resident e-commerce participant under the GST regime. Also, they will undertake WHT on the payment/ payables for the supply of such services to the resident e-commerce participant under section 194-O of the IT Act and pay EL 2.0 on these amounts of the consideration received/ receivable from the service recipient in India.

▪ Lack of Awareness

The lack of awareness of EL and OIDAR provisions is a key challenge that leads to Indian tax authorities raising queries, and issuing tax notices and tax liability

on overseas online service providers. The overseas service providers having their presence outside India tend to consider that Indian tax provisions would be applicable only if they have any taxable or physical presence in India. However, the Indian tax law clearly states that any online service provider rendering specified services to specified Indian recipients shall obtain necessary tax registrations in India, collect and pay necessary tax and undertake compliances as per the Indian tax laws.

▪ **Non collection / payment of tax**

Due to a lack of awareness, the overseas entities have collected only service consideration from their clients in India and have not recovered GST (at 18% on such service consideration) from their customers. Similarly, the overseas online service providers are failing to pay EL at 2% on the amount of consideration received for providing online services. The tax demands from the Indian tax authorities are leading to a scenario where the overseas entities are forced to pay taxes and interest out of the consideration received, which is a significant cost for the business. If the entity obtains GST registration as an OIDAR service provider, they can issue invoices wherein they can collect the GST (at 18%) from the service recipient over and above the service consideration and remit the same to the Indian Government.

▪ **Intra-group transactions from Transfer Pricing perspective**

Often, it is witnessed that overseas online service providers operate their business from several entities located in different countries and perform different business functions. Also, these overseas

service providers tend to form centralised service centres for provisions of services within the group. Further, such intra-group arrangements, being transactions with related parties, attract transfer pricing provisions whereby it becomes necessary to evaluate whether the cost charged to associated enterprises is at arm's length price or not. Intra-group transactions have caught the interest of Indian tax authorities and are constantly being monitored to evaluate if they result in shifting of the profit base to lower tax jurisdictions.

▪ **Registration under GST**

The overseas supplier of OIDAR services is required to evaluate the following scenarios to obtain GST registration:

- Subject to specified conditions, if an overseas intermediary is involved in facilitating the rendition of OIDAR services between an original service provider and an end customer in India, then such overseas intermediary will be deemed to be an OIDAR service provider and will be required to comply with the GST provisions.
- If an overseas supplier of OIDAR services has any person representing them and operating in India, then such person shall get registered and comply with GST provisions on behalf of the OIDAR service provider.
- If an overseas supplier does not have any representative in India, it will need to appoint a person in India for the purpose of GST registration and tax payment or register itself as a non-taxable OIDAR service provider.

▪ **Unaddressed tax notices**

Indian tax authorities have been issuing notices to several overseas online service providers, but these notices may not be delivered to the authorised person of such overseas online service providers. This has led to a situation where



the tax demands are increasing on a periodic basis, along with the interest due on such taxes.

▪ Maintenance of Records

An overseas supplier of OIDAR services is required to maintain additional records to meet Indian GST compliances. The ERP systems and data-recording mechanism of the service providers must accommodate capturing information, including the details of the service rendered and the State in which the service recipient is located, and ensure issuance of invoice/ receipt in line with Indian GST law.

OUR SERVICES

Backed by global expertise, coupled with years of experience & domain knowledge, BDO India tax experts understand the nuances of tax and compliance-related challenges and work to provide solutions to address the issues faced by the OIDAR services on account of evolving tax laws. Our services are designed to:

- Determine if the services rendered would fall under the ambit of EL or OIDAR services by reviewing the transaction flow and contracts.
- Assist in responding to tax notices issued to the overseas entity and representing the entity before the Indian tax authorities.
- Assist in identifying representatives and obtaining tax registrations in India.
- Undertake day-to-day compliances with respect to direct and indirect taxes.
- Assist in setting up Standard Operating Procedures (SOPs) to maintain records and ensure compliance under the Indian tax laws.

- Assist in setting up operations in India if the overseas entity decides to establish a physical presence in India.

METHODOLOGY

- Understanding the business and operating model of the entity and the services offered by the entity.
- Examining relevant provisions of the Indian tax laws to determine taxability.
- Assist the entity in drafting a statement of facts to prepare submissions and represent the entity before the Indian tax authorities.
- Assistance in carrying out compliances with the help of technology-driven solutions.
- Advising on structuring/ restructuring business transactions from the Indian tax laws perspective.

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BDO India takes a phased approach in delivering services to maximise efficiency and the transparency of our engagement.



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US\$12.8 billion



+12.1%*
REVENUE INCREASE
*(at constant exchange rates)

1,803 OFFICES **164 COUNTRIES & TERRITORIES**



111,307
PEOPLE **+14.4%**

PERCENTAGE REVENUE BY REGION



FEE SPLIT BY SERVICE LINE



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BDO in India offers Assurance, Tax, Advisory, Business Services & Outsourcing and Digital Services for both domestic and international clients across industries. The team at BDO in India consists of over 7,500 professionals led by more than 270 partners and directors operating out of 18 offices, across 12 key cities.



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88% OF OUR CLIENTS PERCEIVE THE EXPERTISE OUR PARTNERS BRING AS VALUABLE
87% OF OUR CLIENTS ARE SATISFIED WITH OUR SERVICE DELIVERY

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BUSINESS ADVISORY SERVICES
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OUR GROWING INDIA PRACTICE IS LED BY AN EXPERIENCED PARTNER & DIRECTORS GROUP WITH BUSINESS FORESIGHT AND EXPERTISE ACROSS INDUSTRIES.

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DELIVERING EXCEPTIONAL CLIENT EXPERIENCE

*Note: Financial results are as of 30 September 2022

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- Corporate Finance and Investment Banking
- Deal Value Creation
- Financial Due Diligence
- M&A Tax and Regulatory
- Strategy & Commercial Due Diligence
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- Human Resource Outsourcing
- Payroll Management and Compliance Services
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- Shared Services Centre



BDO DIGITAL

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- Technology Products and Solutions

TAX

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- International Tax Services
- Private Client Services
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- Transfer Pricing
- Customs & International Trade
- Goods & Services Tax (GST)
- Indirect Tax Assessment & Litigation Assistance
- Incentives & ESG
- Tax Technology

CONTACT US

For queries regarding our services, please write to us at taxadvisory@bdo.in

For any other comments or feedback, kindly write in to marketing@bdo.in

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