

Service tax - Amendments pertaining to online database and retrieval services

10 November 2016



The Ministry of Finance has issued certain Notifications dated 9 November 2016, pertaining to service tax legislation, making amendments which significantly affect the providers or recipients of **'online information and database access or retrieval services'**. The amendments made by such Notifications shall come into effect from 1 December 2016. A list of such Notifications has been encapsulated in the table below:

Sr. No.	Notification
1.	46/2016-Service Tax Amends Place of Provision of Services Rules, 2012 ('POPS) to amend the place of provision for 'online information and database access or retrieval services'
2.	47/2016-Service Tax Amends notification No. 25/2012-ST dated 20 June 2016 to withdraw exemption from service tax for online information and database access or

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	retrieval services provided by a person in non-taxable territory to 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, located in taxable territory
3.	48/2016-Service Tax Amends Service Tax Rules, 1994 to prescribe that the person located in non-taxable territory providing online information and database access or retrieval services to 'non-assesse online recipient', as defined therein, is liable to pay service tax
4.	49/2016-Service Tax Amends notification No. 30/2012- ST, dated the 20 June 2016, making service provider located in the non-taxable

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	territory with respect to online information and database access or retrieval services provided in the taxable territory to 'non-assesse online recipient liable to discharge service tax and compliances thereon.

Furthermore, **Circular No. 202/12/2016-Service Tax** dated 9 November 2016 has also been issued clarifying various issues pertaining to online information and database access or retrieval services.

Gist of the amendments vide the above Notifications and clarification by the Circular has been summarised in the ensuing paragraphs:

Definition of 'online information and database access or retrieval services' amended

The term 'online information and database access or retrieval services' has now been defined under the Service Tax Rules, 1994, ('Rules') and the same has to be referred for the purpose of POPS. As per the definition provided under the Rules 'online information and database access or retrieval services' means services:

- whose delivery is mediated by information technology over the internet or an electronic network;
- the nature of which renders their supply essentially automated;
- involving minimal human intervention; and
- impossible to ensure in the absence of information technology.

Further, as per the definition, online information and database access or retrieval services includes the following electronic services, such as:

- (i) Advertising on the internet;
- (ii) 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.

The Circular further provides for an indicative list of services which shall or shall not fall under the 'online information and database access or retrieval services'

Amendment in the Place of Provision of Service Rules, 2012

Amendment in Rule 9:

Currently the place of provision of services in respect of 'online information and database access or retrieval services' is governed by Rule 9 (b) of the POPS which states that the place of provision of such services is the location of the service provider.

Henceforth, Rule 9(b) of POPS shall stand omitted. The Circular states that henceforth, the place of provision of such services shall be governed by Rule 3 of POPS.

Amendment in Rule 3:

Existing Rule 3 of POPS provides that the place of provision of a service shall be the location of the recipient of service. However, as per proviso to Rule 3, 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.

Now, in respect of online information and database access or retrieval services, the said Proviso to Rule 3 shall not be applicable Accordingly, even if 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 service recipient.

[Service recipient deemed to be located in taxable territory:](#)

Where 'online information and database access or retrieval 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 person receiving such services shall be deemed to be located in the taxable territory if any 2 of the following non-contradictory conditions are satisfied, namely:

- (i) the location of address presented by the service recipient *via* internet is in taxable territory;
- (ii) the credit card or debit card or store value card or charge card or smart card or any other card by which the service recipient settles payment has been issued in the taxable territory;
- (iii) the service recipient's billing address is in the taxable territory;
- (iv) the IP address of the device used by the service recipient is in the taxable territory;
- (v) the service recipient's bank in which the account used for payment is maintained is in the taxable territory;
- (vi) the country code of the SIM card used by the service recipient is of taxable territory;
- (vii) the location of the service recipient's fixed land line through which the service is received by the person is in taxable territory.

Amendment in Mega Exemption Notification

Currently, Notification 25/2012, dated 20 June 2012, also known as 'Mega Exemption Notification', provides exemption in respect of services received from a provider of service located in a non-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.

Henceforth, this exemption shall stand withdrawn in respect of 'online information and database access or retrieval services' received by the aforesaid service recipients from a person located in a non-taxable territory.

'Non-assessee online recipient' ('NOAR') - New definition

'Non-assessee online recipient' has been defined to mean:

- 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.

In a case where online information and database access or retrieval services provided or agreed to be provided by any person located in a non-taxable territory and received by an NOAR, such service recipient shall be deemed to be an NOAR if such person does not have service tax registration.

Service tax liability under RCM in respect of service recipient other than NOAR

In a scenario where a service recipient, other than NOAR, receives online information and database access or retrieval services from a service provider located in a non-taxable territory, the service recipient would be liable to discharge service tax under RCM.

Service tax liability where services are provided to NOAR

The liability to discharge service tax, when the online information and database access or retrieval services are provided to an NOAR by a service provider located in the non-taxable territory, has been discussed under the following scenarios:

Scenario 1:

- The service provider is in a non-taxable territory;
- NOAR is in taxable territory.

The service provider shall be the person liable for paying service tax.

Scenario 2:

- Service provider is in a non-taxable territory;
- NOAR is in taxable territory;
- An intermediary is located in the non-taxable territory is involved.

An intermediary located in the non-taxable territory including an electronic platform, a broker, an agent or any other person, by whatever name called, who arranges or facilitates provision of such service but does not provides the main service on his account shall be deemed to be receiving such services from the service provider in non-taxable territory and providing such services to the NOAR.

However, if the specified conditions are satisfied then such intermediary would neither be considered as service recipient, nor as a service provider.

Scenario 3:

- The service provider is in non-taxable territory;
- NOAR is in taxable territory;
- The service provider has a representative in taxable territory.

The person representing the service provider for any purpose in the taxable territory shall be the person liable for paying service tax.

Scenario 4:

- The service provider is in a non-taxable territory;

- NOAR is in taxable territory;
- The service provider is not having a physical presence or representative for any purpose in the taxable territory.

The service provider may appoint a person in the taxable territory for purpose of paying service tax and such person shall be liable for paying service tax.

Consequential compliances

- Service tax registration to be applied in Form ST-1A within 30 days of levy of service tax or the date from when the service provider has commenced the supply of such taxable services in the taxable territory in India;
- An invoice, a bill or, challan shall include any document, by whatever name called, whether or not serially numbered, should contain the prescribed details;
- Service tax registration shall be granted in Form ST-2A;
- Service tax returns to be filed in Form ST-3C;
- Large Taxpayer Unit, Bengaluru (LTU Bengaluru) under the Central Board of Excise and Customs (CBEC) would be the administrative authority.

Dhruva Comments:

- These amendments appear to be a fallout of BEPS Action Plan -1 : Digital Economy issued by OECD.
- The amendments have been brought at a time when the entire country is gearing up for implementation of GST. In view of the amendments being introduced at such a crucial juncture, it appears that the Government intends to incorporate similar provisions under the GST regime, and therefore, making an attempt to bring the assessee in sync to the expected legislation.
- After the enactment of the amendment, it would be interesting how the Government ensures compliances at the end of service providers or intermediaries which are located outside the

territorial jurisdiction. Further, the possibility of round of litigations challenging the powers of the Government to charge and recover tax from service providers or intermediaries located in non-taxable territory cannot be ruled out.

- Furthermore, despite the Governments effort to regularise the amendments smoothly, it would be perplexing to determine the territorial jurisdiction of a service provider located in non-taxable territory, be it the service provider itself or the intermediary.

Key contacts

Dinesh Kanabar, CEO
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia, Partner
ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri, Partner
niraj.bagri@dhruvaadvisors.com

Srinath S, Associate Partner
srianth.s@dhruvaadvisors.com

Our offices

Mumbai

1101 & 1102, One Indiabulls Centre, Tower 2B,
841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013, India
Tel: +91-22-6108 1000

Bengaluru

Prestige Terraces
5/1, Union Street
Infantry Road
Bangalore 560001
Tel: +91-80-4660 2500

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Corporate Road, Prahladnagar,
Ahmedabad 380 015.
Tel: +91-79-6134 3434

Delhi

101-102, 1st Floor, Tower-4B
DLF Corporate Park,
M G Road, Gurgaon, Haryana – 122002
Tel: + 91-124 6687000

Singapore

One Raffles Place, #41-01
Singapore 048616
Tel: +65 6812 1600

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