


Online gaming industry and GST: An ongoing saga

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Abstract

Online skill-based money gaming has emerged as a multi-billion-dollar industry in India. This growth has taken place on the basis of a century old distinction between games of skill and games of chance. However, the skill-based games, when played for stakes, have recently attracted regulatory scrutiny in various forms. One such form has been the imposition of a higher level of Goods and Services Tax (GST), which is India's indirect federal sales tax. The present paper analyses the growth of real money skill-based games in India along with its distinction from chance-based games (betting). Subsequently, the paper traces the deliberation undertaken by the GST Council in determining the imposition of a higher tax on online skill-based real money gaming along with the reaction of the industry. In conclusion, the authors analyse the impact of the higher taxation on the industry along with the legal challenges that the decision may face in courts.

Keywords

Online Gaming, taxation, game of skill, game of chance, GST

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1. Introduction

Over the past half a decade, India has witnessed an exponential rise in the online gaming industry, especially its subset real-money gaming. The proliferation of the internet and availability of affordable smartphones has ensured that gaming activities are far more accessible to the masses, which has led to it becoming a multi-billion dollar industry. These games range from online rummy, poker to fantasy sports and other casual games of skill, with several operators having added attractive characteristics to capture the interests of new users. The offerings range from games to play with friends and family or with strangers, with or without stakes.

As the proliferation of the offerings has increased, so has the regulation. Online gaming service providers are being asked to navigate a legislative framework and regulatory understanding based on a law which was drafted more than 150 years ago in the context of physical betting and gambling.³ In order to be able to offer a game to consumers, the service providers have been required to show that their services do not amount to betting and gambling by relying on judicial precedents pertaining to the distinction laid out between ‘games of skill’ and ‘games of chance’.⁴

With the increasing market-cap, a further attempt at regulating real-money games for stakes was implemented starting October, 2023 wherein a 28% Goods and Services Tax (GST), which is the primary indirect tax law in India, was levied on such activities.⁵ While the move has given sanctity to real-money games, it was made with intention of increasing the revenue generated for the central and state governments.

This paper seeks to trace the history of the regulation of real-money games of skill in India, which has evolved from card games, such as rummy and poker, to newer forms played online, such as fantasy sports. Further, the paper explains the games’ interaction with the GST, in order explain the decision and assess the impact of the same on operators of online skill-based games.

³ Public Gaming Act, 1867.

⁴ See *R.M.D. Chamarbaugwala v. Union of India*, [1957] 1 SCR 930; *State of Andhra Pradesh v. K. Satyanarayana*, [1968] 2 SCR 387.

⁵ See Notifications No. 48/2023, dated 29th September 2023 and 49/2023, dated 29th September 2023, Ministry of Finance, Government of India.

The present paper is divided into four sections. First, it deals with the history and rise of online gaming, with an emphasis on India. Second, the paper discusses the legal regulation of betting and gambling in India. It traces the web of legislations regulating betting and gambling and analyses the court decisions on the issue of ‘game of skills’ and ‘game of chance’, culminating into the present state of regulation of real-money gaming in India. Third, the history of GST in India along the evolution of its application to real-money games of skill is discussed. Finally, the researchers present the issues arising for businesses to operate in the present scenario, the legal concerns that exist within the amendment and potential challenges ahead.

2. Present state of online gaming in India

The rise of the online gaming industry can be attributed to the technological advancements that have taken place, more so within the last few years. India has approximately 600 million smartphone users who have access to the internet, made possible due to affordable mobile internet data.⁶ India has also embraced digital payment platforms, more so post demonetisation, which allows for real-time payments.⁷ This has created a large consumer base, which seeks various methods to interact with friends, family and other gaming enthusiasts. In an attempt to capitalise on the said consumer base, the service providers offer a diverse set of games online, most of which were played in their physical form in almost all homes in India. One sub-category of these games includes board games, such as chess and ludo.⁸ Another sub-category of these games includes card games, such as online poker and rummy.⁹ These games are predominantly skill-based games and rely on the skill, knowledge and experience of the player.

During the pandemic, with people confined to their homes, they turned to online games and esports as a means of entertainment and staying socially connected.¹⁰ Statistics claim that India has 568 million gamers, out of which a quarter are paying users.¹¹ This growing market has an

⁶ Anand (2022).

⁷ Dixit (2023).

⁸ Bhatia et al. (2021).

⁹ Sagar (2023).

¹⁰ Amin et al. (2022).

¹¹ Lohchab (2023).

annual turnover of about INR 30,000 crores and an annual growth of 25 to 30 percent.¹² The result of these statistics has led to the setting up of the Centre of Excellence in Online Gaming in 2023.¹³ In an attempt to jump onto the bandwagon, the number of service providers, too, has grown exponentially. For example, in the sphere of fantasy sports, which is a separate category of online real money gaming, previously non-existent in physical form), the number of major fantasy sports service providers has surged from just a handful in 2016 to approximately 140 such service providers.¹⁴ Each of these services provides are trying to add exciting elements to attract and hold onto customers, giving rise to a severe need for regulations on such offerings. The regulation of fantasy sports when played for stakes has only emerged as an issue over the past decade¹⁵ and often operate relying on regulations existing in the context of the first two categories of games i.e. card and board games and games which involve betting and gambling.

Another major category of classification of online games are video games or esports. They are similar to fantasy sports as they have developed due to technological developments and internet access. While several esports are electronic iterations of real-world sports, they, unlike fantasy games, operate within their self-contained environment and are not reliant on real-world events. These games can take various forms such as racing games, first-person or third-person shooters, battle arenas, role-playing games. The legality of these games is generally not questioned as they generally do not involve element of staking, apart from in-game transactions ('microtransactions') which may allow a player to unlock in-game features,¹⁶ and primarily rely on skill of the players. Thus, these games are also promoted by governments and sports bodies.¹⁷

A separate category of games, which involves wagering on a game of chance i.e., betting and gambling, also exist on the internet. As will be discussed below, these games are banned in most states in India. However, this has not prevented companies based abroad from advertising

¹² DH Web Desk ([2022](#)).

¹³ PIB Delhi ([2023](#)).

¹⁴ Ibid.

¹⁵ Gurdeep Singh Sachar v. Union of India, 3 AIR Bom R (Cri) 467, Bombay High Court; Varun Gumber v. Union Territory of Chandigarh, 2017 Cri LJ 3827, Punjab and Haryana High Court.

¹⁶ King and Delfabbro ([2019](#)).

¹⁷ PIB Delhi ([2023](#)).

betting and gambling services on the internet. This in turn has led to the Government of India issuing several advisories cautioning against such advertising.¹⁸

3. Regulation of betting and gambling in India

To understand the present regulation and the change in the applicability of GST (entire pool of money vs. only on service provider fee; and 18% vs. 28%) on online real money gaming, it is essential to understand the regulations of betting and gambling in India and the context in which such offerings developed.

Prior to the enactment of the Constitution, betting and gambling were regulated by the Public Gambling Act, 1867 (PGA), which was the central act governing betting and gambling activities. The PGA was enacted with the aim of prohibiting betting and gambling and the running of a ‘common gaming house’ i.e., any enclosed space, in which instruments of gaming are kept or used for profit or gain. As an exception, it allowed staking on ‘games of skill’. However, it did not define the terms betting and wagering. Further, it did not define the term ‘game of skill’.

Post the promulgation of the Indian Constitution, a different framework was adopted, by enumerating betting, gambling, and lotteries in the Seventh Schedule of the Constitution. Under this scheme, the power to regulate betting and gambling falls within the legislative powers of the states *vide* Entries 34¹⁹ and 62²⁰ of List II of the Seventh Schedule. On the other hand, central government has the power to regulate lotteries *vide* Entry 40²¹ of List I. Following these changes, several states enacted their own betting and gambling legislations. The changes in the legislative powers of the states have resulted in a complex web of policies regarding the legality of betting and gambling. These policies span a continuum from complete prohibition to partial prohibition to absence of prohibition. States such as Goa²² and Sikkim²³ have legalised betting

¹⁸ PIB Delhi ([2024](#)).

¹⁹ Constitution of India, 1950, List II, Entry 34 states “Betting and gambling”.

²⁰ Constitution of India, 1950, List II, Entry 62 states “Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling”.

²¹ Constitution of India, 1950, List I, Entry 40 states “Lotteries organised by the Government of India or the Government of the State”.

²² The Goa, Daman and Diu Public Gambling Act, 1976.

²³ Sikkim Regulation of Gambling (Amendment) Act, 2005.

and gambling. While other states such as Maharashtra,²⁴ and West Bengal²⁵ have allowed wagering on limited events, such as horse racing. Furthermore, West Bengal exempts poker, rummy and other card games from the ambit of gambling.²⁶ Some other states have chosen to replicate the provisions of the PGA with necessary amendments and prohibit both, wagering and betting.²⁷ A common thread that seems to be present in most state regulations is the permissibility of playing games of skill for stakes. However, most legislations, until recently, have continued to not define the terms ‘betting and gambling’ or ‘game of skill’. In the absence of legislative clarity, the Supreme Court of India has been called upon, several times, to clarify the meaning of the term ‘game of skill’ and create a distinction thereof from ‘game of chance’.

In the case of *R.M.D. Chamarbaugwala v. Union of India*,²⁸ the Supreme Court applied the test that activities relying on the skills of the participant would qualify as business activities protected by Article 19(1)(g) and would not amount to gambling activities.²⁹ Moreover, the Court clarified that gambling activities would not be accorded constitutional protection.³⁰

In the case of *State of Andhra Pradesh v. K. Satyanarayana (Satyanarayana case)*,³¹ the Court held that rummy and bridge are games of skill.³² The Court held that these games require players to memorise the fall of cards which involves skill.³³ Further, playing rummy entails skill in holding and discarding cards.³⁴ Thus, rummy and bridge were considered as games consisting predominantly elements of skill. The Court noted that even though all card games contain an element of chance due to the distribution of cards not being set to any pre-determined pattern, the element of chance does not take away the essential ingredient of skill involved in such games.³⁵ However, the Court in its decision, in an attempt to separate the premises (mostly clubs) wherein such card games were being played from gaming houses, convoluted matters

²⁴ Bombay Race Courses Licensing Act, 1912.

²⁵ West Bengal Gambling & Prize Competition Act, 1957.

²⁶ Ibid.

²⁷ See Maharashtra Prevention of Gambling Act of 1887.

²⁸ [1957] 1 SCR 930.

²⁹ Ibid.

³⁰ Ibid.

³¹ [1968] 2 SCR 387.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

by mentioning that the money that the owner of such premises charges from its users for offering the services does not amount to running of a gaming house. The Court noted as follows:

*It is commonly known that accounts have to be kept, stocks have to be purchased and maintained for the use of the members and service is given. Money is thus collected and there is expenditure for running of each section of the establishment. Just as some fee is charged for the games of billiards, ping-pong, tennis, etc, an extra charge for playing cards (unless it is extravagant) would not show that the club was making a profit or gain so as to render the club into a common gambling house. Similarly, a late fee is generally charged from members who use the club premises beyond the scheduled time. This is necessary, because the servants of the club who attend on the members have to be paid extra remuneration by way of overtime and expenditure on light and other amenities has to be incurred beyond the club hours. Such a charge is usual in most of the clubs, and we can take judicial notice of the fact.*³⁶

The Court further held that charging 50 paise as sitting fees from the users “is not such a heavy charge in a Members’ Club as to be described as an attempt to make a profit or gain for the club”.³⁷

In the case of *K. R. Lakshmanan v. State of Tamil Nadu (Lakshmanan case)*,³⁸ the Court further elucidated on the difference between ‘games of skill’ and ‘games of chance’ and noted that it is difficult to classify any game as a game of pure skill or pure chance and it is the preponderant element (skill or chance) that shall be taken into consideration to classify a game. Using the test, the Court held that betting on horse races would qualify to be a game of skill as it “primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast horses, a better trained jockey can touch the winning-post.”³⁹ Thus, a person

³⁶ Ibid, para 9.

³⁷ Ibid, para 10.

³⁸ (1996) 2 SCC 226.

³⁹ Ibid, para 30.

placing a bet will have to take into account all the aforementioned factors in order to win the bet.

Upon the advent of the internet and games being offered on it, questions started arising on whether the jurisprudence pertaining to ‘game of skill’, decided in the context of offline and physical games, could apply in the online context and second, whether the newer forms of offerings, such as fantasy sports, could be considered as a ‘game of skill’. In the absence of clear guiding legislative actions or judicial decisions, the aforementioned decisions were used by businesses seeking to offer online real-money gaming services. For example, in the case of fantasy sports, participants require knowledge of the sport, its players, their current form, weather conditions and other statistics, thereby satisfying the tests laid down in the *Satyanarayana case* and *Lakshmanan case*. Further, as far as the charges for providing services were concerned, the standard laid down in *Satyanarayana case* was considered as justifiable.

However, judicial clarity slowly emerged. The first of which was seen in *Varun Gumber v. Union Territory of Chandigarh (Gumber case)*,⁴⁰ wherein the Punjab and Haryana High Court held that fantasy sport games require skills, judgment and experience in terms of selecting the teams and analysing the statistics. The Court observed that:

*playing of fantasy game by any participant user involves virtual team by him which would certainly requires a considerable skill, judgment and discretion. The participant has to assess the relative worth of each athlete/sportsperson as against all athlete/sportspersons available for selection. He is required to study the rules and regulations of strength of athlete or player and weakness also. The several factors as indicated above submitted by the respondent -company would definitely affect the result of the game.*⁴¹

Therefore, according to the Punjab and Haryana High Court, such games would amount to ‘games of skill’ and it would be legal to offer the same for stakes. The Supreme Court rejected the appeal filed against the said decision.⁴² This meant that the fantasy gaming model offered by the platforms such as Dream11 was given a green signal *vis-à-vis* it being a ‘game of skill’

⁴⁰ 2017 Cri LJ 3827, Punjab and Haryana High Court.

⁴¹ Ibid, para 8.

⁴² Special Leave Petition (Criminal) Diary No. 35191/2019, Supreme Court of India.

and other service providers could safely follow the said model without falling afoul of the betting and gambling legislations. This decision was then relied upon by the Bombay High Court in the case *Gurdeep Singh Sachar v. Union of India*⁴³ and the Rajasthan High Court in the case of *Chandresh Sankhla v. State of Rajasthan*⁴⁴ to hold that the offering and playing of fantasy games does not constitute betting or gambling. Further, a detailed analysis was provided in the case of *Ravindra Singh Chaudhary v. Union of India*,⁴⁵ wherein the Rajasthan High Court rejected a public interest litigation against Dream11.

Subsequently, several states enacted legislations that prohibited playing online games of skills for stakes. For instance, the state of Karnataka amended the Karnataka Police Act, 1963, to include online games of skill within the ambit of ‘gaming’ and wagering or betting to include online games of skills played for money.⁴⁶ Similarly, the state of Tamil Nadu amended the Tamil Nadu Gaming Act, 1930 thereby prohibiting all forms of games being played for stakes in cyberspace, irrespective of the game being that of skill.⁴⁷ These amendments were challenged by the online gaming service providers. In the case of *Junglee Games India Private Limited v. State of Tamil Nadu*,⁴⁸ the Madras High Court declared the amendment which had prohibited online games of skills for stakes as *ultra vires* the Constitution in its entirety. The Court held that the ambit of the entry in List II appeared to be confined to betting in games of chance. The amendment to the Karnataka Police Act, 1963 was challenged before the Karnataka High Court. The Court, in the case of *All India Gaming Federation v. State of Karnataka (All India Gaming Federation case)*,⁴⁹ upon analysis of previous decisions pertaining to the distinction of games of skill versus games of chance, held that the words betting and gambling, as mentioned in Entry 34, List II, have to be read conjunctively to mean only betting on gambling activities that fall within the legislative competence of the State.⁵⁰ According to the Court, since the term gambling by its very nature excludes skill, games of

⁴³ 3 AIR Bom R (Cri) 467, Bombay High Court.

⁴⁴ (2020) 2 RLW 160 (Raj), Rajasthan High Court.

⁴⁵ (2020) 4 RLW 3322 (Raj), Rajasthan High Court. The Court noted that Dream11 was regulated by a self-regulatory body which has rules about practices and has framed Ombudsman scheme. Further, the leadership team featured eminent persons. In addition, Federation of Indian Fantasy Sports has also issued self-regulation guidelines on advertising online gaming.

⁴⁶ The Karnataka Police (Amendment) Act, 2021, Section 2.

⁴⁷ Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021, Part II.

⁴⁸ AIR 2021 Mad 252.

⁴⁹ (2022) 2 AIR Kant R 422, Karnataka High Court.

⁵⁰ Ibid.

skill cannot be included. The Court struck down the amendments relating to online games of skills as *ultra vires* the Constitution.

In 2023, the Ministry of Electronics and Information Technology (MEITY) was notified as the appropriate ministry to regulate online gaming.⁵¹ In furtherance of the same, MEITY notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 (Amendment Rules). The Amendment Rules laid down, inter alia, a governance structure for online gaming in India via self-regulatory bodies of the service providers and led to the legitimisation of online games of skill.

4. Goods and Service Tax Act and its applicability to online games of skill

The power to levy indirect taxes in India is complex, with both the centre and states having such powers. Prior to the enactment of GST, different states had different taxation structure along with different rates of taxes.⁵² Further, the taxes were focused on production and trade rather than consumption.⁵³ This led to the recommendation for the establishment of a comprehensive tax on goods and services, that would be destination (inter-state vs. intra-state) based.⁵⁴ Another key focus was to make taxation simpler.⁵⁵

This led to a discussion on the concept of GST, which, after several years of discussion,⁵⁶ was introduced by way of the Constitution (101st Amendment) Act, 2016. The aim of GST was to simplify the indirect taxation and to bring about transparency in the method of tax imposition, collection and administration. GST is a value-added tax, which ensures that the consumer pays tax in direct proportion to the value of the goods or services.⁵⁷ GST has a dual model which allows central government to tax the inter-state supply of goods and services and both the central government and respective state governments to tax the intra-state supply. The taxation to be imposed is decided upon the recommendations of the GST Council, formed under Article

⁵¹ Government of India (Allocation of Business) (Three Hundred and Seventieth Amendment) Rules, 2022.

⁵² Empowered Committee of State Finance Ministers (2009).

⁵³ Department of Economic Affairs (2016), Report of the Task Force on Implementation of the Fiscal Responsibility and Budget Management Act, 2003, Chapter 2, para 2.4.2.

⁵⁴ *Ibid*, Chapter 5, para 5.3.12.

⁵⁵ *Ibid*.

⁵⁶ Jain (2018), p. 3-17.

⁵⁷ *Ibid*, p. 19.

279A of the Indian Constitution. It must be noted that while the recommendations of the GST Council are not binding, they must be “*acted upon the Union and States in letter and spirit to maintain the constitutional harmony*”.⁵⁸

Based on the recommendation of the GST Council, the Parliament enacted (i) the Central Goods and Services Tax Act, 2017 (CGST Act), which provides for tax levy and collection on intra-state supply of goods and services; (ii) the Integrated Goods and Services Tax Act, 2017 (IGST Act), which provides for tax levy and collection on inter-state supply of goods and services; and (iii) Union Territory Goods and Services Tax Act, 2017, which provides for tax levy and collection on intra-state supply of goods and services within a Union Territory. The states have also enacted respective state GST laws.

Section 7 of the CGST Act defines the scope of the term ‘supply’. Prior to the 2023 amendments, Section 7(2) provided the definition that activities or transactions specified in Schedule III of the GST will not be considered as ‘supply’ of goods or services. Entry 6 of Schedule III provided that ‘actionable claims, other than lottery, betting and gambling’, would not be treated as a supply of goods or supply of services. In 2018, the Central Goods and Services Tax Rules (CGST Rules) were amended to introduce Rule 31A(3) which provided that in case of supply of lottery, betting, gambling and horse racing, the value of supply of actionable claim shall be 100% of the face value of the bet or the amount paid to the totalisator.

Given that there were Supreme Court decisions that had provided the distinction between games of skill versus the game of chance in context of betting and gambling, along with the *Satyanarayana case* that allowed for charging of maintenance fee, the practice that was adopted by real-money online skill-based service providers was that when a player signed in to play an online skill-based games for stakes, certain amount of money would be kept as platform fee, while the remaining amount was kept in an escrow account which would then be distributed among the players as prize money. Thus, the real-money online skill-based gaming service providers were paying tax of 18% on the gross-gaming revenue (GGR) i.e., the commission/platform fee that the service providers were retaining, instead of the entire amount of money paid by a user.

⁵⁸ Ibid, p. 388.

The judicial legitimacy for this practice came by the decision in *Sachar*;⁵⁹ where the petitioner had argued that (i) playing online skill-based games for stakes amounted to betting and gambling; and (ii) that GST was to be paid on the entire amount, including the amount kept in escrow account. The Bombay High Court, relying on the decision in the *Gumber case*, rejected the argument of the petitioner on the first issue. On the second issue, the Court held that while the amounts deposited in the escrow account were an actionable claim, since the real-money online skill-based games offering was not lottery, betting or gambling, there was no possibility of tax evasion. In coming to the decision, the Court also relied on Explanatory Notes to the Scheme of Classification of Services, which differentiated between games intended to be played on the internet from online gambling services.

A recent decision of the Karnataka High Court, in *Gameskraft Technologies Private Limited v. Directorate General of Goods, Services Tax (Gameskraft case)*,⁶⁰ which relied upon the *All India Gaming Federation case* mentioned hereinabove, reaffirmed the distinction between games of skill and games of chance and held that playing a game of skill for stakes is not gambling. It further held that games of skill will be considered actionable claims, which are out of the purview of GST, and it is only games of chance, such as lottery, betting and gambling, that would be taxable.

5. GST Council recommendations on online gaming and legislative action

The GST Council had been considering the issue of the rate and valuation of GST on online gaming from the 35th GST Meeting. Subsequently, on 24th May, 2021, in furtherance of the decision of the GST Council, a Group of Ministers (GoM) was formed to examine the issues pertaining to valuation of services provided in casinos, race courses and online gaming and legal changes that may be required for better means of valuation.⁶¹ The report of the GoM was presented to the GST Council in its 47th Meeting (First Report). The GoM recommended that the imposition of GST on casinos, race courses, online gaming and lottery should be uniform in terms of rate and valuation.⁶² No distinction should be maintained between games of skill, including horse racing or games of chance (lotteries) and that GST may be levied at the rate of

⁵⁹ 3 AIR Bom R (Cri) 467, Bombay High Court.

⁶⁰ (2023) 116 GSTR 53, Karnataka High Court.

⁶¹ Department of Revenue ([2021](#)).

⁶² GST Council ([2022](#)) Minutes of the 47th Meeting of GST Council, para 20.4.1.

28%, which in case of online gaming, would be on the full value of the consideration.⁶³ However, upon submissions made by various stakeholders, who argued that high taxation would lead to closure of industry and movement into black markets, by usage of VPN by users, along with the argument that casinos, horse racing and online gaming could not be clubbed together, the GoM was asked to re-examine the issue.⁶⁴

The second report of the GoM (Second Report) was discussed by the GST Council in its 50th meeting. The GoM reported that the views had remained inconclusive due to the complexity of the issue and divergence of views.⁶⁵ Hence, the GST Council was asked to take the decision.⁶⁶ The Convenor of the GoM highlighted that games of skill do not fall within the ambit of betting and gambling and classification of each skill-based game depended on judgments by the courts.⁶⁷ It was suggested that until the MEITY frames rules relating to the classification of skill-based games, the matter be deferred.⁶⁸ It was further suggested that 28% tax rate should be levied on the GGR, which is calculated at table level rather than on individual transactions.⁶⁹ From the discussion, it appeared that the driving factor in clubbing games of skill and games of chance under the same bracket was the ambiguity in the existing legislations about the scope of games of skill.

Upon considering the Second Report, the GST Council debated the amount of taxation that should be levied on real-money gaming. The minutes of the meetings indicate that several members had highlighted the challenges regarding the distinction between game of skill vs. game of chance and certain members felt that an approach should be taken that makes the law straightforward, easy and simple.⁷⁰ What is also evident from the discussions held is that predominantly the members did not think that the difference between game of skill and game of chance had relevance for the purpose of taxation. It was decided that actionable claims

⁶³ Ibid, para 20.4.2.

⁶⁴ Ibid, paras 20.5 to 20.21.

⁶⁵ GST Council (2023), Minutes of the 50th Meeting of the GST Council, para 6.2.

⁶⁶ Ibid.

⁶⁷ Ibid, para 6.3.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid, paras 6.7-6.36.

supplied in online gaming are to be under the purview of GST to be taxed at the rate of 28% on full face value.⁷¹

In the 51st meeting, despite reservations by the States of Delhi, Goa, Sikkim and Punjab, the Council approved the amendments to the CGST Act, IGST Act, 2017 and CGST Rules 2017, which would give effect to the said taxation of real-money gaming services.⁷² However, the Chairperson assured that the decision will be reviewed six months after its implementation.⁷³

Subsequently, the Lok Sabha passed amendments to the CGST Act and the IGST Act. The amendments provided for a definition of online gaming as “*offering of a game on the internet or an electronic network*”.⁷⁴ Further, online money gaming is defined as:

*online gaming in which players pay or deposit money or money’s worth, including virtual digital assets, in the expectation of winning money or money’s worth, including virtual digital assets, in any event including game, scheme, competition or any other activity or process, whether or not its outcome or performance is based on skill, chance or both and whether the same is permissible or otherwise under any other law for the time being in force.*⁷⁵

The biggest change introduced by way of the amendments is in the definition of ‘supplier’. A deeming fiction is created to provide that a person who organises or arranges, supply of specified actionable claims, including a person who owns, operates or manages digital or electronic platform for such supply, will be considered a supplier.⁷⁶ The definition of specified actionable claim is also amended to include online money gaming.⁷⁷ Further, Schedule III is amended to make specified actionable claims in online money gaming as taxable.⁷⁸ It is provided that the value of supply in cases of online money gaming shall be the total amount paid or deposited with the supplier by way of money or money’s worth, including virtual digital

⁷¹ Ibid, p. 57.

⁷² GST Council (2023), Minutes of the 51st Meeting of the GST Council, p. 22.

⁷³ Ibid.

⁷⁴ Central Goods and Services Tax (Amendment) Act, 2023, Section 2(a).

⁷⁵ Ibid.

⁷⁶ Central Goods and Services Tax (Amendment) Act, 2023, Section 2(c).

⁷⁷ Central Goods and Services Tax (Amendment) Act, 2023, Section 2(b).

⁷⁸ Central Goods and Services Tax (Amendment) Act, 2023, Section 4.

assets, by or on behalf of the player.⁷⁹ Any amount returned or refunded to the player, for any reason whatsoever, shall not be deductible from the value of supply of online money gaming.⁸⁰ Explanation to Rule 31B provides that if any amount received by the player as winnings which is used for further event without withdrawing shall not be considered as amount paid to or deposited with the supplier.⁸¹

The amendments came into effect on October 1, 2023. States are in the process of amending their respective laws to give effect to the decision. A key concern is that the changes were described as ‘clarificatory’ in nature,⁸² which has allowed the tax authorities to claim GST on online gaming with a retrospective effect.⁸³

6. Analysis and conclusion

The real-money online skill-based gaming industry reacted with dismay to the decision of imposing 28% tax.⁸⁴ With the amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, which established the self-regulatory bodies, the hope of the industry was that it would have the effect of legitimising online games of skill played for real money and they would be kept separate from games of chance. However, no such relaxation in terms of taxation was given to the industry.

The effect of the change can be understood from the following illustration. Previously, an online skill gaming operator would pay tax on the GGR. Thus, in a given case of a user spending INR 100 to play a fantasy sport, the service provider would keep a certain sum for providing the service, say INR 10, while the rest would be deposited in an escrow account and distributed amongst winners. Thus, the service provider would pay tax of 18% on the said INR 10 (their income), i.e. a measly sum of INR 1.8. Under the new scheme, the service providers are obligated to pay tax on the entire sum of INR 100, i.e. INR 28, the burden of which, by most service providers, has been passed on to the user leading to a drop in user base.

⁷⁹ Central Goods and Services Tax (Third Amendment) Rules, 2023, Rule 4.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² PTI (2023).

⁸³ Mukul and Saha (2023).

⁸⁴ The Hindu Bureau (2023).

Given the positive impact the industry has had on the economy, the stakeholders have vehemently pointed out the negative effect the tax changes will have on the growth of the industry and consequently the economy. Reports indicate that larger real-money online skill-based gaming service providers, such as Dream11, are likely to see a decline of 30-40% in their revenue.⁸⁵ While the Chairperson of the GST Council had assured that the decision regarding taxation will be reviewed after six months, in the short term, the businesses immediately reacted by laying-off employees and reducing their workforce.⁸⁶

In the medium term, the industry is likely to see consolidation, with smaller real-money online skill-based gaming operators being acquired by the larger service providers.⁸⁷ In the medium to long term, the real-money online skill-based gaming operators will have to diversify their businesses to other revenue streams in non-real money gaming sectors. This strategy is evident in the operation of Dream Sports, which runs the real-money online skill-based gaming platform Dream11, however has already invested in related avenues such as NFT, broadcast and travel services and is further looking to invest in sports and allied sectors.⁸⁸ Similar decisions appear to have been taken by MPL and Nazara.⁸⁹ Further, real-money online skill-based gaming operators will look to expand their market to other jurisdictions, which had been explored in the past by operators such as MPL.⁹⁰

In the opinion of the authors, the argument that the amendment is merely clarificatory in case of games of skill will require close scrutiny as the consistent stance of the judiciary, in various contexts, has been that there is a difference between games of skill and games of chance. This principle had been reaffirmed by the Karnataka High Court's decision in the recent *Gameskraft case* and the Madras High Court in *All India Gaming Federation v. State of Tamil Nadu*.⁹¹ In these cases the Court emphasised on the distinction between games of skill vs. games of chance and set aside the provisions of the CGST Act which included games of skill within its ambit. The argument will have to be viewed in light of the original Rule 31A of CGST Rules, as

⁸⁵ Mittal and Sharma (2023).

⁸⁶ BS Web Team (2023).

⁸⁷ Malik (2023).

⁸⁸ Mittal and Sharma (2023).

⁸⁹ Subramaniam (2023).

⁹⁰ Mittal (2021).

⁹¹ (2023) 2 Writ LR 649, Madras High Court.

introduced in 2018, which, while clubbing horse racing, lottery, betting and gambling together for the purposes of providing the value of supply, provided horse racing explicitly as a category in itself. This would indicate that horse racing is not considered betting and gambling by itself. However, at the same time, the scope of the exception to actionable claims, in Schedule III, which refers to betting, gambling and lottery, did not include horse racing. A single judge bench of the Karnataka High Court, in *Bangalore Turf Club Limited v. State of Karnataka*,⁹² held that taxing the entire face value of the bet is beyond the scope of the CGST Act. The Court also alluded to the decision in *Lakshmanan case* regarding difference of game of skill vs. game of chance. The appeal to the decision is pending before the division bench of the Karnataka High Court.⁹³ This is important as horse racing, as held in *Lakshmanan case*, is deemed to be a game of skill wherein a GST of 28% is levied on the face value. Prior to the *Gumber case*, the fantasy operators had been using the principle set forth in *Lakshmanan case* to draw a parallel and use it to their advantage. For this reason, it is important that the law makers further classify the gambling, betting and gaming categories as follows (a) Sports Betting, Games of Skill and Gambling; (b) Lottery (regulated by the Lotteries (Regulation) Act, 1998); (c) Horse Racing (exception created in PGA and principles laid out in *Dr KR Lakshmanan v. State of Tamil Nadu*); (d) Prize Competition (regulated by the Prize Competitions Act, 1955); and (e) Games of Skill (fantasy gaming, rummy, poker, etc.); and thereafter take an informed decision in terms of levying tax instead of a one size fits all approach.

Further, it is also necessary to analyse that if the contention pertaining to the amendment being only clarificatory in nature is correct, why a need was felt to amend the definition of supplier to create a deeming fiction. In a recent writ petition by the fantasy sports operators against the tax imposition,⁹⁴ arguments have also centred around the question of whether there is a supply by a party to another i.e., whether supply exists between parties.⁹⁵

⁹² (2021) 51 GSTL 228, Karnataka High Court.

⁹³ *Union of India v. Bangalore Turf Club Limited*, WA 727/2021, Karnataka High Court.

⁹⁴ *M/S E-Gaming Federation v. Union of India*, W.P.(C) No. 001374 - / 2023, Supreme Court of India.

⁹⁵ Anand (2024).

As the appeal from the writ petition and the *Gameskraft* case is pending before the Supreme Court,⁹⁶ the clarificatory nature of the demand could very likely signal a death knell for the vibrancy in the real-money online skill-based gaming sector.

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⁹⁶ Directorate General of Goods and Services Tax Intelligence (HQS) v. Gameskraft Technologies Private Limited, SLP(C) No. 019366 - 019369/2023, Supreme Court of India.

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