



July 2023

Recommendations of the GST Council on taxability and valuation of online gaming, horse racing and casinos

The Goods and Services Tax (“GST”) Council, in its 50th Meeting held on July 11, 2023, recommended that GST be levied at 28% on the entire value of bets placed for online gaming.

Current position under the GST Law

Section 7 of the Central Goods and Services Tax Act, 2017 (“CGST Act”) defines the scope of the term “supply”, which excludes certain activities (listed in Schedule III of the CGST Act) from the ambit of “supply”. Entry No. 6 of Schedule III specifically provides that “*actionable claims, other than lottery, betting, and gambling*” are to be treated as neither supply of goods nor supply of services. Therefore, only lottery, betting, and gambling are currently subject to GST at the rate of 28%.

While games of chance are covered under “gambling” and are subject to GST at the rate of 28%, games of skill played online (i.e., online gaming) are currently subject to GST at the rate of 18% only on the platform fees/ charges.

An online gaming platform collects money in the following forms:

- a) Prize money, which is kept aside for distribution as “winnings” (say INR 1000 (Indian Rupees one thousand)), and
- b) Platform fee or an entry fee for participating in the game (say, INR 1000 (Indian Rupees one thousand)*10% = INR 100 (Indian Rupees one hundred)).

For a game of skill, tax is only payable at 18% on the platform fee (i.e., 18% of INR 100 (Indian Rupees one hundred) = INR 18 (Indian Rupees eighteen)).

The above position was affirmed by the Hon’ble High Court of Karnataka in a recent ruling in the case of ***Gameskraft Technologies Pvt. Ltd. vs. Directorate General of Goods Services Tax Intelligence***¹ wherein it was held that rummy is a “game of skill” and, accordingly, cannot be equated with lotteries, betting or gambling. Further, the Hon’ble High Court observed that rummy, whether played online or offline, continues to be a game of skill. The Hon’ble High Court held that Entry No. 6 of Schedule III of the CGST Act covers actionable claims in respect of games of skill and only excludes actionable claims in respect of lottery, betting and gambling. Given that games of skill (such as rummy) are neither betting nor gambling, the same are excluded under Schedule III of the CGST Act and are, therefore, not covered under the ambit of the GST law.

¹ 2023 (5) TMI 926.

Position as per the recommendations of the GST Council

As per the recommendations of the GST Council, GST is to be levied at a flat rate of 28% on all online games, including games of skill. Therefore, “prize money” and “platform fees”, will both be subject to GST at the rate of 28% (i.e., INR 1,100 (Indian Rupees one thousand one hundred) \times 28 % = INR 308 (Indian Rupees three hundred eight), in the above illustration), thereby clearly increasing GST collections by the government.

The recommendations do not seem to apply to “games of skill” when played through offline mode (i.e., in clubs, etc.) and, therefore, the same will likely remain outside the ambit of GST. However, the taxability of the same can be ascertained only once the amendments to the law are made.

The above recommendations, if enforced, will effectively render the ruling (*supra*) otiose.

Regulatory concerns

The recommendations of the GST Council are a step backwards by the Government of India – which, until recently, had been taking steps to encourage the growth of India’s online gaming industry. These steps include (a) the introduction of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 which seek to introduce self-regulatory bodies (“**SRBs**”) and regulate online gaming companies as intermediaries; and (b) the Ministry of Electronics and Information Technology’s (“**MeitY**”) plans to introduce a central framework to regulate online gaming. Notably, one of the purposes of SRBs is to certify that online games do not involve wagering. It is also a settled position of law, upheld by various judgements of the Hon’ble Supreme Court of India and Hon’ble High Courts across States, that games of skill are distinct and must be regulated separately from gambling (i.e., games of chance).

Nevertheless, Union Minister for Finance of Corporate Affairs, Smt. Niramala Sitharaman, in a [press conference](#) following the announcement of the recommendations of the GST Council, said that the GST Council is purely concerned with taxation and is not concerned with the distinction between games of skill and games of chance. The Hon’ble Minister also made references to casinos when asked a question relating to online gaming companies – demonstrating a disconnect between the GST Council and the MeitY and Judiciary.

From a GST law perspective, levying GST on the full value of funds contributed by users does not seem to be justified. The prize pool and bet value do not constitute income or revenue for online gaming platforms – who have no lien or rights over the amounts which are distributed as winnings. Accordingly, such funds should not be considered towards the value of services which are exigible to GST. Therefore, it remains to be seen as to how the amendment to GST laws (along with valuation provisions) basis the recommendations of the GST Council will be effectuated to levy a tax on the prize pool and bet value.

Challenges and criticisms surrounding the recommendation

Based on the recommendations of the GST Council, games of skill will be treated uniformly with games of chance and will be subject to a higher GST rate of 28% on the full amount collected, including prize money distributed to players.

Noting the growth of the online gaming industry in recent years – while it appears to be a lucrative proposition for the Government to collect higher revenues, taxing online gaming (games of skill) at 28% (and not just the platform fees), can be disruptive for this booming sector.

Studies indicate that such a high tax incidence on the sector may have negative consequences, since the tax burden will ultimately be borne by the user – who will be deterred from engaging in online gaming due to significantly reduced returns. The sector has seen immense foreign direct investment and has contributed immensely to innovation and research and development, which may be impacted due to potential loss of income and business. Also, the recommendations are a significant shift from the position of law in most other countries – which tax online games in the range of 15% to 21% on the platform fee only. This may cause a shift of business from India to more favorable jurisdictions.

While there is no doubt that the legislature has the power to impose tax on any transaction, a move to saddle a growing sector with a huge burden of tax in a manner which disturbs the settled position of law is bound to raise concerns. While it seems likely that the validity of the amendments may be challenged before the Hon'ble Courts, the success of such challenges will largely depend upon the wording of the amendments and the manner in which it is carried out. However, till such time finality ensues on the matter, the industry will have to cope with the uncertainty and put interim measures in place to ensure that they abide by the law in force.

Gaming Law Practice

With the advent of the Internet, mobile gaming, eSports and the proliferation of sports wagering we represent technology providers for internet and mobile gaming, various operators and payment solution companies seeking to work with and form partnerships with this industry. Our lawyers have substantial experience in all facets of gaming laws, covering a range of issues confronted by our clients within the industry, including those related to technology, equipment, and faced by service provider to the industry. Additionally, our teams support clients in regulatory and compliance matters, including assisting our clients in obtaining regulatory approvals, drafting internal compliance procedures and, conducting internal investigations in connection with alleged regulatory violations. In recent years, JSA has built a niche in advising online/mobile gaming, gambling and e-sports companies and technology providers. JSA also counsels such businesses in a range of corporate matters, including financings, mergers & acquisitions, labour and employment matters, and all facets of litigation.

JSA helps navigate all the complexities of the industry, and our experience stretches across the complete spectrum of gaming and esports, including: (a) Interactions with regulatory bodies; (b) Structuring and negotiating agreements between the various parties involved in this highly regulated industry; (c) Advising on the aspects of a game may categorize it to be gambling; (d) Drafting terms and conditions of a game, mobile gaming applications, e-sport tournaments and other such events/competitions; (e) Advising on compliance matters, including regulations in internet and mobile gaming; (f) Conducting and supporting internal audits, investigations and diligence exercises.

Tax Practice

JSA offers a broad range of tax services, both direct and indirect, in which it combines insight and innovation with industry knowledge to help businesses remain compliant as well as competitive. The Tax practice offers the entire range of services to multinationals, domestic corporations, and individuals in designing, implementing and defending their overall tax strategy. Direct Tax services include (a) structuring of foreign investment in India, grant of stock options to employees, structuring of domestic and cross-border transactions, advising on off-shore structures for India focused funds and advise on contentious tax issues under domestic tax laws such as succession planning for individuals and family settlements, (b) review of transfer pricing issues in intra-group services and various agreements, risk assessment and mitigation of exposure in existing structures and compliances and review of Advance Pricing Agreements and (c) litigation and representation support before the concerned authorities and before the Income Tax Appellate Tribunal, various High Courts and Supreme Court of India. Under the Indirect Tax, JSA provides services such as (a) advisory services under the Goods and Services Tax laws and other indirect taxes laws (VAT/ CST/ Excise duty etc.), and includes review of the business model and supply chain, providing tax implications on various transactions, determination of tax benefits/exemptions, analysis of applicability of schemes under the Foreign Trade Policy (b) transaction support such as tax diligence (c) assistance in tax proceedings and investigations and (d) litigation and representation support before the concerned authorities, the Appellate Tribunals, various High Courts and Supreme Court of India. The team has the experience in handling multitude of assignments in the manufacturing, pharma, FMCG, e-commerce, banking, construction & engineering, and various other sectors and have dealt with issues pertaining to valuation, GST implementation, technology, processes and related functions, litigation, GST, DRI investigations etc. for large corporates.

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