

Online Gaming & The Game of Tax

With the advent of technology and quantum leaps in internet bandwidth infrastructure in India, while gaming on the ground continued to enthrall the populace, digital gaming started coming of age. While online games were the craze ever since the green-screen, floppy based computers came into our lives, this has exponentially increased with faster chips, memory, cloud technology and graphic imaging. All these and much more are driving an industry termed as Online Gaming Industry to stellar heights, both in terms of users as well as developers.

While the Indian gaming market is estimated at around USD 3.49 billion in 2024, it is expected to rise to USD 7.24 billion at a CAGR of 15.68 per cent by 2029. Considering the population demographics of India with the highest amount of youths compared to other countries, growth in online gaming in India is expected to be the highest. With these projections, how could it have escaped the attention of the GST authorities, who found a new avenue to take GST collections to even greater levels. And thus began the saga of the Game of Tax on Online Gaming.

Online gaming and gambling

It is important to understand the legality of online gaming before delving into the GST issue. Online gaming has to be differentiated from gambling which is illegal in our country. Though States have the power under the Constitution to regulate and control gambling, the Central law Public Gambling Act framed in 1867 acts as the general law. Since mankind had yet not invented computers, online gaming as gambling does not obviously find any mention here and one has to resort to various jurisprudences to understand what is online gaming and whether it can be termed as gambling. Then, based on the State regulations, it can be determined whether the activity is legal or illegal.

As a general rule, gaming can be a game of skill or a game of chance. While the former is legal and permitted, the latter mostly takes on the character of gambling. This is because in game of skill, the skill and experience of the player is critical, while in a game of chance, as the word suggests, the win or loss is in the hands of fate or destiny. In the various rulings of the Supreme Court and High Courts, distinction has been made between games involving skill and games of chance. Fantasy Sports, where the users create their own virtual teams which then play against each other based upon real life

sporting events, is another kind of online gaming. While distinguished as games of skill, nothing is yet black or white.

The Tax Landscape

As the GST laws were framed, Entry No. 6 of Schedule III, while specifically considering “actionable claims” as neither supply of goods nor of services, also excluded lottery, betting and gambling from the ambit of actionable claims, thus permitting taxability thereof. The term “business” also covered the activity of wager in the definition in Section 2(17). In effect, levy of GST was there for lottery, betting and gambling, but not for actionable claims. In various jurisprudences, lottery, betting and gambling have been held to be game of chance. Game of skill, on the other hand, would fall under the category of actionable claims and hence, out of the purview of GST.

The saga began after the humongous demand of INR 21,000 crores was raised on Gameskraft Technologies, a gaming company running technology platform for various kinds of online gaming. The authorities held that these were not game of skill but game of chance and tax at 28 per cent is to be levied. On appeal as to whether the online games viz. rummy, played with stakes would amount to game of chance as betting or gambling, the Karnataka High Court upheld the demand. Supreme Court has stayed the demand and final decision is awaited.

The Game of Tax starts

In the meanwhile, based on the recommendations of the GST Council, the taxability in respect of online gaming was amended effective October 1, 2023, not only increasing the tax rate and the basis of valuation, but also including online money gaming as an exclusion to actionable claims in Schedule III, paving the way for its taxability. The new definition of online money gaming includes within its ambit any event, scheme, competition or any activity or process wherein players deposit money or money’s worth including virtual digital assets in the expectation of winning money or money’s worth including virtual digital assets, whether or not the outcome or performance is based on skill, chance or both. Further, any person supplying online money gaming services from outside India to a person in India shall be liable for registration and payment of tax in India. The tax rate was increased from 18% on the

platform fee termed as gross gaming revenue (‘GGR’) to 28% on the contest entry amount (‘CEA’). This has resulted in tax liability beyond comprehension and the entire online gaming industry is on the verge of being disrupted.

To clarify these terminologies, CEA is paid by the user in an online real money game and is distributed into the prize pool and held in an independent trust account while the platform fee or GGR is the service charge levied by the platform for providing the gaming service. Both CEA and GGR have tax liability attached to it which has to be borne by the player.

With these amendments, taxability of game of skill is now on the same level as game of chance and the legal differences between the two stand nullified as far as GST is concerned. Secondly, while the GST revenue will grow phenomenally, the prize pool drastically reduces.

To illustrate:

Particulars	Before amendment	After amendment
CEA	500	500
Platform fee or GGR	50	50
GST on GGR @ 18%	9	Nil
GST on CEA @ 28%	Nil	140
Balance Prize Pool	441	285

Platform fee is assumed as 10% of CEA

The above table clearly brings out how the GST revenues shoot up and the prize pool gets drastically reduced. All in all, the win may not be win at all.

Conclusion

The government should review the tax structure and the valuation procedure to reduce the impact of the change on this booming industry. Putting games of skill in the same tax basket as games of chance is certainly not a welcome move and also aims at negating settled jurisprudences on the subject. What will be interesting is if the Supreme Courts overturns the ruling of the Karnataka High Court and terms these games as games of skill and not of chance. In such a situation, would the judiciary be rendered irrelevant vis-à-vis the law makers and the judgement be of no relevance? Has the online gaming industry commenced its sunset or should it get ready to open the sundowner, we have to wait and watch.

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