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GST on Online Gaming: Game, Set, Match!

“Sometimes things are so overt, they are covert”

What can possibly justify the CBIC’s stance in the latest Show Cause Notice sent to a prominent online gaming platform? Perhaps not even this remark of one of greatest detectives of fiction world, Sherlock Holmes.

At the time when Industry was expecting clarity from GST Council on multiple issues surrounding GST on online gaming, betting, gambling and the likes, taxman slapped demand notice running into thousands of crores on one of India’s fastest growing online gaming platforms. News of similar notices being issued to other players also broke out. In this backdrop, the Authors take a microscopic view on core issue at epicenter of this high-profile litigation and attempt to predict its trajectory in times to come.

Underlying transaction

While online games exist in variety of shapes & forms, most popular format involves pooling of equivalent contributions (‘prize’) by players to play specific game in hope of winning pooled prize money. Online gaming platforms enable interested players to play popular games, allow players to interact with each other and hold pooled contribution as a bailee. Gaming platforms provide these services to players for a fee (‘fee’) which is paid by players at beginning of game itself. Pertinent to note that players deposit a single amount at beginning of game towards fee as well as prize.

GST is a transaction tax and its applicability on a transaction is intricately related to way various activities embedded therein are inter-connected and modelled. Pertinently, Revenue has demanded 28 percent GST on entire contribution received from all players, i.e., sum of prize and fee (‘Gross Gaming Value’/’GGV’) from gaming platforms under Rule 31A of the CGST Rules. Rule 31A deals with valuation of lottery, betting and gambling for levy of GST. Revenue is characterizing instant transaction as an actionable claim of gambling.

A careful reading of Terms and Conditions pre-communicated to players and conduct of these games elucidates existence of following two connected yet distinct supplies that are embedded in an online game like rummy:

i. Transfer of prize amount from participant to gaming platform for transfer of right to claim prize i.e., actionable claim of beneficial interest in movable property not in possession (‘Part A’), and,

ii. Supply of service of allowing access to their platform on payment of fee (‘Part B’)

Pertinently, most of these platforms determine fee (Part B) as percentage of prize and pre-stipulate that sums deposited with them towards prize amount (Part A) are held in trust and kept unencumbered. These platforms never receive any right or title over these sums. Breaking down of this seemingly single supply is permissible and also finds support from jurisprudence under Excise laws wherein Supreme Court[1] held that if non-excisable goods (software) are transplanted into excisable goods (hardware), taxpayer is still not liable to pay excise duty on combined value of both. The same analogy equally applies under GST law as GST is levied only on transaction qualifying as supply at first place.

Taxability and related aspects

At the outset, long-standing jurisprudence relating to lottery, betting and gambling establishes that despite there being an element of chance, a game preponderantly of skill would still be a ‘game of skill’ and not gambling[2]. The distinction between ‘game of skill’ and ‘game of chance’ is important in present scenario wherein if game being played is proven to be ‘game of skill’, actionable claim will fall in Entry 6 of Schedule III of the CGST Act and hence, will not be taxable. Games like rummy[3] , poker[4] and other similar games (popularly misconstrued as gambling) have been consistently held to be games of skill. To that extent, applying revenue’s own characterization of instant transaction as actionable claim, these demand notices are clearly untenable and will not stand test of time. The Authors highlight that this entirely depends on characterization of game being played as a game of skill.

Having said that, true taxability of this transaction is no longer an unnerving question. For any transaction to be exigible to GST, it needs to pass test of ‘supply’ as given under Section 7 of the CGST Act. For taxability of Part A of transaction, the Authors have already discussed that any actionable claim towards game of skill is ousted from levy of GST vide Schedule III of the CGST Act. Pertinent to highlight that the Bombay High Court in the case of ***Gurdeep Singh Sachar v. UOI, TS-496-HC-2019(BOM)*** held that prize money to be distributed among players is in nature of actionable claim and no GST is applicable thereon. Hence, no GST liability on prize pool arises in hands of gaming platform.

Accordingly, only supply from gaming platforms is supply of online gaming services, classifiable under SAC 998439 as *‘Online gaming services not elsewhere classified’* which attracts 18 percent GST. Explanatory Notes to SAC 998439 provides for inclusion of games intended to be played on internet, strategy games, action games etc.

Further, in terms of Section 15(1) of the CGST Act, value of taxable supply for levy of GST is price paid or payable for such supply. As Part-A of underlying transaction does not qualify as supply, only fee recovered by gaming platform (price for Part-B) shall qualify as transaction value and be subject to GST.

The GST Council was fully seized of GST complexities revolving online games in its 35^{th} meeting wherein they discussed taxing GGR in detail. Recipient of demand notice has gone on record to state that its total revenue in period of dispute was only one third of demand raised. The addictive nature of these games compels participants to re-deploy their winnings to play same games again or new games. Hence, revenue is taxing same amount again and again as opposed to gaming platform’s actual revenue. While GST Council is about to enter its 48^{th} meeting, dream of a ‘Good and Simple Tax’ still remains a fantasy game for most industries still. The eventual unraveling of this issue in future will be worth watching out for.

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[1] CCE v. Acer India Limited, 2004 (172) ELT 289 (SC)

[2] The pre-dominant skill test, as laid down in K.R. Lakshmanan v. State of Tamil Nadu, MANU/SC/0309/1996, State of Andhra Pradesh v. K. Satyanarayana and Others, MANU/SC/0081/1967

[3] All India Gaming Federation v. State of Karnataka, MANU/KA/0345/2022

[4] Junglee Games India Private Limited v. State of Tamil Nadu, MANU/TN/5230/2021