

# Recent Developments In India GST Laws

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## Background

Applicability of Goods and Services Tax (“GST”) on online gaming operators has long been a controversial issue in India. Indian courts have held that skill-based games are not betting and gambling, which are games of chance. Therefore, the buy-in amounts deposited by players as contribution towards prize pool, are not actionable claims in relation to lottery, betting and gambling and accordingly, not subject to GST. Historically, Indian skill-based operators were discharging GST at rate of 18% on service fee charged to players.

After deliberations on the tax rate and tax base for skill-based games for over 3 years, the Indian government has made certain changes to the GST regime which are likely to have far reaching consequences for both Indian and offshore gaming operators.

## **1. Developments on the legislative front**

The GST Council in its 50th and 51st meetings recommended to levy GST at the rate of 28% on full face value of bets placed with online gaming operators. Consequently, certain amendments were made to the Central Goods and Services Tax Act, 2017 (“CGST Act”) and Integrated Goods and Services Tax Act, 2017 (“IGST Act”). The Central Government will notify the date from which amendments will take effect.

While the GST Council had indicated that the amendments will come into effect from October 1, 2023, the revenue authorities have been quoted to say that the amendments are merely ‘clarificatory’ in nature and will be applicable retrospectively. Few state governments have started amending state GST laws for implementation from October 1, 2023. Recently, valuation rules have also been notified for determination of taxable base for online gaming.

### **1.1 Amendments in the CGST Act**

#### **1.1.1 Definitions of 'Online Money Gaming'**

The amendments to the CGST Act have introduced a definition of ‘online money gaming’ to provide that the online games in which the players pay or deposit an amount with the expectation of winning rewards, regardless of whether (i) the outcome of game is dependent on skill or chance, or (ii) such games are permissible under any law for the time being in force, would qualify as online money gaming (“OMG”). The scope of OMG is made wide enough to include any game, scheme, competition or any other activity or process, regardless of its legality or whether it is in nature of game of skill or game of chance. The definition of OMG also provides that the deposit by players may be in form of money or money’s worth or virtual digital assets (“VDA”).

#### **1.1.2 Supply in relation to specified actionable claims made taxable**

GST applies on supply of goods or services. Goods have been

defined to *inter-alia* include actionable claims. Actionable claim *inter-alia* means a claim to any debt.

Schedule III of the CGST Act specifies transactions which are neither considered as a supply of good nor as a supply of service and are accordingly not subject to GST. Prior to the amendments, actionable claims, *other than lottery, betting and gambling*, formed part of Schedule III. Therefore, supply of actionable claims, other than actionable claims in relation to lottery, betting and gambling were not subject to GST. Considering the jurisprudence distinguishing skill-based games from lottery, betting and gambling, actionable claims in relation to betting and gambling were treated differently than actionable claims in relation to game of skill.

The CGST Act has been now amended to include definition of 'Specified actionable claim' ("Specified AC"). Specified AC has been defined to include actionable claim involved in or by way of *inter-alia* betting, gambling or OMG.

Schedule III has now been amended to provide that supply of actionable claims *other than Specified AC* shall neither be considered as supply of good nor a supply of service. Therefore, supply of Specified AC shall be considered to be subject to GST. Considering Specified AC includes actionable claims in relation to OMG, such supply shall be considered to be subject to GST. With this amendment, actionable claims in relation to betting, gambling and OMG have been brought at the same footing.

### **1.1.3 Online gaming platforms deemed to be 'Suppliers' of specified AC**

GST is payable by supplier of goods or services. The definition of 'supplier' has been amended to include a deeming fiction such that any person who organizes or arranges, directly or indirectly, supply of Specified AC, including a person who owns, manages or operates a digital or electronic platform for supply of Specified AC, shall fall within the ambit of 'supplier'. The amendment provides that such person will be deemed to be the supplier of

Specified AC irrespective of whether consideration for supply of such actionable claim is paid or conveyed to him or through him or placed at his disposal in any manner.

Prior to this amendment, it was possible to argue non-application of GST on buy-in amounts due to lack of nexus between the services supplied by online gaming operators and the buy-in amount received by players. However, the deeming fiction incorporated within the definition of 'supplier' withers this argument.

## **1.2 Valuation Rules**

The valuation rules provide that the value of supply of online gaming, including supply of actionable claims involved in OMG, shall be the total amount paid or payable to or deposited with the supplier by way of money or money's worth, including VDA, by or on behalf of the player. It is further provided that any amounts refunded or returned by the supplier to the players (for any reasons whatsoever) will not be deductible from the value of supply of OMG.

The rules also clarify that winnings redeployed by players, without withdrawing, shall not be considered as amount paid to the OMG operator, therefore, should not be included in the value of supply.

## **1.3 Amendments in the IGST Act**

### **1.3.1 OIDAR services**

Online Information and Data Access or Retrieval ("OIDAR") services have been defined under the IGST Act to mean the services whose delivery is mandated by information technology over the internet or an electronic network. OIDAR service providers that provide such services. While OMG has been excluded from the meaning of OIDAR, offshore online gaming operators providing, *inter-alia*, subscription-based games would still be covered under the OIDAR regulations.

### **1.3.2 Mandatory payment of tax and registration for offshore OMG operators**

Amendments have been made to the IGST Act to impose a statutory obligation on offshore OMG suppliers to discharge GST on supply of OMG to persons in India. Prior to this amendment, several operators were taking an argument that supply of OMG, being import of an intangible actionable claim should not be subject to GST.

The IGST Act has also been amended to provide that in order to discharge GST, offshore OMG suppliers shall obtain registration under the simplified registration scheme. In case of failure to obtain such registration, the GST department may block any information generated, transmitted, received or hosted in any computer resource used for supply of OMG by such offshore OMG supplier.

## **2. Developments On The Judicial Front**

The Karnataka High Court, in the case of Gameskraft, had quashed a huge GST demand of ~INR 21,000 crores by holding that buy-in amount received by the rummy operator, being a game of skill should not be subject to GST. The GST department had appealed the said decision before the Supreme Court of India.

Recently, the tax department's petition against the Gameskraft decision was heard before a three-judge bench of the Supreme Court, where the Court granted an ad-interim stay on the order of the Karnataka High Court until the next hearing. This move may lead to opening of assessments by the GST department for several operators.

## **Conclusion**

The amendments by legislature have far reaching consequences on gaming operators providing services in India. The amendments increase both the tax rate and tax base for GST. Further, the stay on the Gameskraft decision by the Supreme Court has been a cause of worry amongst all industry

stakeholders. In case the Supreme Court passes an adverse order, it may have a ripple effect on other operators. Considering that operators would not have the money to discharge tax amount for past periods, it may drive several operators out of business.

While the industry has received a boost from regulatory perspective, the fate of the Indian gaming industry truly hinges on GST development.



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