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## Balanced GST regime critical for growth of the gaming industry

*The imposition of 28% GST on Buy-in Amount may render the online skill-based industry unviable due to a significant drop in the prize money available for distribution to players*

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At present, online skill-based gaming operators pay GST at the rate of 18% on the service fee charged to players.

### Gowree Gokhale and Ipsita Agarwalla

The recent Karnataka High Court ruling quashing the Rs 21,000 crore GST demand against an online skill gaming operator should open the path for the GST council to finalise the GST stance for the online skill gaming industry.

At present, online skill-based gaming operators pay GST at the rate of 18% on the service fee charged to players. This is consistent with the status under the erstwhile service tax regime. The Group of Ministers (constituted by the GST Council) is now debating whether GST should be levied at a rate of 28% on

service fees and buy-in amounts (that is, same GST levied on betting and gambling). Such taxation would be contrary to the existing legislation and constitutional principles. Further, it would be detrimental to the Central government's efforts to encourage the online skill gaming industry. To make the industry sustainable, these initiatives must be matched by an appropriate tax policy framework.

## **Business Model**

Operators are technology companies that host skill games on online platforms and offer services to help them run. On such platforms, players compete against one another. The Operators charge players a small commission for providing such platforms and services. Also, the players contribute a sum to the prize pool from which prize money/winnings are disbursed to the game's winners ("Buy-in Amount").

## **Issues with GST Council proposal**

Firstly, raising the GST rate to 28% would put skill-based games at par with games of chance. The term "betting and gambling" as used in the Constitution and various anti-gambling state laws, has been interpreted to mean betting and gambling on games of chance. Moreover, the Supreme Court of India has ruled that skill-based games should not be treated in the same way as lottery or betting and gambling. Skill gaming has been recognised as a constitutionally protected business and trade activity.

When the legal position is so obvious, equating skill games with chance games under GST law would go against clearly established distinction.

It is widely accepted that the legislature has complete awareness of the existing laws on the subject when enacting a law. Courts have also held that a legal phrase which has been used in a statute and judicially interpreted must be assumed to be used in the sense in which it was judicially interpreted. Hence, under the GST law, the phrases "betting and gambling" should be considered to mean games of chance.

The Karnataka High Court has reaffirmed the distinction between a game of skill and a game of chance in a recent decision. The Karnataka High Court further noted that the GST authorities tried in vain to cherry pick lines from several court judgements to build a non-existent case, which is not permitted by law.

A lack of classification between a game of chance and a game of skill may result in inequality, thereby, violating the fundamental right to equality enshrined under Article 14 of the Constitution.

Secondly, the principle of interpretation of fiscal statutes states that charging sections (which provide for tax levy) should be strictly construed. A person cannot be taxed if he has not been brought into the ambit of the charging provision by unambiguous words. GST is levied on the 'supply' of goods or services. GST on Buy-in Amount can be levied only if the Gaming Operators can be said to have supplied such actionable claims. Gaming Operators, on the other hand, just facilitate skill-based games between players. The Buy-in Amounts placed by players while playing a game of skill constitute an actionable claim, although the Gaming Operator is not involved in or providing such actionable claims. Only the players are providing an actionable claim inter se. The recent Karnataka High Court affirmed the lack of supply of "goods". A levy of GST on the Buy-in Amount would be unjustifiable because it falls outside the ambit of the charging section under the GST law.

Finally, GST can be levied on 'consideration' received for supply of goods or services. The Gaming Operators do not supply any taxable goods or services to players in exchange for the Buy-in Amount. There is no nexus between the technology services offered by Gaming Operators and the Buy-in Amounts received from players. Several Courts have repeatedly held that for a supply to be taxed, there must be a direct link/nexus between supply of goods or services and the consideration. In absence of such a relationship, the Buy-in Amount cannot be subject to GST.

## **Recommendation**

Studies have suggested that an appropriate tax regime leads to a favorable channeling rate i.e., the proportion of gaming that consumers conduct through domestic channels. An unfavourable tax regime may encourage the growth of a parallel unregulated non-compliant sector, driving players away to foreign gaming operators. This could result in significant income loss for the government and a negative impact on the Indian startup ecosystem. The imposition of 28% GST on Buy-in Amount may render the online skill-based industry unviable due to a significant drop in the prize money available for distribution to players. It may also give rise to litigation about the constitutional validity of the levy.

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The growth of the gaming industry is heavily reliant on the government's tax policy framework. On the direct tax front, the Government did a commendable job by establishing a favourable withholding tax framework for online games. The correct GST framework will provide the gaming industry a boost, acting as a catalyst for stimulating innovation in the AVGC sector and maintaining a safe playing environment for players. It is critical that the current GST framework (of charging GST at the rate of 18% only on the commission) for online skill-based games be maintained. A balanced GST regime for online skill-based games could help India realize its promise to become the world's new gaming capital.

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<a href="#">HCL Technologies Ltd.</a>	1158.35	1.83
<a href="#">Power Grid Corporation Of India Ltd.</a>	246.85	1.54
<a href="#">Bajaj Auto Ltd.</a>	4661.7	1.4

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Nifty

Sensex

Company	Value	%Change
<a href="#">Bajaj Finance Ltd.</a>	7209.85	-2.39
<a href="#">Bajaj Finserv Ltd.</a>	1507.25	-2.25
<a href="#">MAH&amp;MAH</a>	1383.25	-1.38
<a href="#">UltraTech Cement Ltd.</a>	8175.5	-1.13

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