

Gaming Law Wrap

September 15, 2022

REGULATORY UPDATE: INDIA'S GAMING INDUSTRY 2022

As we approach the fourth and final quarter of the year, we take stock of the legal and regulatory developments in India's gaming industry.

Despite the constitution of multiple bodies by the Central Government (an inter-ministerial panel¹ to contemplate regulations for the online gaming industry ("IM Panel"), an Animation, Visual Effects, Gaming and Comic ("AVGC") Promotion Task Force², ("Task Force") and a Government of Ministers ("GOM")³ to consider goods and service tax ("GST") for online gaming, 2022 has yet not delivered to the industry its promised regulatory certainty.

There has been no clarity as yet on whether there will be a central safe harbor for skill games, manner of determination of skill, appointment of a central regulator, nor applicable goods and service tax (GST) leviable on skill gaming transactions.

On the enforcement front, gaming advertisements, particularly those during sporting events, faced increased scrutiny with regulators clamping down on surrogate advertisements of sports betting websites in India. The Central Board of Direct Taxes ("CBDT") has also sought to investigate non-filing of income tax returns in relation to Indian players' winnings⁴.

The next few months will likely shape the future of the industry. The Supreme Court will determine the constitutional validity of banning skill games, the Central Government, helmed by the IM Panel is expected to release draft guidelines. Certain Indian States like Tamil Nadu, Rajasthan⁵ and Kerala are contemplating State laws for the industry.

Some of the key developments and our analysis are summarized below:

1. Inter-Ministerial Task Force likely to introduce draft regulations in the next few months: considers deposit limits

The IM Panel was constituted in May 2022, to contemplate central regulations for the online gaming industry⁶. The panel comprises of the Niti Aayog's CEO, the secretaries of the Ministry of Home Affairs, Revenue, Department for the Promotion of Industry and Internal Trade ("DPIIT"), as well as Ministry of Electronics and Information Technology ("MeiTy"), Ministry of Information and Broadcasting ("MIB"), and the Sports Ministry.

Information about the IM Panels deliberation have not been made public. However, latest reports suggest⁷ that it is likely to recommend rules governing the amount of money individual players spend in the game. These reports also suggest that the draft regulations may be finalised over the next month, and will then be introduced for public consultation⁸.

2. Supreme Court dismisses special leave petition (SLP) against Rajasthan High Court order holding fantasy sports as games of skill

A writ petition⁹ was filed before the High Court of Rajasthan in 2019 alleging that Dream 11's fantasy sport games amounted to sports betting, and gambling activities/games of chance. It was further alleged that Dream 11 was evading GST by paying only 18%, instead of 28%, and that too on the commission/platform fee amount, and not on the stake amount.

In October 2020, the High Court of Rajasthan held that the result of the fantasy game depended on the skill of the participant and not on chance, and accordingly it was not gambling. The winning or losing of the virtual team by the participant was also independent of the outcome of the game or event in the real world. Accordingly, the online fantasy game offered by Dream 11 was a game of skill, protected under freedom of business and trade guarantees¹⁰ under the Constitution of India. In respect of the GST issue, the court deferred the issue to the GST authorities to consider in accordance with the law, in view of its findings that the game was a game of skill.

A SLP (i.e., a petition seeking leave to appeal) was filed against the Rajasthan High Court's order¹¹. A division bench (i.e., two judge) of the Supreme Court has dismissed¹² the SLP, i.e., refused the petitioner permission to appeal, on September 9, 2022. A copy of the order is not available on the court website yet.

3. Supreme Court due to hear Tamil Nadu appeal against High Court order striking down ban on skill games: State mulls new law to prohibit games of skill

In August, 2021, the High Court of Madras struck down¹³ certain amendments introduced to the *Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021*, holding that the complete prohibitions on for-money online games of skill

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under the Amendment Act were unreasonable, excessive, and manifestly arbitrary, thereby falling afoul of Article 19(1)(g) of the Constitution. The court emphasized that the State had failed to justify the need for a total prohibition on even games of skill, nor demonstrated why a lesser form of restriction would not have sufficed. You can read our analysis of the High Court's order [here](#).

A SLP was filed against this order before the Supreme Court by the Government of Tamil Nadu¹⁴ and is currently pending. Notice has been issued to the parties, and the matter is listed next on November 7, 2022.

In parallel, the Government of Tamil Nadu is contemplating a fresh law to prohibit online games, particularly Rummy. The Government had constituted a committee (headed by a retired High Court judge) to assess risks of online Rummy (such as financial loss and suicide, exploring the dangers of these games with relevant data, and impact of advertising games and measures to restrain such advertisements)¹⁵. The Committee presented its report to the Government¹⁶ in June 2022, recommending (1) a ban on online games, and (2) a law against online games at a national level¹⁷. Subsequently, it was reported that the Tamil Nadu Cabinet had considered the report and a majority of cabinet members were in favour of banning online rummy by way of introducing an ordinance¹⁸.

A stakeholder consultation was held in August¹⁹ 2022, pursuant to which it was reported that a draft legislation banning all online games was prepared and considered by the Cabinet²⁰. Accordingly, there may be an Ordinance seeking to prohibit online games in Tamil Nadu. It is unclear whether the law would seek to prohibit certain games only (like Rummy), or other games of skill as well.

4. Group of Ministers likely to suggest GST on gaming industry in next 7 – 10 days; seeks legal opinion

A Group of Ministers (GoM) was constituted²¹ to suggest the GST rate on casinos, race courses and online gaming. GST is applicable at a rate of 28% on games of chance, and the skill gaming industry pays 18% GST on the commission or gross gaming revenue (GGR) (i.e., the fee charged by online gaming operators). There is an ongoing discussion at the GoM level on whether (1) GST should be charged at the rate of 28% on both games of skill as well as games of chance, and (2) whether it should be on the entire amount which a player deposits for a game, or on the commission amount. NDA's view has been to continue the existing GST framework (i.e., GST at 18% on the GGR) for online skill based games, as we explain [here](#).

As per latest reports²² on 5th September, the GoM is seeking a legal opinion on the applicable tax rate and is seeking to differentiate between the three sectors (casinos, horse racing, and online gaming), before making its final recommendations to the GST Council. The same reports suggest that the GoM is likely to finalise its recommendations within 7 – 10 days.

5. CBDT scrutinizes players' winnings on online gaming platforms

As per reports, the Central Board of Direct Taxes ("CBDT") is scrutinizing earnings by players on fantasy gaming apps and online gaming platforms, and non-filing of income tax returns in this respect. The reports suggest that the department has uncovered earnings amounting to INR 58,000 crores (approx. USD 7.29 Billion) in the last three years.

Under the Income Tax Act, 1961, a tax of 30% is required to be deducted before paying income from winnings above INR 10,000. Accordingly, the department seeking to recover INR 20,000 crores (approx. USD 2.51 Billion) in tax, per officials' statements²³.

6. Scrutiny of gaming advertisements (games of skill as well as chance) increases

■ Advertisements of games of chance and sports betting

Most Indian States prohibit publication of gambling related advertisements (i.e. on games of chance such as casino games, as well as sports betting, etc.)²⁴. Offering and advertising games of skill is permitted in most States.

However, recently there has been several advertisements which have appeared on both online and print media, particularly during sporting events such as the Indian Premier League and Asia Cup. Some of these advertisements are of foreign sports betting platforms.

In light of this, the Ministry of Information and Broadcasting ("MIB") has issued an *Advisory on Advertisements of Online Betting Platforms*²⁵ on June 13th, 2022 ("MIB Advisory"). In the MIB's advisory, it has noted that a number of advertisements of online betting websites / platforms are appearing in 'print, electronic, social and online media,' and that such advertisements are prohibited in most parts of India. It has also stated that such advertisements are misleading and don't appear to be in conformity with the *Consumer Protection Act, 2019* ("CPA"). The advisory advises 'online and social media, including the online advertisement intermediaries and publishers', to not display or target betting and gambling related advertisements towards the Indian audience. It is addressed to newspapers, TV channels, publishers of news and current affairs content, and is copied to social media intermediaries.

The All India Gaming Federation ("AIGF"), a self-regulatory gaming body, has written to Anurag Thakur, the Minister of MIB, seeking cancellation of the broadcasting license granted to Sony Network, a leading Indian television channel, due to alleged promotion on betting and gambling websites during the broadcast of the Indian cricket team tour of England²⁶ on its OTT platform.

■ Advertisements of games of skill

Although advertising games of skill are permitted in most Indian States, they are regulated under the *Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022* ("Misleading Ads Guidelines"), introduced by the Central Consumer Protection Authority ("CCPA"), as well as by the Advertising Standards Council of India ("ASCI").

As per reports²⁷, gaming related advertisements emerged as one of the top violative categories of advertisements

received by the ASCI between April 2021 – March 2022, on account of making misleading claims, leadership and trust claims, as well as claims around referral programs (i.e., refer a friend and win)²⁸. ASCI had previously cautioned²⁹ operators of real money gaming platforms not to indulge in irresponsible advertisement, especially in light of overall regulatory scrutiny of the industry.

During the Parliament's Monsoon Session, it was reported³⁰ that 13 ministers of the Parliament had requested a written response from MIB on illegal betting and gambling through media and online intermediaries. There were also questions raised on surrogate advertisements and steps being taken by the Government to curb such advertisements. MIB submitted a written response³¹ to these queries, referring to the existing machinery under the Misleading Ads Guidelines, and the MIB Advisory. With respect to surrogate advertisements, the MIB reiterated the legal requirements to be adhered under the CCPA Ad Guidelines which expressly prohibit surrogate advertisements.

7. Kerala contemplates amendments to law to ban online Rummy for stakes

A year after the Kerala High Court³² struck down a notification³³ seeking to prohibit, in effect, '*online Rummy when played for stakes*', it appears that Kerala is planning to reinvoke a ban on online rummy in light of the several suicides in the State³⁴.

By way of background, the State of Kerala had issued a notification³⁵ which had the effect of a prohibiting online Rummy played for stakes. Subsequently, the High Court of Kerala struck down the notification³⁶ and held it to be arbitrary, illegal and in violation of Articles 14 and Article 19(1)(g) of the Constitution of India. An appeal has been filed before the Kerala High Court by the State of Kerala against this order.

At present, reports³⁷ suggest that Kerala is amending Section 3 of the Kerala Gaming Act, 1960, which penalises certain forms of gambling, to prohibit online Rummy for stakes. The Chief Minister was quoted in August 2022 stating that a legislative amendment to the Kerala Act was being considered to regulate online gaming such as Rummy, due to suicides pursuant to losing money through online gaming³⁸.

8. Google launches pilot program to allow DFS and Rummy apps on Google Play store

In a huge win for Indian daily fantasy sport (DFS) and online Rummy operators, Google has announced the launch of a limited-time pilot to distribute DFS and Rummy apps on the Google Play Store in India³⁹. The pilot program will commence on September 28, 2022 and requires applicants to submit an application form for Google Play team's assessment.

Previously, all real-money gaming apps were prohibited by the Google Play store in India.

– Raashi Vaishya, Tanisha Khanna & Gowree Gokhale

You can direct your queries or comments to the author

¹ <https://timesofindia.indiatimes.com/business/india-business/govt-forms-inter-ministerial-panel-to-regulate-online-gaming/articleshow/91821159.cms>

² <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1814698>

³ https://gstcouncil.gov.in/sites/default/files/committees-dynamic/OM-for-GoM-online_gaming24052021.pdf and <https://gstcouncil.gov.in/sites/default/files/GoM-Dynamic/OM%20dated%2011.06.2021GoM%20Casinos.pdf>

⁴ https://www.business-standard.com/article/economy-policy/cbd-t-asks-the-winners-of-online-games-to-pay-taxes-file-updated-itr-122082600199_1.html

⁵ <https://www.nishithdesai.com/NewsDetails/6144>

⁶ <https://timesofindia.indiatimes.com/business/india-business/govt-forms-inter-ministerial-panel-to-regulate-online-gaming/articleshow/91821159.cms>

⁷ <https://economictimes.indiatimes.com/tech/technology/inter-ministerial-group-drawing-up-rules-for-gaming/articleshow/93715346.cms>

⁸ *ibid*

⁹ Ravindra Singh Chaudhary v Union of India & Ors, DB Civil WP No. 20799/2019

¹⁰ Article 19(1)(g), Constitution of India

¹¹ Avinash Mehrotra v Union of India SLP(C) No. 015791/2022

¹² A dismissal of a SLP does not mean the Supreme Court has dismissed the *appeal*, but has dismissed the special leave petition (i.e., has not granted the petitioner permission to appeal). In other words, the Supreme Court has not permitted the petitioner to enter the appellate arena. Accordingly, the Supreme Court's order of dismissal would not attract the doctrine of merger, i.e., the order passed by the Supreme Court would not 'merge' with the High Court, thereby putting an end to the proceedings. The High Court order therefore continues to be operational, without any modification by the SC.

¹³ *Junglee Games India Pvt. Ltd. & Anr. v The State of Tamil Nadu & Ors* WP Nos.18022, 18029, 18044, 19374, 19380 of 2020, 7354, 7356 and 13870 of 2021

¹⁴ SLP (C) No. 19981-19988/2021 The State of Tamil Nadu & Ors v Junglee Games India Pvt. Ltd. & Anr.

¹⁵ <https://timesofindia.indiatimes.com/city/chennai/online-rummy-panel-submits-report-to-tamil-nadu-govt/articleshow/92487583.cms>

¹⁶ <https://twitter.com/CMOTamilnadu/status/1541303199927500800>

¹⁷ <https://www.thenewsminute.com/article/online-gambling-ban-tn-government-seeks-inputs-stakeholders-166603>

¹⁸ <https://g2g.news/rummy/tamil-nadu-no-decision-yet-on-online-rummy-ban-cabinet-in-favour-of-a-ban/>

¹⁹ <https://indianexpress.com/article/cities/chennai/tamil-nadu-govt-inputs-stakeholders-legislation-regulating-online-gaming-8077926/>

²⁰ <https://www.thehindubusinessline.com/news/tamil-nadu-may-ban-online-rummy/article65827579.ece>

- ²¹ https://gstcouncil.gov.in/sites/default/files/committees-dynamic/OM-for-GoM-online_gaming24052021.pdf
- ²² https://www.business-standard.com/article/economy-policy/gom-on-gst-levy-on-casinos-online-gaming-to-seek-further-legal-opinion-122090501301_1.html
- ²³ *ibid*
- ²⁴ Most State laws prohibit 'printing, publishing, selling, distributing or in any manner circulating anything with the intention of aiding or facilitating gambling/gaming.'
- ²⁵ <https://mib.gov.in/sites/default/files/Advisory%20on%20online%20betting%20advertisements%2013.06.2022%282%29.pdf>
- ²⁶ <https://g2g.news/gaming/surrogate-betting-ads-aigf-writes-to-anurag-thakur-seeking-revocation-of-sony-liv-broadcaster-license/>
- ²⁷ <https://inc42.com/buzz/fantasy-gaming-startups-dominate-advertisement-complaints-received-by-asci-against-gaming-sector/>
- ²⁸ <https://www.outlookindia.com/business/as-gaming-cryptocurrency-lead-asci-s-six-violative-advertising-categories-the-spotlight-is-on-influencers-once-again--news-211119>
- ²⁹ <https://www.newindianexpress.com/business/2022/apr/12/14-gaming-firms-violating-advertising-code-during-ipl-asci-2441210.html>
- ³⁰ <https://g2g.news/online-gaming-laws/13-mps-raise-joint-question-on-illegal-betting-and-gambling-websites-mib-to-respond-tomorrow/>
- ³¹ <http://164.100.24.220/loksabhaquestions/annex/179/AU240.pdf>
- ³² Head Digital Works Pvt. Ltd. v State of Kerala & Ors., WP (C) No. 7785/2021
- ³³ G.O (P) No.26/2021/HOME, Government of Kerala
- ³⁴ See: <https://g2g.news/gaming/kerala-boy-commits-suicide-police-suspect-gaming-addiction/>
- ³⁵ Supra note 43
- ³⁶ *Ibid*
- ³⁷ See: <https://g2g.news/online-gaming-laws/now-kerala-to-ban-online-rummy/>
- ³⁸ <https://g2g.news/online-gaming-laws/kerala-to-bring-a-law-to-curb-online-rummy-cm-pinarayi-vijayan/>
- ³⁹ <https://support.google.com/googleplay/android-developer/contact/dfsform>

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