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Online Games : Valuation & Classification of Service : GST Law of India

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Moot Questions

- What is the Value of services provided by a Company providing online platform to the Players participating in the online game?
- What is the applicable rate of GST on the services of providing platform for online games?

A. Example for convenience of discussion

1. A online gaming Company M/s Jeeto Online provides online platform services for conduct of games viz. ludo, carrom etc. Rules of the game shall be such that the players shall pool Rs. 50 (say) each in their own game's Players Pool Account. M/s Jeeto Online shall charge and transfer 15% fees out of amount pooled by players, and balance would be distributed among them as follows:

a. Winner	Rs. 100
b. 1 st Runner Up	Rs. 50
c. 2 nd Runner Up	<u>Rs. 20</u>
	<u>Rs. 170</u>

B. Classification of Service for rate of tax

2. The Hon'ble Supreme Court in the matter of *K.R. Lakshmanan (1996) 2 SCC 226* is of the view that:
 - i. the competitions where success depends on substantial degree of skill are not 'gambling'; and
 - ii. despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of "mere skill".
3. The Hon'ble Punjab & Haryana High Court in the matter of *Varun Gumber v. Union Territory of Chandigarh; 2017 SCC Online P&H 5372* has relied upon the judgment of

Hon'ble Supreme Court in the matter of *K.R. Lakshmanan (supra)* and held that success in Dream 11's fantasy sports basically arises out of users exercise superior knowledge, judgement and attention and therefore it is a game of skill and not a game of chance. SLP filed against this order has been dismissed by the Hon'ble Apex Court.

4. The Hon'ble Bombay High Court has also examined this issue in respect of online Dream 11's Fantasy Games in the matter of ***Gurdeep Singh Sachar, 2019 (30) G.S.T.L. 441 (Bom.)*** and held that the activity of Dream 11 do not amount to 'gambling' or 'betting' or 'wagering'. In the said judgment the Hon'ble Court has observed that the activities performed by 'Dream 11 Fantasy Pvt Ltd' do not involve any betting or gambling as their result is not dependent upon winning or losing of any particular team in real world on any given day. **Since the Court has observed that it's a online game not involving any gambling/betting, the Court has held that same is chargeable to 18% GST.** The judgement of Bombay High Court was challenged four times before Hon'ble Supreme Court and details of such petitions are as under:

- i.* The Division Bench of Hon'ble Supreme Court dismissed the SLP filed by ***Varun Gumber*** vide its order dated 04.10.2019.
- ii.* The Division Bench of Hon'ble Supreme Court has dismissed the SLP filed by ***Gurdeep Singh Sanchar*** vide its order dated 13.12.2019.
- iii.* The Division Bench of Hon'ble Supreme Court in SLP filed by ***Union of India*** vide its order dated 13.12.2019 made it open for Union of India to apply for a review before the High Court of Bombay to decide GST aspect on merits. The Hon'ble Apex Court has further vide its order dated 30.01.2020 clarified that the only scope of review before the Bombay High Court is in respect to GST.
- iv.* The Three Judges Bench of Hon'ble Supreme Court in SLP (Criminal) filed by the ***State of Maharashtra*** vide its order dated 06.03.2020 has issued the notice and stayed the operation of the judgement and order passed by Bombay High Court until further orders.

5. Similar finding was also given by the Hon'ble Rajasthan High Court in ***Chandresh Sankhla, 2020 (42) G.S.T.L. 195 (Raj.)***. The Court finds that the issue of treating the game "Dream 11" as having any element of betting/ gambling is no more res integra and dismissed the PIL.

6. It is to be noted that it is uncertain whether in the SLP filed by the *State of Maharashtra* the Hon'ble Supreme Court will admit the SLP and re-open the issue of the legality of Fantasy Games or will only delve into the issue of taxability or will dismiss the SLP. However, after allowing the Union of India to file review petition in respect to issue of GST before the Bombay High Court, it seems unlikely that the issue of GST shall be taken up by the Apex Court in SLP filed by the *State of Maharashtra*. Nonetheless, the issue is unsettled and is under litigation.
7. The games which predominantly require use of skills and strategies by players to compete and win over others like Ludo, carrom etc., the same can be classified as skill-based Games. Skill based games are leviable to GST @ 18% under SAC 998439 on the value of amount charged by Gaming Companies for its services.

C. Valuation of services provided by Companies providing platform for online games

8. Earlier, the legality of Online Games in India primarily rests on the question that whether such games are games of skill or games of chance. Now, the question that took the lead was about the taxability of such online gaming services under GST Law.
9. In the matter of Gurdeep Singh (supra) one of the questions was raised by the petitioner in regard to value of supply and he has submitted that Dream 11 is paying GST only on amount charged towards platform fee (say 15%) whereas GST is payable on 100% amount collected by the Company.
10. The Hon'ble Bombay High Court in the aforesaid said case observed that the amounts pooled by the participants is an 'actionable claim', as the same is to be distributed amongst the winning participating members as per the outcome of a game. The Court observed that since the activity of 'Dream 11 Fantasy Pvt Ltd' does not amount to lottery, betting or gambling, the activity or transaction pertaining to such actionable claim can neither be considered as supply of goods nor supply of services as per Entry 6 of Schedule III of CGST Act, and is thus clearly exempted from levy of any GST. A review application was filed by *Union of India* in respect of GST and is pending before the Bombay High Court.

Dispute on Valuation Issue

11. The issue of valuation of services provided by Online Gaming platforms is pending even before GST Council and the litigations have also started.
 - a. The GST department has started questioning gaming companies to determine if GST is applicable on the total transaction value or the net commissions that accrue to these gaming firms.
 - b. In view of representation received from various associations, in 35th GST Council Meeting dated 21.06.2019, the Group of Ministers (GoM) had recommended that the issue regarding rate and valuation of Online Gaming and other miscellaneous issues be forwarded to the Fitment Committee and Law Committee. Later in 38th GST Council Meeting dated 18.12.2019 also, the issue was being requested to be referred to Law Committee and it was also recognized in the Minute Book that litigations are going on by Online Gaming Portals.

D. Author's View

12. The games which predominantly require use of skills and strategies by players to compete and win over others like Ludo, carrom etc., the same can be classified as skill-based Games.
13. Skill based games are leviable to GST @ 18% under SAC 998439 on the value of amount charged by Gaming Companies for its services.
14. In the given example, the amount actually charged by M/s Jeeto Online for its online platform services is 15% Fees collected and transferred out of pooled amount of players. Therefore, in author's view GST should be levied only on the portion of amount actually charged i.e. 15% Fees. However, as discussed, the issue relating to Value of Service is contentious due to the following reasons:
 - a. The GST department has issued notices to online gaming industry. It is also pending before the Law Committee of GST Council for final decision;
 - b. The issue is pending before the Hon'ble Bombay High Court in a review petition filed by Union of India;

- c. The Hon'ble Supreme Court has also issued the notice and stayed the operation of the judgment of Bombay High Court in SLP filed by State of Maharashtra.
15. Thus, levy of GST on remaining 85% amount which pooled by Players and distributed among players is subject to further outcome of the ongoing litigation.
16. It is to be noted that the terms of agreement between prospective players and Gaming Coming will play a crucial role in determining the GST implication. Therefore, the concept and methodology of the game should come out clearly from the terms and conditions pertaining to the games and Player's consent should be taken on the terms and conditions of the games.

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