

## Will the GST Council put an end to the GST dilemma?

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– By Gowree Gokhale

The fate of the Indian online skill-gaming industry is likely to be decided at the upcoming 50th GST Council meeting on July 11. The government has recognised online skill-based gaming as a promising sector and has also provided support in the form of favourable policies. The Ministry of Electronics and Information Technology (MeiTy) has introduced the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules), providing regulatory clarity and a boost to the sector. The contribution of the online skill-based gaming sector to the Indian economy cannot be overstated.

Online skill-based game operators are technology companies that provide an infrastructure platform for hosting games. They effectively operate as an intermediary between players and simply host the games. Operators have no impact on game play. Users select the games they want to play based on their skills and the money they want to stake to compete with other players. For offering the infrastructure platform to the players, gaming operators charge a nominal service fee/commission. The players, in turn, contribute an amount to the prize pool, from which the gaming operator distributes prize money/winnings to the game's winners (Buy-in Amount).

### What is the Controversy?

Recently, Indian [online gaming](#) operators have found themselves amid tax disputes. The issue of an online skill-based gaming operator's GST liability is not new. In 2018, it first surfaced in a lawsuit involving a fantasy sports platform before the Bombay High Court. Although being decided in favour of the taxpayer, the case is still ongoing before the Supreme Court. The Director General of Goods, Services Tax Intelligence (DGGSTI) recently demanded Rs 21,000 crores from an online rummy operator. The DGGSTI raised a claim alleging that the supply involves 'betting and gambling', and so the gaming operator should pay GST not only on the service fee charged from players but also on the 'Buy-in Amounts'. The Karnataka High Court quashed this demand, stating that the gaming operator only dealt with games of skill and the 'Buy-in Amounts' should not be subject to GST. Consistent with judicial rulings, online skill-based gaming operators currently pay 18 per cent GST on the service fee charged to players.

The GST Council established a Group of Ministers (GoM) to investigate taxation issues in the gaming industry. It is understood that the GoM proposed levying GST at 28 per cent on service fees and Buy-in Amounts, which, if implemented, would raise taxes on online skill gaming to the same level as betting and gambling. While the [GST Council](#) has requested the GoM to rethink its findings, the GoM has yet to reach a consensus. The GoM proposal to impose GST at a rate of 28 per cent on the aggregate of service fees and Buy-in Amount is, in our opinion, contrary to the existing legislation and established constitutional principles.

## **Prerequisite for levy of GST**

GST applies to the 'supply' of goods or services. Supply, as envisaged under GST law, must invariably include (i) supply of goods or services or both; (ii) be made or agreed to be made for a consideration; and (iii) in the course or furtherance of business. It is a fundamental principle that charging sections should be strictly construed. A person cannot be taxed if he has not been brought into the ambit of the charging section by unambiguous words.

Gaming operators are mere facilitators of skill-based games between participants. The 'Buy-in Amount' is set by the participants; there is no 'supply' from the gaming operator. The Buy-in Amount reflects a debt claim that must be distributed to the winners of the relevant game. As a result, the Buy-in Amount is an 'actionable claim', that is treated as 'goods' for CGST Act. Only actionable claims relating to lottery, betting and gambling are taxable under GST law.

Skill-based games are treated differently than lottery, betting and [gambling](#), which are all games of chance. So, the Buy-in Amounts being an actionable claim about a game of skill should not be subject to GST.

Besides, the presence of 'consideration' is required for qualification as 'supply' and consequent levy of GST. [Gaming](#) operators do not supply any taxable goods or services to the players for receipt of the 'Buy-in Amount'. This transaction lacks a nexus between the services offered and the 'Buy-in Amounts' received. In the absence of such a relationship, the 'Buy-in Amount' cannot be subject to GST. This is consistent with the settled judicial position that for a supply to be taxed, there must be a direct link/nexus between the supply of goods or services and the consideration.

## **Equating a game of skill with a game of chance**

Increasing the GST rate to 28 per cent would equate betting and gambling as a game of chance' with 'games of skill'. This will negate the distinction between 'betting and gambling' and 'games of skill' as defined in the Indian Constitution and various state laws. Skill-based games have been recognised as constitutionally protected activities. This nullification will result in inequality, violating the fundamental right to equality enshrined in Article 14 of the Constitution. As for the interpretation of the term 'betting and gambling' under GST law, it is well settled that phrases must be read in the same way as they are statutorily provided and judicially interpreted. Any deviation from the well-established legal position that betting and gambling are similar to games of chance may raise constitutional challenges.

## **Other aspects of the gaming industry**

Online skill-based operators frequently incentivize players with joining bonuses, referral bonuses, promotional money, etc. In the hands of gaming operators, these bonuses represent business expenses. In terms of how these incentives are used, withdrawal limits etc, each operator may have various terms and conditions. While most of the debate about the applicability of GST to the online skill-based industry has focused on the tax base and tax rate, such an isolated approach may be out of step with business reality. The government has already explained these nuances in the rule and clarifications introduced for determining net winnings for purposes of withholding tax provisions, which has been welcomed by the industry.

## **Impact of GOM proposal on the skill gaming industry**

The increase in GST may result in a substantial reduction in prize money available for distribution, which may drive players to illicit websites and/or foreign gaming operators. It would also adversely impact revenue collection and result in employment losses. The government's position on the GST regime for skill-based games is likely to be decisive for this industry. The industry wants a fair and equitable tax policy, not an exemption.

### **Recommendation**

Given these realities, the existing GST framework for skill-based games must be maintained. The government's commitment to this sunrise sector will be demonstrated by the earliest settlement of this matter in consultation. The government should also provide guidance/instructions to GST officials to take a consistent approach in the ongoing GST assessments. The online gaming industry has lauded amendments and clarifications obtained under the income-tax regime. A similar holistic approach under GST will provide a much-needed boost to the online skill-based gaming industry, catalysing innovation in the skill-gaming sector while preserving a safe playing environment for players.

*(Source: Financial Express)*