

GST on Online Games - Rising Challenge for Online Gaming Industry

November 12, 2020 | [\[2020\] 121 taxmann.com 152 \(Article\)](#)



Introduction

During the period of lockdown in the world, one of favourite pastime for all age groups was playing Online games with family and friends, the most common of which was Ludo. However, for tax professionals and Gaming Companies, it was more than a fun pastime. In India, the legality of Online Games primarily rests on the question that whether such games are games of skill or games of chance? But this time, the question that took the lead was about the taxability of such online gaming services.

Puneet Agrawal

Partner of ALA
Legal, Advocates
and Solicitors



Pawan Arora

Joint Partner of
ALA Legal,
Advocates and
Solicitors



Shivi Agarwal

Associate of ALA
Legal, Advocates
and Solicitors

Suppose a Company M/s Khelo 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. 25 (say) each in their own game's Players Pool Account. M/s Khelo Online shall charge and transfer 10% fees out of amount pooled by players, and balance would be distributed among them as follows.:

a. Winner	Rs. 60
b. 1st Runner Up	Rs. 20
c. 2nd Runner Up	Rs. 10
	Rs. 90

The question that arises in above situation is-

1. What is applicable rate of GST on services provide by M/s XYZ?
2. What will be the Value of Services on which GST is payable?

Conclusion and Author's View

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.

In the given example, the amount actually charged by M/s Khelo Online for its online platform services is 10% 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. 10% Fees.

However, as discussed above the issue relating to Value of Service is contentious:

- (1) It is pending before the Law Committee of GST Council for final decision;
- (2) The issue is pending before the Hon'ble Bombay High Court in a review petition filed by Union of India;
- (3) 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;
- (4) The GST department has also issued notices to online gaming industry.

Thus, levy of GST on remaining 90% amount which pooled by Players and distributed among players is subject to further outcome of the ongoing litigation.

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.

Legal Position and Industry Disputes in respect to Online Games

Nature of Game

The Hon'ble Supreme Court in the matter of ***Dr. K.R. Lakshmanan v. State of Tamil Nadu [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".

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 *Dr. 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 by the petitioner against the order of Hon'ble Punjab & Haryana High Court has been dismissed by the Hon'ble Supreme Court [***SLP (C) No. 026642/2017***].

In the recent past, 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 v. Union of India [2019] 106 taxmann.com 290/75 GST 258 (Bom.)***, and 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. The

Hon'ble Bombay Court has held that the activity of Dream 11 do not amount to 'gambling' or 'betting' or 'wagering'.

It is pertinent to note that the judgement of Bombay High Court dated 30-4-2019 in *Gurdeep Singh Sachar (supra)* was challenged quadruple times before Hon'ble Supreme Court. The details of all the petitions filed against Bombay High Court are as under:

- i. The Division Bench of Hon'ble Supreme Court *vide* its order dated 4-10-2019 dismissed the SLP filed by **Varun Gumber [SLP (Criminal) having Diary No. 35191/2019]**.
- ii. The Division Bench of Hon'ble Supreme Court *vide* its order dated 13-12-2019 has dismissed the SLP filed by **Gurdeep Singh Sanchar [SLP (Criminal) having Diary No. 43346/2019]**.
- iii. The Division Bench of Hon'ble Supreme Court *vide* its order dated 13-12-2019, in SLP filed by **Union of India [Diary No. 41632/2019]** made it open for Union of India to apply for a review insofar as the GST aspect is concerned before the High Court of Bombay to be decided on merits. Further, a miscellaneous/interlocutory application **[IA no. 14605/2020]** was filed for clarification/direction on the said order of Apex Court dated 13-12-2019 wherein the Hon'ble Apex Court has *vide* its order dated 30-1-2020 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 *vide* its order dated 6-3-2020 in SLP (Criminal) filed by the **State of Maharashtra [Diary No. 42282/2019]** has issued the notice and stayed the operation of the judgement and order passed by Bombay High Court until further orders.

Recently a similar finding was also given by the Hon'ble Rajasthan High Court in **Chandresh Sankhla v. State of Rajasthan [D.B. Civil Writ Petition No. 6653 of 2019, dated 14-2-2020]**. 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 has dismissed the PIL.

In view of this, it is now uncertain whether in the SLP having Diary No. 42282/2019 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, having relegated the Union of India to the High Court for filing review petition in respect to issue of GST, it seems unlikely that the issue of GST shall be taken up by the Apex Court in SLP having Diary No. 42282/2019. Nonetheless, the issue is unsettled and is under litigation.

Value and Tax Rate of GST

In the matter of *Gurdeep Singh (supra)* second question was raised by the petitioner in regard to value of supply and tax rate of GST.

- (a) Petitioner has submitted that Dream 11 is paying GST only

on amount charged towards platform fee (say 20%) whereas GST is payable on 100% amount collected by the Company.

- (b) Applicable rate of GST on gambling/betting is 28% and therefore Dream 11 is required to pay GST @ 28% instead of 18%.

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. Further, since the Court has observed that it's a online game not involving any gambling/betting, the same is chargeable to 18% GST.

As discussed above, a review application was filed by **Union of India [IA/1/2020]** on 8-1-2020, in respect of GST which is pending before the Bombay High Court.

The Government's perspective

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.

In view of representation received from various associations such as All India Gaming Federation (AIGF), in 35th GST Council Meeting dated 21-6-2019, 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.

Thus, the issue of valuation of services provided by Online Gaming platforms is pending even before GST Council and the litigations have also started.

■ ■