Online Gaming – Are all bets off? Who wins? Who loses?

The GST Council in its 50th and 51st meetings had recommended to levy GST on Casino, Horse Racing and Online gaming at the uniform rate of 28% on full face value. As there was no consensus among the Group of Ministers on the aspect of taxing Casino, Horse Racing and Online gaming at 28% on the value of bets placed or on the Gross Gaming Revenue (GGR is the revenue earned by the online gaming platform i.e., amount wagered minus amount won by players), it was left to the GST Council to decide. The Council, therefore, deliberated and decided to levy GST at a uniform rate of 28% on:

1. In case of casinos – Gross value of chips purchased.
2. In case of horse racing – on the full value of bets placed with bookmaker.
3. In case of online gaming – on the full value of bets placed.

While arriving at the aforesaid conclusion, the GST Council did not want to wade into the controversy of 'game of skill' and 'game of chance' and in doing this, it treated all the games played in a casino or online the same way. This in effect would get over the Karnataka High Court judgment in the case of Gameskraft Technologies Private Limited vs. Directorate General of Goods Services Tax Intelligence [W.P. No. 19570 / 2022]. Amendments to the CGST and IGST legislations were notified w.e.f. 1 October 2023 to align with the recommendations of the GST Council. These amendments include inter alia clarity in the GST laws vis-à-vis actionable claims, valuation and taxation of online money gaming, online gaming and actionable claims in casinos, registration and compliances for overseas online gaming operators, as well as removal of online money gaming imports from the ambit of Customs Tariff Act.

Let us now compare where does India stand as compared to other countries, from taxation policy standpoint. In the United States, the taxation of the gaming industry varies at the state level and there may be federal taxes on certain types of gambling. The US state of Nevada, which is home to global gaming hotspot of Las Vegas has adopted a GGR based taxation model wherein the state charges a 3.5% - 6.75% on the GGR apart from an initial licensing fee of USD 0.5 million. Similarly, the US state of Louisiana has adopted a two-tier model wherein it charges 10% on GGR in offline mode and 15% on GGR in online mode.

The United Kingdom shifted its tax structure from the turnover tax model to the GGR tax model for the online gaming industry. Earlier under the turnover tax model, the UK was levying 6.75% on the buy-in amount. Under the GGR model, the tax rate was changed to 15% of the revenue less the winning prize to be paid by the gaming operator. Further, UK has also introduced a remote gaming duty (RGD) of 21% on gross revenues earned by offshore based gaming operators from their customers in UK. It is to be noted that winnings from such betting and gaming are completely tax free in the hands of the recipient.

Another global casino and gaming hotspot i.e., Macau, levies a special gaming tax of 35% on the GGR, applicable to all games, including gaming machines.

The only major economy which still seems to adopt a turnover tax model is Germany. It levies a turnover based tax only for 'games of chance' and that too at a modest rate of 5.3%.

One thing that can deduced from above is that most global economies charge a tax on gaming and casino industry by following the GGR model of taxation. Further, the tax rates average between 3% to 15% and in case of turnover based tax models, the tax rates are lower given the larger base amount.

While the new taxation policy of online gaming, casinos and horse racing could make India a global outlier which charges a seemingly high rate of GST i.e., 28% that too on the value of bets placed itself, it seems that the lawmakers are of an opinion that such a high rate of GST may at best reduce the prize money and do away with some casual gamers but may not completely deter the consumers from their gaming habits.

Here a question could have arisen as to what would happen if these gaming companies shifted their base outside India to a jurisdiction which levies a lower rate of tax. Right now, this may seem to be win-win for both the service provider and the gamer. The gamers would be happy as the tax amount would not eat into the prize money as much as it would if 28% GST is levied, and the service provider would be happy as it be able to keep its customer base intact. Well, the government seems to have covered its tracks on this one.

The government has carved out an exclusion from the definition of Online information and Database Access or Retrieval (OIDAR) services, which refer to a category of services delivered digitally via the internet. While the GST law defines OIDAR in clear terms and also enlists illustrative services such as advertising, cloud services, e-books, online streaming of songs or videos, software downloads, and online gaming services, the distinction should ensure that the online money gaming activities, where participants deposit funds in anticipation of winning money or equivalent assets (such as virtual digital assets), are treated separately. Similar to OIDAR service providers, a simplified GST registration mechanism has been prescribed with a condition to block public access to the supplier's information generated, transmitted, received or hosted in any computer resource used for supply of online money gaming, in case of non-compliance.

Given the above, one may wonder if this could be a death knell for the online gaming industry and casinos. The tax authorities world over, including India, view taxation not only as a revenue generating activity but also as a way of moderating the behaviour of people and societies. In a way, taxation policies reflect the cultural leanings of a society. This explains the 'sin tax' or highest rate of GST being applied to goods or services the consumption of which, in the general view, could have an adverse impact on the peaceful and orderly functioning of a society. Thus, when Indian tax authorities charge a whopping 28% GST on tobacco products along with other cesses, it is a way of conveying to the people that tobacco consumption should be given up. But has such a high rate of tax ever made a dent in the demand for tobacco products?

For the upcoming interim Union Budget 2024, the big question remains as to whether the Hon'ble Finance Minister would accede to the requests of the technology and innovation driven e-sport companies who have sought a rate rationalisation relief/GST review on the ground that the games are preponderantly involving 'skills', distinct from pure 'chance' based gambling.

While protecting the genuine skill-based online games while disincentivizing addictive gambling/betting can be considered as an optimal approach, it seems less likely that the 28% taxation would be rolled back at this stage. This is especially considering that the matter is sub-judice before the Apex Court whereby retrospective tax demands by the DGGI have been challenged by major online gaming companies.

Nonetheless, in view of the high stakes involved, viz. INR 1.12 lakh crore (approx.) worth of tax demands against ~71 show cause notices, it would also be prudent to have some regulatory clarity and a more unified approach to the legal proceedings across the country. The government should define the policy on treating tax positions as fraudulent as compared to interpretational differences along with the ensuing implications on penalties to peg the potential of economic growth of this industry.

In addition to the above, the industry has sought a distinction in taxation of money deposited strictly for wagering versus in-app purchases. Charging differential GST rate on in-app/game purchases separate from bet amounts, can incentivize responsible monetization. Unfortunately, there's been no indication whatsoever on this aspect from the government and hence, the current tax structure could continue.

The online gaming industry has witnessed an unprecedented expansion. The industry expects the policymakers not to play hardball on this front, thereby creating a win–win situation for all. Ultimately, supporting this sunrise industry's sustainable expansion through strategic taxation alterations can unlock gaming's scintillating promise whilst responsibly regulating the risks.

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