GST on online skill-based gaming

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Background

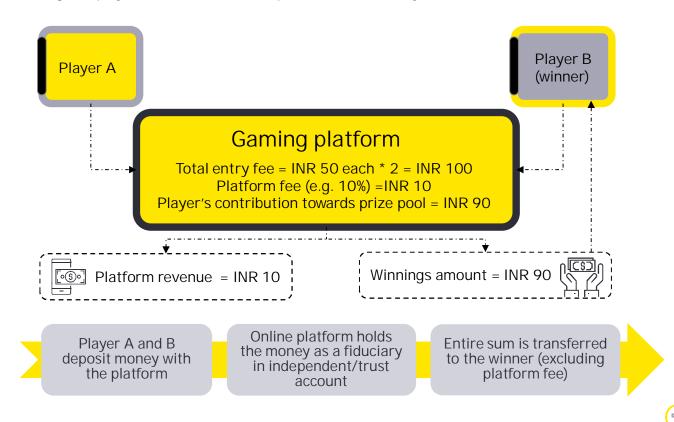
Sports and gaming have been a predominant source of entertainment since time immemorial. The advent of technology and the constantly increasing number of internet users has led to a paradigm shift in how the gaming industry operates. Resultantly, online skill-based gaming has emerged as an important avenue for entertainment due to a multitude of favorable factors, such as young and tech-savvy population, affordable availability of feature-packed smartphones, better internet connectivity, increased awareness and development of local gaming content suited to one's preferences.

A Group of Ministers ('GoM') has been constituted by the GST Council to recommend the appropriate Goods and Services tax (GST) structure for the online skill-based gaming industry. According to media reports, the GoM may also consider recommending a levy of GST on the complete contest entry amount (including the prize pool) collected by the platform at a GST rate of 28% for the online skill-based gaming industry. This proposal to consider the change in valuation, if finalized, would be a a major shift from the current tax position adopted by the industry under the current GST provisions. The online skill-based gaming industry currently pays tax at the rate of 18% on the platform fee or Gross Gaming Revenue (GGR) earned by the gaming operators.

As per current GST provisions, GST is applicable on face value for betting and gambling activities. However, the Supreme Court and High Courts in India have passed various judgments wherein games like rummy, poker, online fantasy sports have been held to be games of skill, not amounting to gambling and betting.

Operating model of online real money gaming companies

The game play structure has been depicted below for easy reference:



Step #	Particulars	Description
1	Deposit of money using banking channels	 Deposits are received through authorized payment gateways and kept in an independent/trust bank account. The gaming platform do not exercise any right over the prize pool component as it amounts to an actionable claim for and among the participants and the platform is holding the same in fiduciary capacity only.
2	Participation in the game	 Of the amount deposited on the platform, the user enters the contest by paying a contest entry amount A portion of the contest entry amount is deducted as platform fee / GGR The platform fee is considered as the consideration for facilitating the gameplays by the gaming platform Remaining amount (net of platform fee/ GGR) is treated as prize pool Players play against each other. The online platform is merely a facilitator of games and does not participate in the game
3	Declaration of results	 Winnings are credited to the user account The entire prize pool amount is distributed to the contest winner(s)
4	Transfer of winnings to user's account	 User is free to withdraw the winnings to his/her bank account or to further use it for gameplays

Current tax position of the industry

Valuation

As per Section 15(1) of the Central Goods and Services Tax Act ('CGST Act'), value of supply of goods and services for levy of GST is price actually paid or payable for the said supply (i.e., transaction value) where the supplier and recipient are unrelated and the price is the sole consideration.

Given the above, industry has predominantly taken the position that the money actually received by the online skill-based gaming operators towards supply of service is the platform fee/GGR. Furthermore, the money contributed by the players towards the prize pool is merely 'transaction in money' over which the online skill based gaming operator has no right or interest either in present or the future. Such prize pool amount is not considered as part of the consideration of the taxable supply for GST.

HSN classification and GST rate

The GST rate for supply of services is notified under notification 11/2017- Central Tax (Rate) dated 28 June 2017. The relevant rate entries under the said GST Notification are as follows:

Sr No	Chapter, Section or Heading	Description of Service	Effective GST rate
22	Heading 9984 (Telecommunications, broadcasting, and information supply services)	(i)(ii) Telecommunications, broadcasting, and information supply services other than (i) above.	18
34	Heading 9996 (Recreational, cultural, and sporting services)	 Gambling	28
35	Heading 9997 (Other Services)	Other services (washing, cleaning, and dyeing services; beauty and physical well-being services; and other miscellaneous services, including services nowhere else classified)	18

As per the Explanatory Notes to the scheme of classification of services under GST, the service code 998439 (under the main heading 9984) is described as follows:

998439 Other on-line content n.e.c

This service code includes games that are intended to be played on the Internet such as roleplaying games (RPGs), strategy games, action games, card games, children's games...

Note: Payment may be by subscription, membership fee, pay-per-play or pay-per- view.

This service code does not include:

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Online gambling services, cf.999692

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From the explanatory notes, it can be seen that all online skill-based games, except online gambling games, are covered under the heading 9984.

Given that online game of skills do not fall under the category of 'gambling', the platform services operators predominantly consider their services to be covered under the heading 9984, which is currently taxed under GST at 18%.

Relevant valuation Rule applicable to chance-based games/ activities such as lottery, betting, gambling, and horse racing may not be applicable to online skilled based gaming platforms

For supplies specified in Rule 31A of the CGST Rules, the taxable value of service shall be 100% of the face value of the bet. Supplies specified in Rule 31A include betting, gambling, or horse racing.

The term 'betting' or 'gambling' has not been defined under the GST law. However, the term 'betting or gambling' has been defined in Section 65B(15) of the Finance Act 1994 to "means 'putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring".

Further, the meaning of the terms 'betting' and 'gambling' has been provided in the case of M/s. Junglee Games India Pvt. Ltd. v. State of Tamil Nadu¹. The Madras High Court has held that these terms in Entry 34 of the Second List of Schedule 7 in the Constitution of India are limited to betting on activities based on chance only. In addition, the Karnataka High Court in the case of All India Gaming Federation vs. The State of Karnataka & Ors², has also defined the terms 'betting' and 'gambling' as confined to games of chance.

The definition of betting and gambling and the judicial interpretation given to these terms seems to restrict its applicability to cases where the winnings are merely on the occurrence of a chance or accident (i.e., game of chance). Given the above, Rule 31A of the CGST Rules, which is applicable to lottery, betting, gambling, and horse racing, may not be made applicable to online skill-based gaming platforms.



1 - M/s. Junglee Games India Pvt. Ltd. v. State of Tamil Nadu (2021) SCC OnLine Mad 2762

2 - All India Gaming Federation vs The State of Karnataka & Ors WP 18703/2021

Tabulated below are the tax positions adopted by online skill-based gaming platforms

Sr. No.	Valuation Base	Whether taxable under GST	Remarks
1	Money deposited with the platform	×	 The money deposited by the participants to the wallet qualifies as a transaction in money (since the money has been only deposited in the wallet and has not yet been used by the participant to play any game/avail service of the platform). This amount would remain as that of the participant. Further, it is in the nature of an 'actionable claim'. Schedule III of the Central Goods and Services Tax Act ('CGST Act') provides that "actionable claims, other than lottery, betting and gambling" shall be treated neither as a Supply of Goods nor a Supply of Services. Levy of tax on the money deposited in the wallet is against the basic principle of the GST law.
2	Contribution to the prize pool	×	 The contributions made by the participants to the prize pool is in the nature of an 'actionable claim', as the same is to be distributed amongst the winning participating members as per the outcome of a game. Schedule III of the Central Goods and Services Tax Act ('CGST Act') provides that "actionable claims, other than lottery, betting and gambling" shall be treated neither as a Supply of Goods nor a Supply of Services.
3	Platform fee		 Online skill-based gaming operators are providing platform services to the users playing games on their platform. The consideration for such services is represented by the platform fee/ GGR earned by the operators for facilitating/providing platform for the gameplay. Since this is the actual fee charged by the gaming companies for providing the platform, this is most appropriate base valuation to levy tax.
4	Distribution of prize money	×	 Mere distribution of prize money qualifies as transaction in money (since there is no element of service in it per se) Thus, no GST is leviable on such distributed amount.

Proposal to levy GST on entire contest entry amount may increase GST by 10 to 20 times

The industry is receiving consideration in the form of platform fee/ GGR for providing infrastructure access to players and their fee/ consideration is restricted to a predetermined percentage of entry fee paid for the game being played by players (the consideration mechanism is very similar to any other technology-based platform).

The remaining component (i.e., contest entry amount minus the platform fees) is the player's contribution to the prize pool. This prize pool is distributed to the winners and the online gaming companies have no right over such amount as the gaming company only holds the money in a separate independent/trust account as a custodian. The foundation and concept of the GST law in India is to levy tax on the supply of goods or services or both for which consideration is received by the supplier in respect of the supply of goods or services (excl. exceptional cases specifically mentioned in the GST legislation). In the case of online skill-based gaming industry, the consideration earned is in the form of platform fees/ GGR which is offered to GST. Thus, the online skill-based gaming industry is of the view that levying GST on the amount which is not a consideration for the skill-based gaming operator companies would be contrary to the provisions of the GST legislation.

Though the change in GST rate from 18% to 28% is in itself an increase of 56% from the current rate, the change in valuation methodology may impact the complete industry and the industry is of the opinion that the business operations may find it difficult to survive with such high taxation. Further, the increase in tax payout may be by 10 to 20 times for the industry. The same has been illustrated by way of an example below:

		If the platform fee is 15%				If the platform fee is 7%	
Sr. No.	Particulars	Current Position (GST @18% on platform fee)	Proposed Change (GST @28% on platform fee)	Proposed Change (GST @28% on stakes)	Current Position (GST @18% on platform fee)	Proposed Change (GST @28% on platform fee)	Proposed Change (GST @28% on stakes)
А	Contribution to the pool	100	100	100	100	100	100
В	Platform fee	15	15	15	7	7	7
С	GST	2.7	4.2	28	1.26	1.96	28
D	% Increase in GST from current position	-	56%	937%	-	56%	2,122%
E	Effective rate of tax as a % of gross revenue of industry (C/B)	18%	28%	187%	18%	28%	400%

Further, from the above illustration, it appears that in case of the proposed tax structure of levying GST on contest entry amount, the GST payout could be as high as four times of gross revenue earned by Industry.



Players may be required to pay three to four times more money per game

Online gaming has emerged as a mainstream entertainment and has constantly challenged the traditional entertainment sources. If the GoM considers taxation on the entire contest entry amount, the cost per game for the players may increase by three to four times.

We have highlighted the same in the below illustration, keeping the entry fee and platform fee/ GGR constant:

Scenario 1: GST on platform fee @18% (Current position)							
		Game					
Sr. No.	Particulars	1	2	3	4		
		Won	Lose	Won	Lose		
A	Opening balance in the wallet	200	276	176	253		
В	Entry fee	100	100	100	100		
С	Platform fee	10	10	10	10		
D	GST	1.80	1.80	1.80	1.80		
E	Money won [(B-C-D)*2]	176		176			
F	Closing balance in the wallet [A-B-C-D+E]	276	176	253	153		



Cost per game for the player = INR 11.80 [(200-153)/4]

Scenario 3: GST on deposits @28%

		Game				
Sr. No.	Particulars	1	2	3	4	
		Won	Lose	Won	Lose	
A	Money deposited in the wallet	200	-	-		
В	GST	44	-	-		
С	Opening balance in the wallet	156	236	136	216	
D	Entry fee	100	100	100	100	
Е	Platform fee	10	10	10	10	
F	Money won [(C-D-E)*2]	180		180		
G	Closing balance in the wallet [C-D-E+F]	236	136	216	116	

Cost per game for the player = INR 17.29 [(200-116)/4]

Scenario 2: GST on platform fee @28%

		Gai	Game		
Sr. No.	Particulars	1	2	3	4
		Won	Lose	Won	Loss
А	Opening balance in the wallet	200	274	174	249
В	Entry fee	100	100	100	100
С	Platform fee	10	10	10	10
D	GST	2.8	2.8	2.8	2.8
Е	Money won [(B-C-D)*2]	174		174	
F	Closing balance in the wallet [A-B-C-D+E]	274	174	249	149



Cost per game for the player = INR 12.80 [(200-149)/4]

Scenario 4: GST on complete stake @28%

			Ga	me	
Sr. No.	Particulars	1	2	3	4
		Won	Lose	Won	Lose
A	Opening balance in the wallet	200	224	124	148
В	Entry fee	100	100	100	100
С	Platform fee	10	10	10	10
D	GST	28	28	28	28
E	Money won [(B-C-D)*2]	124		124	
F	Closing balance in the wallet [A-B-C-D+E]	224	124	148	48



Cost per game for the player = INR 38.00 [(200-48)/4] From the above illustration, it may be observed that the cost per game for a player could increase by three to four times (i.e., from INR 12 to INR 38 in above illustration) if the GST is levied on the contest entry amount value at 28%.

As the incidence of tax is increasing significantly, the ability to play games at a per user level could decrease at a faster pace (i.e., from 10 to 4 games as per the above example) and industry believes that the inclination of users continuing to engage on the platform could eventually decline.

Appropriate taxation leads to favorable channeling rate

Besides the proposed levy of tax at 28% on contest entry amount, 30% income tax is also charged on winnings of the participants, making the effective rate of taxation on online gaming between 45-50% on contest entry amount.

Global studies³ have suggested that an appropriate rate of taxation leads to a favorable channeling rate, i.e., the proportion of gaming that consumers conduct through domestically channel license (i.e., regulated sector). Studies further suggested that with a higher rate of taxes, gaming operators as well as consumers would choose not to join the licensed or regulated system. The Fitment Committee has also recommended GST on GGR as it is the most prevalent practice internationally.⁴

Therefore, the industry apprehends that a higher tax slab for online gaming could lead to proliferation of a parallel unregulated non-compliant market and there is a risk that the growth of legitimate and legally compliant companies may stifle.

Further industry also apprehends that while the customers may be attracted toward such economical, inexpensive, and innovative modes of game play, they could be easily defrauded with minimal respite against the economic frauds. Given this, consumer protection may be at risk and open the door for other illegal businesses.

Further, industry believes that a higher taxation may benefit the offshore gaming companies, who may not be India GST compliant and outside the purview of the regulatory oversight. In their belief, this will benefit the ecosystem of offshore gaming companies in other jurisdictions at the cost of domestic regulated companies. In addition, the Indian ecosystem will lose the potential foreign investments in the sector and the ability to contribute to the domestic employment.

Unique features of online skill-based gaming

- Online skill-based gaming operators are primarily providing technology solutions to users In online skill-based gaming, the operators provide a technology-based platform to support and enable user interface. The services provided by the gaming operators through this technology platform are key to the entire online skill-based gaming ecosystem. Thus, the services provided by online gaming operators are more in the nature of a technological solution, wherein they make available a platform for users from different landscapes and assist in facilitating the games.
- Online skill-based gaming operators are charging fixed considerations The skill-based gaming companies earn revenue by charging a platform fee/ GGR to the players for using their platform. The fee charged is not depended on the outcome of the game. This is indeed the revenue earned by the company. Moreover, huge amounts are spent by the gaming companies in research and development and designing of their platform to make it user friendly, which further substantiates the fact that this is a technological product.
- Online skill-based gaming operators are not participating in any games As per business model of online skill-based gaming industry, companies are only providing the platform and infrastructure to users and users are engaging with each other. Such gaming companies are not participating in such games and companies are charging for providing such platform and infrastructure. Whatever money is contributed to the pool is redistributed to the winner and is subject to Income Tax as per the provisions of the Income tax legislation, in the hands of the players. The user's contributed to winners.

3 - https://www.egba.eu/uploads/2020/06/Tax-analysis-Denmark.pdf and copenhagen-economics-2016-licensing-system-for-online-gambling.pdf (copenhageneconomics.com)

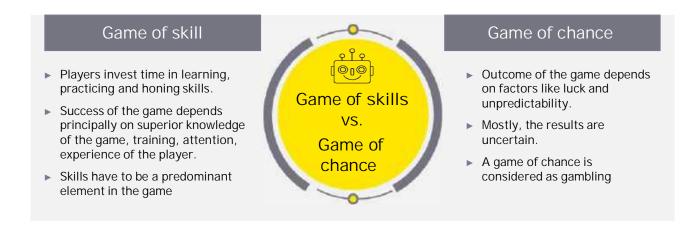
4- https://gstcouncil.gov.in/sites/default/files/Agenda/37-meeting/Detailed Agenda Note - 37th GSTCM - Volume 3.pdf Agenda for 37th GST Council Meeting Volume - 3, Annexure V, SI. No. 4

- Active participation from users The online skill games (such as rummy, poker, fantasy sports, etc.) involve active participation and/ or interaction among users with primary focus on entertainment value. The players constantly engage with one another, apply skills, and use their knowledge while playing the game.
- Legal (Supreme Court and High Courts) position on skill-based gaming The Supreme Court and various high courts have analyzed the various aspects in detail and held that some of the popular games such as rummy, fantasy sports, poker etc., qualify as game of skill since it requires a person to learn, adapt and improvise on the nuances of the game. The same is as under:

Online skill-based gaming category	Citation	Judicial principle
Dummu	State of Andhra Pradesh vs K. Satyanarayana & Ors (1968 AIR 825, 1968 SCR (2) 387)	The Supreme Court held that rummy is mainly and predominantly a game of skill.
Rummy	Dr. K. R. Lakshmanan vs State of Tamil Nadu and ANR (1996 AIR 1153, 1996 SCC (2) 226)	The Supreme Court confirmed rummy to be a game of mere skill.
Poker	Indian Poker Association & Anr vs State of West Bengal & Ors (W.P.A. No. 394 of 2019) (Calcutta High Court)	High Court held that playing poker does not amount to gambling as it is not included in the definition of "gaming or gambling" under section 2(1)(b) of West Bengal Gambling and Prize Competition Act, 1957.
	Indian Poker Association (IPA) vs The State of Karnataka (WP 39167/2013) (Karnataka High Court)	HC: Poker is a game of skill and does not require any licence to engage in the activity of providing an avenue for its members for the purpose of recreation.
	Avinash Mehrotra v. State of Rajasthan SLP Diary No(s) 18478/2020	The Supreme Court dismissed an appeal against this High Court judgement.
Fantasy Sports Games ('FS')	Varun Gumber vs Union Territory, Chandigarh & ORS CWP No. 7559/2017 (Punjab and Haryana High Court)	FS format involves a substantial degree of skill, thereby classifying it as a 'game of skill'. The Supreme Court dismissed an appeal against this High Court judgement.
	Ravindra Singh Chaudhary vs UOI, 2020(42) G.S.T.L. 195 (Rajasthan High Court)	The High Court held that games offered by FS does not amount to betting as held by the Supreme Court

Current GST law also makes distinction between online gaming and betting and gambling, - Present GST law also recognizes online gaming separately under the rate notification, while separate valuation and GST rate entry have been notified for betting and gambling including horse racing.

Tabulated below are the key differences between the 'game of skill' and 'game of chance' as highlighted by courts in various judgments:



AVGC sector has potential to become the torch bearer of "Create in India" and "Brand India"

As per the Press Information Bureau released on 8 April 2022, the Animation, Visual Effects, Gaming and Comic (AVGC) sector in India has the potential to become the torchbearer of "Create in India" and "Brand India". India has the potential to capture 5% (~\$40 billion) of the global market share by the year 2025, with an annual growth of around 25-30% and creating over 1,60,000 new jobs annually.

As per industry estimates, India has over 500 gaming companies. The industry has provided employment to thousands of people and has also witnessed Foreign Direct Investment (FDI) inflow of ~US\$2.7 billion (over ~INR 20,000 crore).

Further, as per industry estimate, the global online gaming market is estimated to grow from US\$38 billion in 2019 to US\$122 billion by 2025. On similar lines, the India online /real money gaming industry is expected to grow from US\$2 billion (INR 15,000 crores) in 2022 to over US\$ 5.4 billion (INR 40,000 crores) in 2025. Currently, India constitutes only 1% of the global gaming industry as compared to the US (23%) and China (25%) demonstrating a huge growth potential.

Further, online skill gamers in India are estimated to grow from over 20 crores in 2022 to over 40 crores in 2025. Of these, an estimated 70% are mobile gamers growing at 38% CAGR.

Given the above events, India has the potential to become the new gaming hub of the world, leveraging the domestic startup ecosystem being facilitated by the government. Further, the Government of India had launched "Digital India", a flagship program with a vision to transform India into a digitally empowered society and knowledge economy. Online skill-based gaming is enhancing and contributing towards the government's digital agenda by digitizing transactions in the online gaming sector.

Therefore, the industry believes that higher taxation may reduce the attractiveness of online skill-based gaming industry and could impact FDI inflows, existing employment as well as future employment opportunities, investment in marketing and IT services, ancillary industries, etc.

Industry is contributing a significant amount to exchequer

As per industry estimates, at present, the industry is contributing more than INR 2,200 crores of GST in 2022. By increasing the tax rate from 18% to 28% on GGR/platform fee, the industry may contribute higher revenue to the exchequer. Apart from GST, winnings from the online games are taxable at 30% as per Income Tax laws in India. Therefore, industry is contributing a significant amount to exchequer.

Internationally, most countries levy tax on platform fee/ GGR earned by online skill-based gaming operators

Analysis of international laws of the various countries where online gaming is popular indicates that largely taxes are levied on the platform fee/ GGR earned by the gaming companies.

Sr. No.	Country	Tax Base	Tax Rate
1	US: Pennsylvania	GGR / Platform fee	Online table games (including poker) - 14% ⁵ . Fantasy sports - 15%
2	US: Nevada	GGR / Platform fee	6.75%6
3	UK	GGR / Platform fee	21%7
4	Sweden	GGR / Platform fee	18% ⁸
5	Germany	GGR / Platform fee	19% ⁹
6	Denmark	GGR / Platform fee	20% ¹⁰
7	Belgium	GGR / Platform fee	11% ¹¹

The growth and contribution of this industry in India can only be made possible with the right taxation framework and regulatory support to the domestic market. Deviating from international best practices may not be fruitful to the stakeholders and only drive the domestic players away.



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Conclusion

Considering the market size and future growth projections, the online skill-based gaming industry is expected to be a significant contributor to furtherance of the Indian startup ecosystem through on various counts such as FDI inflows, employment, investment in marketing and IT services, ancillary industries (such as data centers and cloud services) etc. This sector could also help in facilitating the Gol's vision for the AVGC sector and encourage the domestic players rather than driving users to foreign companies/ offshore platforms; thereby enhancing government's revenue collection.

Therefore, the right tax structure for this industry could drive tax revenues, provide impetus to new technology-based startups, and positively impact overall industry at large and safe playing environment to the consumers. The crystallization of the GST valuation mechanism could be a catalyst in enabling ease of doing business and spur growth of this rising sector.



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