

Tax Hotline

July 10, 2019

BOMBAY HIGH COURT: FANTASY SPORTS GAMING IS NOT GAMBLING; GST INAPPLICABLE ON POOLED AMOUNTS!

- Bombay High Court rules in favour of Dream11 to hold that games played on its platform amount to games of skill and not chance.
- Rules applicability of GST only on the service fee charged by the platform for the services provided by it.
- Rejects argument that GST should be payable on the whole amount pooled in by the players.

Recently, the High Court of Bombay (“**High Court**”) in the case of *Gurdeep Singh Sachar v. Union of India*,¹ following the judgment of the High Court of Punjab and Haryana (“**P&H High Court**”) ruled that no betting or gambling is involved in the fantasy games operated by Dream11 as their result is not dependent upon winning or losing of any particular team in real world on any given day. It further ruled that Goods and Service Tax (“**GST**”) is not applicable on the entire deposit received from the player but only on the consideration which is payable / collected for the supply of goods or services or both within the platform.

BACKGROUND

The case before the High Court of Bombay stems from a Criminal Public Interest Litigation (“**PIL**”) filed against Dream11. Dream 11 is fantasy sports platform based in India that allows users to play fantasy cricket, hockey, football, kabaddi and basketball. The PIL alleged that Dream11 was carrying out illegal operations of gambling/betting/wagering in the guise of Online Fantasy Sports Gaming (“**OFSG**”) and hence should be penalized under the *Public Gambling Act, 1867* (“**Act**”). The PIL also alleged that Dream11 was in violation of the Central Goods and Service Tax Act, 2017 (“**CGST Act**”) read with Rule 31A of Central Goods and Service Tax Rules, 2018 (“**CGST Rules**”).

Section 7 of the CSGT Act provides that certain activities under Schedule III of the CGST Act shall neither be treated as a supply of services, or supply of goods, and would therefore be exempt from the levy of GST. Schedule III lists “*actionable claims, other than lottery, betting and gambling*” as one such activity. Rule 31A of the CGST Rules determines the value of supply for the calculation of GST in the case of lottery, betting, gambling and horse racing. As per this rule, the value of supply of an actionable claim in the form of chance to win in betting, gambling (...) is “*100% of the face value of the bet or the amount paid into the totalizer*.” It was on this basis that the Petitioner contended that the entire amount paid by the player would be the basis of calculation for GST which for betting, gambling or lottery is currently applicable at the rate of 28%.

CONTENTIONS OF THE PETITIONER

The contentions of the Petitioner primarily revolved around the following:

- Fantasy games are nothing but means to lure people to spend their money for quick earning by taking a chance, and most of them end up losing their money in the process, which is thus “*gambling/betting/wagering, being different forms of “gambling”*”.
- Upon entering in various contests and putting alleged betting money in those contests, the player receives a tax invoice which taxes only the money that Dream11 retains towards services of providing the platform to the players. For the balance amount, i.e. the stake put in by the player to play the contest an “acknowledgement” is given. This “acknowledgement” amount collected from each player is pooled in as Escrow Account and their contribution ultimately gets distributed amongst the players themselves as price money immediately upon conclusion of game, as a result of which, some players get more than their contribution, and some lose money. and not the entire amount which is put as stake by the player.
- Since these activities are nothing but ‘gambling’ or ‘betting’, even if this acknowledgement amount is separately kept in an Escrow account and not retained by Dream11, GST should be payable on this amount as the activity carried out by the platform is nothing but ‘betting’ or ‘gambling’ and should therefore be governed by Rule 31A(3) of CGST Rules.
- Like horse racing, the said Rule shall apply even in such fantasy games amounting to gambling and/or betting and/or wagering, and thus GST at the rate of 28% shall be payable on 100% amount collected by Dream11 and not at the rate of 18% which is currently being paid on the amount that is retained by Dream11 for services of providing the platform.

CONTENTIONS OF DREAM11

Dream11 contended the following:

- The games available on Dream11’s platform are not in the nature of betting / gambling. This fact has already been decided by the P&H High Court² wherein the court ruled in favor of Dream11 and held that success in Dream 11’s

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fantasy sports basically arises out of user exercise of superior knowledge, judgment and attention thus, as per their skill; and that their fantasy games are exempt from the application of the penal provisions, in view of Section 18 of the Act, and held that they have protection guaranteed under Article 19(1)(g) of the Constitution of India. In reaching their decision, the P&H High Court relied on the Supreme Court's decision of *K. R. Lakshmanan v. State of Tamil Nadu*³ ("**Lakshmanan case**") to hold that playing fantasy sports games required the same level of skill, judgment and discretion as in case of horse racing.

- A Special Leave Petition against this judgment of P&H High Court was admittedly dismissed by the Hon'ble Supreme Court vide Order dated September 15, 2017.
- An explanation of how the game works on the platforms was given wherein it was explained that the players compete against such virtual teams created by other users / participants. The winners are decided based on points scored, using statistical data generated by the real-life performance of the players on the ground. Further, the deadline to create a team is latest by the official match start time and no changes can be made after the deadline. The participants do not bet on the outcome of the match and merely play a role akin to that of selectors in selecting the team. Therefore, the games played on their platform is a 'game of skill' and not of 'chance', and therefore outside the purview of Rule 31A(3) of the CGST Rules.

ISSUES BEFORE THE HIGH COURT

1. Whether the activities of Dream11 amount to 'Gambling' / 'Betting'?
2. Whether Rule 31A(3) of CGST Rules should be applicable to Dream 11?

RULING

The High Court ruled in favor of Dream11 and rejected the contentions of the Petitioner. Reliance was placed on the decision of the P&H High Court and the *Lakshmanan* case to hold that the games played on the Dream 11 platform were games of skill and not games of chance. The court ruled that if the result of the game/contest is determined merely by chance or accident, any money put on stake with consciousness of risk and hope to gain, would be 'gambling' or 'betting'. Since that is not the case in case of fantasy games played on the Dream 11 platform, the same does not amount to gambling or betting. It rejected the argument of the Petitioner that the result would depend largely on extraneous factors such as, who amongst the players actually play better in the real game on a particular day, which according to the Petitioner would be a matter of chance, howsoever skillful a participant player in the online fantasy game may be.

In respect of the issue on payment of GST, the High Court rejected the allegation of the Petitioner that Dream 11 has evaded GST by erroneous classification of the games played on their platform. It held that only if their OFSG is 'gambling' or 'betting', there is a scope to infer the possibility of any tax evasion. It further ruled that the amounts pooled by the players in the escrow account is an 'actionable claim' as the same is to be distributed amongst the winning participating members as per the outcome of a game. As discussed above, under the CGST Act, 'actionable claims' other than lottery, betting and gambling are neither considered to be 'supply of goods' nor a 'supply or services', and are hence exempt from the levy of GST.

Since OFSG on Dream 11's platform is not in the nature of betting or gambling, the High Court ruled that money pooled in by the players cannot be subject to GST. It further rejected the argument of the Petitioner that the money so deposited by the players should fall under the definition of consideration and hence taxable to GST. The scope of definition of 'consideration' extends only in relation to "*the supply of goods or services or both*". Since, the said activity or transaction relating to the actionable claim qua the amounts of participants pooled in escrow arrangement, for which only acknowledgement is given, is neither supply of goods nor supply of services, the same is clearly out of the purview of the expression 'consideration'. The Bombay High Court further agreed with Dream 11's view that GST is payable only on the consideration which is payable / collected for the supply of goods or services or both within the platform at the rate of 18%.

ANALYSIS

- **Game of Skill:** The ruling of the High Court should bring about cheer to the OFSG industry. The decision of the High Court is welcomed move as there may have been earlier some doubt on whether the decision of the P&H Court in followed in other states. Ruling by Bombay High Court in favor of Dream 11 and giving a reasoned order, will further strengthen the position of OFSG.
- **Applicability of GST:** The ruling of the High Court gives much needed clarity to the skill gaming industry on applicability of GST. The High Court in its right mind has understood how the game works in practice and the only service provided by Dream 11 is that of providing the players with a platform on which they can come together and play. Therefore, the charge of GST only on the service fee is completely justified. Another way to look at this would that the value of services that Dream11 is providing is equivalent only to the service fee that they are charging on a game to game basis. Once the fact is clarified that any game is a game of skill, the same logic should apply to other skill game formats. They also should only be charged at 18% on the value of the services provided by them and not on the whole amount pooled in by the players.
- **Escrow Account:** In the instant case, Dream11 was using an escrow account where the money of the players was being pooled and from which the winner was being paid. This has been an important question that the gaming industry has been trying to answer. While the High Court order does not go into this aspect, the fact that if an escrow account is maintained the money is pooled should help in establishing in that the money's in the escrow was never the money of the platform but belonged to the players and hence there should be no GST on such money's.

However, the important question that needs consideration is what if the platform does not maintain an escrow account? Whether or not GST should be applicable in that case? It is quite clearly understood that the money that belong to the players is not considered revenue of the platform and are accordingly calculated and disclosed in the balance sheet. Therefore, by implication, there should be no requirement to maintain a separate escrow account for the purposes of exemption from GST on such amounts. However, this question remains unanswered.

¹ Bombay High Court, Criminal Public Interest Litigation Stamp No.22 Of 2019.

² Shri Varun Gumber v. Union Territory of Chandigarh and Ors., CWP No. 7559 of 2017.

³ K. R. Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153.

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