

Gaming Law Wrap

May 09, 2023

FOREIGN INVESTMENTS IN ENTITIES OFFERING GAMES WITH NO REAL-MONEY REWARDS DOES NOT AMOUNT TO GAMBLING - UPHOLD BY BOMBAY HIGH COURT

- The Petitioner, Play Games 24X7 Pvt. Ltd. owned and operated www.rummycircle.com, my11circle ("Petitioner").
- The Petitioner had periodically received foreign direct investment ("FDI") during 2006 - 2012 ("Relevant Period").
- The Petitioner started offering Ultimate Teen Patti and Call it Right ("Impugned Games") after the Relevant Period. There was no cash / prizes / winnings being distributed to players in Impugned Games.
- By virtue of receiving foreign investments, the Petitioner was required to undertake certain reportings under Indian exchange control laws¹.
- There were certain procedural/technical delays in carrying out the required reporting obligations. This required filing of compounding application to the Reserve Bank of India ("RBI") which was filed by the Petitioner on August 30th, 2012.
- The RBI directed the Petitioner to approach the Department of Industrial Policy and Promotion now known as Department for Promotion of Industry and Internal Trade ("DPIIT") to seek a clarification on the Petitioner's eligibility to receive FDI.
- However, for 8 years (i.e., from 2013 till 2020) there was no resolution despite three representations being made by the Petitioner to the DPIIT.
- In March, 2020, the Petitioner filed a fresh compounding application with the RBI. The RBI returned the application in September, 2020, stating that the clarification from the DPIIT had not been received.
- Accordingly, the Petitioner filed a writ petition before the High Court of Bombay ("Court") seeking a direction to the RBI to consider and decide the Petitioner's application for compounding of such non-compliances² ("Petition"). The DPIIT was also made a respondent in the Petition.
- In the affidavit filed by DPIIT, it raised an issue in relation to the Impugned Games on the ground that they are games of chance and therefore amounting to gambling (which is a prohibited sector for FDI).
- The Court interpreted past Supreme Court judgments while considering whether the Impugned Games amounted to 'gambling' and held that FDI in an entity offering games in which no reward is given, did not constitute 'gambling'.
- The Bombay High Court has accordingly directed the RBI to expeditiously hear and decide on the Petitioner's application for compounding of foreign investment related compliances³.

PARTIES' CONTENTIONS:

- DPIIT: The DPIIT contended that, apart from Rummy⁴, and fantasy cricket, the Petitioner also conducted Teen-Patti (three-card game), and 'Call it Right' ("Impugned Games") which fell into the category of betting and gambling, a sector in which FDI was prohibited. The Impugned Games, i.e. Teen Patti or the three card game was held to be a game of pure chance and accordingly fell under the category of 'gambling and betting activities.' Hence, the Petitioner was in violation of the Foreign Direct Investment Policy of India ("FDI Policy") of India.

[Note: It appears from DPIIT's affidavit that it has applied the test of skill vs. chance while assessing whether an activity amounts to 'betting and gambling' from a policy standpoint. This could be inferred because DPIIT did not object to the Rummy and fantasy cricket offerings of the Petitioner, thereby recognizing that FDI in entities offering such products does not contravene the FDI Policy.]

- **Petitioner:** The Petitioner argued that the Impugned Games were social games which did not involve any prizes in cash or in tangible/monetary value that could be won by players. The Petitioner monetized such games through in-app purchases to buy virtual chips (to play additional games, etc.), and through in-app advertisements. Since there were no rewards/prizes offered for such games, they did not amount to 'gambling' under Indian laws,⁵ even if they were games of chance.
- **RBI:** The RBI was not concerned with the assessment of the nature of the business. It only required some authority, body or court to state that the activity was not illegal as it could not permit a compounding of an illegal activity.

Research Papers

Compendium of Research Papers

April 11, 2024

Third-Party Funding for Dispute Resolution in India

April 02, 2024

Opportunities in GIFT City

March 18, 2024

Research Articles

Private Client Insights - Sustainable Success: How Family Constitutions can Shape Corporate Governance, Business Succession and Familial Legacy

January 25, 2024

Private Equity and M&A in India: What to Expect in 2024?

January 23, 2024

Emerging Legal Issues with use of Generative AI

October 27, 2023

Audio

IBC allows automatic release of ED attachments: Bombay HC reaffirms

April 15, 2024

The Midnight Clause

February 29, 2024

Enforceability of unstamped or inadequately stamped Arbitration Agreements

January 10, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Cyber Incident Response Management

February 28, 2024

Webinar : Navigating Advertising

Accordingly, the question before the Court was whether the Petitioner's business activity was illegal/prohibited by law, such that it was disentitled to receive foreign investment, and specifically, whether online (i.e., website based and mobile-based) games offered by the Petitioner, constituted 'gambling,' under Indian law⁶.

COURT’S ORDER :

- The court primarily relied upon the Supreme Court's judgment in Dr. K.R. Lakshmanan vs State Of Tamil Nadu And Anr⁷ and held that the predominant element of the activity, skill or chance, determined the character of the game. However, to constitute gambling, both conditions had to be met (1) it must be predominantly a game of chance, and (2) it must be played for a reward.
- The DPIIT had also not demonstrated that there was any element of reward in either of the Impugned Games. Per contra, the Petitioner had clearly stated in its Terms of Service that there was no reward.
- Accordingly, since there was no reward the Impugned Games did not amount to gambling, hence not illegal.
- The Court also directed the RBI to hear and decide on the Petitioner's compounding application on an expedited basis.

TAKEAWAYS

Under the FDI Policy issued by the Government of India and as codified into law by the Foreign Exchange Management Act, 1999 (“**FEMA**”) the Foreign Exchange Management (Non- Debt Instruments) Rules, 2019 (“**Non-Debt Rules**”), FDI in entities involved in following activities is prohibited

- Gambling and betting including casinos, etc.,
- Foreign technology collaborations in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for lottery business and gambling and betting activities.

The terms “gambling and betting” have not been defined under Indian foreign exchange laws. While it appears that DPIIT applied the test of skill vs. chance while assessing whether an activity amounts to ‘betting and gambling’, the Bombay High Court too applied the same test. However, the Bombay High Court relying on Supreme Court’s test in the Lakshmanan case, expressly recognized that for the Impugned Games to constitute gambling, both conditions had to be met: (1) it must be predominantly a game of chance, **and** (2) it must be played for a reward.

The Court further observed that an entity offering games in which no reward is given, did not constitute ‘gambling’, hence not illegal. Thus, FDI in entities offering such games is permissible under the FDI Policy.

While the Court has not specifically dealt with whether FDI in entities offering real-money games of skill like Rummy and Fantasy Sport (i.e. the other offerings of the Petitioner) is permissible, it is implied from the DPIIT’s submission that it did not object to FDI in such business.

Although, the RBI refused to take a stand on whether the activities of the Petitioner amounts to gambling, the clear direction by Court is an express acceptance that the Impugned Games are not prohibited as they do not amount to gambling.

– Tanisha Khanna , Huzefa Tavawalla & Gowree Gokhale

You can direct your queries or comments to the authors

¹Under the Foreign Exchange Management Act, 1999 (“FEMA”), Foreign Exchange Management (Transfer of issue of security by a person resident outside India) Regulations 2000 (as substituted by the Foreign Exchange Management (Transfer of issue of security by a person resident outside India) Regulations 2017.

²Play Games 24x7 Pvt. Ltd. v Reserve Bank of India & Anr., WP No. 3047/2022

³Play Games 24x7 Pvt. Ltd. v Reserve Bank of India & Anr., WP No. 3047/2022

⁴Rummy has been held to be a game of skill by the Supreme Court State Of Andhra Pradesh vs K. Satyanarayana & Ors, 1968 SCR (2) 387

⁵In addition, it was argued that the two games were launched beyond the reporting period for when compounding was sought. However, we have not focused on this aspect for the purpose of this note.

⁶Paragraph 14 of the Bombay High Court's order

⁷1996 AIR 1153

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.