

# Gaming Law Wrap

July 29, 2021

## GAMING UPDATE

As use of digital devices has increased significantly in the last year in India, several State Governments and Indian courts have taken note of the burgeoning online gaming industry. There have been a slew of legislative and judicial developments in several Indian States, ranging from proposals to regulate the industry, to attempts to prohibit all real money gaming activities. In this wrap, we have taken stock of some of the key developments.

### 1. UTTAR PRADESH

The State Law Commission of Uttar Pradesh ("**Commission**") has submitted a report ("**Report**") to the Chief Minister of the State proposing introduction of a new law governing betting and gambling, which specifically covers online gaming. Presently, the Public Gambling Act, 1867 is applicable in Uttar Pradesh. The Report contains a draft of the Uttar Pradesh Prevention of Gambling Bill, 2021 ("**UP Bill**"), which we have discussed subsequently.

The Commission is only a recommendatory, and not a legislative body. It makes suggestions for legal reform to the State Government, which the State Government may take up at its discretion.

#### 1.1. Key Features of the UP Bill

##### 1. *Extension of the UP Bill to online medium*

The UP Bill has been specifically extended to cover online gaming:

- The UP Bill, *inter alia*, penalises any person who opens, keeps or operates a 'common gaming house' or **online gaming**.
- A 'common gaming house' has been defined to include any 'site' whatsoever in which instruments of gaming are kept or used for gaming. A 'site' has been defined to include the cyberspace.
- 'Gambling or gaming' has been defined to include online gaming for money or any other stakes.

##### 2. *Whether games of skill are exempted*

The Report suggests that the intent of the UP Bill is to exempt games of skill, by stating that '*games of mere skill should be exempted from the purview of the proposed Act.*'<sup>1</sup>

However, the drafting of the UP Bill is unclear and several provisions are contradictory in respect of whether games of skill are excluded or not.

##### 3. *Offences by Companies*

The UP Bill brings companies within the ambit of the legislation by recognizing that companies may commit offences. It seeks to introduce provisions imposing vicarious liability on persons who were in charge of, and responsible to, the company\*, as well as the company itself, and its managing director and other directors. However, it saves persons from liability if they prove that contraventions took place without their knowledge or that they exercised all due diligence to prevent such a contravention.

[\*company has been defined to include any incorporated entity like societies, trusts, LLPs].

#### 1.2. Next Steps

It is unclear at this stage whether the State Government will take up the recommendations of the Commission or not.

Since Uttar Pradesh is the most populous State in India, it is an important market for gaming operators.

### 2. KARNATAKA

#### 2.1. Karnataka to introduce law to cover online gaming

In the ongoing matter of *Sharada D R v. State of Karnataka (WP 13714/2020)* before the High Court of Karnataka ("**Karnataka HC**"), the petitioner made a representation to the State Government of Karnataka on 12<sup>th</sup> September, 2020 to ban all forms of online betting and gambling in the State. However, the State Government did not respond to the representation and accordingly the petitioner filed a writ petition before the High Court of Karnataka. A brief chronology of facts and latest updates on this case below:

- The State Government had submitted to the court (on February 16, 2021), that a proposal to enact legislation on online betting and gambling was being placed before the State Cabinet.
- The Karnataka HC had thereafter directed the State Government 1) to place on record the decision taken by the Cabinet and 2) to take a stand on online betting and gambling in the State. On June 1, 2021, the State Government

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stated that it would place its stand on record within a period of 15 days. On June 22, 2021, the State sought further time till June 29<sup>th</sup>.

- By order dated June 29, 2021, the High Court of Karnataka observed that the State Government had still not placed its stand on record despite being granted time, nor produced the decision of the State Cabinet regarding a proposal to enact a legislation. Accordingly, the court directed the Chief Secretary of the State Government to file an affidavit within **one week** explaining why the State Government has not abided by their assurances, nor complied with the court orders.
- On July 8, 2021, the Chief Secretary informed the State Government that a draft bill had been prepared for consideration of the State Cabinet, after consultation with experts. After the bill is approved by the State Cabinet, the Home Department would take steps to present the bill before the State legislature. The State sought time to make a statement about when the cabinet would make a decision on the Bill.
- The matter has been listed next on **August 10<sup>th</sup>, 2021**.

Accordingly, it is likely that a bill will be introduced to cover online gaming in Karnataka soon.

Meanwhile, as per reports<sup>2</sup> the Advocates Association of Bangalore, a voluntary association of advocates in the State, has called for a ban on all real money gaming activities in a petition to the Government, citing concerns over children's health.

## 2.2. Karnataka High Court holds GST only applicable on operators' commission, Centre files Appeal

The Karnataka HC held that turf clubs ("Turf Clubs") are liable to pay goods and service tax ("GST") only on the commission instead of the entire bet value (100%) of the amounts received in the totalisator. We have briefly summarized the finding of the Karnataka HC below:

- Tax is only applicable on the supply of goods and services; on a value determined under the Central GST Act, 2017 ("**CGST Act**") which deals with the value of taxable supply;
- A totalisator does not indulge in betting. The Karnataka HC held that betting is neither in the course of business nor in furtherance of business of a race club for the purposes of the CGST Act. The Turf Clubs merely hold the amount received in the totalisator for a brief period in its fiduciary capacity. Once the race is over the money is distributed to the winners of the stake. It is for a certain period between input of money by the participants and output of money to the winners of stake during the race the petitioners hold that money in fiduciary capacity for which the consideration that the petitioners receive is the commission;
- 31A(3) of the CGST Rules which declares value of actionable claim in the form of chance to win betting, gambling or horse races to be 100% of face value of bet amount paid to the totalizator is thus beyond the scope of the CGST Act, so far as it takes away from the principle that tax can only be levied on the consideration received for a service. The Karnataka HC further held that Rule 31A(3) completely wipes out the difference between the bookmakers and a totalisator by making the Petitioners liable to pay tax on 100% of the bet value. In this regard, the Karnataka HC held that the Rule 31A(3) does not conform to the provisions of the CGST Act and accordingly is ultra vires the CGST Act. The Karnataka HC ordered the striking down of the aforesaid Rule in so far as Petitioners are concerned;
- The activity of the Turf Club is a game of skill and not a game of chance.

The findings of the Karnataka HC stating that Petitioner is not engaged in betting on the basis that it merely holds the bet money in fiduciary capacity, should be useful for online gaming portals on which the players do not bet against the house.

As per reports<sup>3</sup>, an appeal has been filed by the Central Government against this order holding Rule 31A(3) of the CGST Rules ultra vires. The matter has not been listed as yet.

## 3. TAMIL NADU

The State of Tamil Nadu had enacted the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021 ("**TN Act**") on November 20, 2020 which, *inter alia*, amended the Tamil Nadu Gaming Act, 1930 ("**TN Gaming Act**"), to (1) extend its provisions online and (2) prohibit all games, including games of skill, when played for stakes.

The TN Act has been challenged before the High Court of Madras in *Jungle Games India Private Limited and Anr v. State of Tamil Nadu*<sup>4</sup>.

The arguments in the matter concluded on July 26, 2021 and the judgment is reserved. The order in the matter will be passed on August 3, 2021.

However, the court orally indicated in the hearing that it would not uphold the TN Act.

## 4. DELHI

A petition has been filed<sup>5</sup> by an NGO, Distress Management Collective, in the Delhi High Court, seeking directions from the Centre to formulate a national policy for the protection of children from online gaming addiction and to constitute a regulatory body to monitor and rate gaming content, for both online and offline gaming.

- The petitioner submitted that they had received complaints from concerned parents of their children getting addicted to online games and developing psychological problems. It was also submitted that online games reward violent behavior.
- In particular, the petition submits that this regulatory body should comprise of members who have the expertise to suggest changes to the developers of violent games; and should also be able to give ratings to these games.
- The petition also mentions that the petitioner had previously made a representation to the central government to constitute a regulatory body to identify games with violent content, or where "*money is extracted for playing*".

It has been reported<sup>6</sup> that the Delhi High court has directed the Central Government to treat the petition as a representation and to decide on whether to formulate a policy for protection of children from online gaming addiction,

and the constitution of a regulatory body to monitor gaming content (both online and offline).

– Tanisha Khanna & Gowree Gokhale

You can direct your queries or comments to the authors

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<sup>1</sup> Chapter VI (Recommendations of State Law Commission), point (xx)

<sup>2</sup> <https://www.thehindu.com/news/national/karnataka/advocates-association-calls-for-ban-on-online-gaming/article35147146.ece>

<sup>3</sup> <https://www.g2g.news/central-government-files-appeal-against-karnataka-hc-horse-racing-gst-order>

<sup>4</sup> WMP /7968/2021

<sup>5</sup> Distress Management Collective v Union of India & Anr., WP (C) 7113/2021

<sup>6</sup> <https://livelaw.in/news-updates/delhi-high-court-directs-centre-to-decide-representation-for-regulation-of-online-games-178311>

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