



White Paper
by TIOL Knowledge Foundation

A Conducive Policy Framework for GST on Online Gaming

February, 2023

Index

1. Vision for the Gaming industry and need for a Comprehensive, Rational and Progressive GST Taxation Framework for Online Gaming
2. The Current Landscape of Online Gaming in India
3. Gaming, Betting and Gambling - the concept, definitions and the legal jurisprudence
 - a. Historical Jurisprudence on gaming, betting and gambling
 - b. The concept of gaming, gambling and betting
 - c. The test to determine game of skill and game of chance
 - d. Government reports on legal framework for gaming, gambling and betting in India
 - e. Proposed IT Rules
4. International Best Practices
5. Proliferation of offshore betting and gambling
 - a. Estimate revenue leakage and legal violations
6. Tax Jurisprudence on betting and gambling and online gaming
 - a. Pre-GST regime
 - b. Post GST regime
7. Litigations and current issues on taxation of online gaming
8. Canons of taxation
9. Benefits of a clear GST tax policy:
 - a. Prevent revenue leakage due to misclassification
 - b. Prevent litigations



- c. Tax certainty for revenue growth
 - d. Key to scaling up Venture Capital and Private Equity Investment
10. Principles to be considered for determining appropriate tax regime for online gaming
11. Recommendations

1. The Need for a Comprehensive, Rational and Progressive Taxation Framework for Online Gaming

- a. With the expansion of information and communication technology, the supply of goods and services has undergone exponential expansion everywhere, including India. The advent of the new age digital economy and borderless markets, the traditional concept of brick and mortar business is substantially supplanted by the digital economy.
- b. India has witnessed a paradigm shift with the advent of the internet with 560 million internet subscribers in 2018.¹ Based on current trends, it is estimated that India will increase the number of internet users by about 40 percent to between 750 million and 800 million and double the number of smartphones to between 650 million and 700 million by 2023. Indians have 1.2 billion mobile phone subscriptions and downloaded more than 12 billion apps in 2018.²
- c. The emerging digital sectors, including agriculture, education, gaming, energy, financial services, healthcare, and retail, as well as government services and labour markets, could each create \$10 billion to \$150 billion of incremental economic value in 2025.³
- d. The online gaming industry, in India, is increasing and there is a direct correlation between the growth of the industry and Digital India Initiatives. With low entry barriers and ease of access, the industry has the potential to be a significant driver of economic and technological growth in India. The online gaming industry has already contributed

¹<https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/digital%20india%20technology%20to%20transform%20a%20connected%20nation/mgi-digital-india-report-april-2019.pdf>

²<https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/digital%20india%20technology%20to%20transform%20a%20connected%20nation/mgi-digital-india-in-brief-april-2019.pdf>

³<https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/digital%20india%20technology%20to%20transform%20a%20connected%20nation/mgi-digital-india-report-april-2019.pdf>



more than INR 22,000 crore⁴ as revenue to the exchequer and has potential to contribute more in the coming years.

- e. The Hon'ble Prime Minister on multiple occasions has set the vision for online gaming as a critical growth engine for the digital economy and the potential for India to become a global leader in gaming.
- f. In accordance with the vision of the PM, the Finance Minister had constituted an AVGC taskforce to recommend a policy framework for enabling the growth of India's AVGC sector which has been struggling to reach its potential despite multiple government interventions in the last two decades. One of the key findings of the AVGC task force is the issue faced by the industry with uncertain tax policy and lack of a national level regulatory framework.
- g. With the allocation of MeitY as nodal ministry for online gaming and proposed IT rules, the issue of taxation related regulatory changes impacting the viability and growth of the sector still exists.
- h. The principal objective of tax policy in a developing market economy is to raise revenues in an equitable manner and with minimum unintended changes in relative prices and allocation of resources as per the famous canons of taxation. The developing countries like India depend on indirect tax revenue more than direct tax revenue as the ability to pay income tax is lower.⁵
- i. While the online gaming industry has a huge economic potential, however, unlike other industries, has been facing regulatory challenges due to lack of clear differentiation between games of skill and gambling/betting.
- j. While the courts in India have clearly held that games of skill and gambling/betting are two distinct and separate categories, however, there is no law clearly providing what constitutes games of skill and gambling/betting.
- k. The uncertainty in terms of distinction and regulation has resulted in multitude of litigations and, resultantly may result in revenue leakage and lower tax revenue due to lack of clarity.

⁴ <https://www.assochem.org/uploads/files/Online%20gaming%20-Impact%20on%20the%20industry.pdf>

⁵ <http://www.isec.ac.in/WP%20448%20-%20Pratap%20Singh%20-%20Final.pdf>

- l. Recently, in the Finance Bill 2023-24, the Central Government has proposed to recognise online gaming as a new industry, separate from lottery, gambling or betting with new provisions under the Income Tax Act. The Central Government also has made changes to the computation of TDS, taxable event for deduction of TDS on winnings in online gaming with an objective to plug tax leakage.
- m. This note highlights the current landscape and the existing legal and tax jurisprudence and the need for a comprehensive, rational and progressive GST taxation framework for online gaming that is in consonance with the principles of taxation.

2. The Current Landscape of Online Gaming in India

- a. Currently, India has over 950 gaming companies and more than 500 gaming startups with at least 15,000 game developers.⁶ India’s online gaming industry has emerged as a sunrise sector in recent years and is expected to increase to Rs 290.3 billion by 2025, from Rs 136 billion in 2021.⁷ The three of the gaming operators i.e. Dream11, MPL and Games 24*7 have also joined the unicorn club.⁸
- b. The following depicts the current economic potential of the gaming industry

	Current (2022)
Investments / FDI	~Rs 20,000 Crores ⁹
Annual Revenue	~Rs 15,000 Crores ¹⁰
Annual GST Contribution	~Rs 2,200 Crores+ ¹¹
Skilled employment	~60,000 jobs ¹²

⁶ <https://www.ibef.org/blogs/india-s-nascent-gaming-industry-on-the-rise>

⁷ <https://www.gamesindustry.biz/indias-gaming-market-to-grow-113-percent-by-2025-kpmg-in-india>

⁸ <https://www.investindia.gov.in/sector/media/gaming>

⁹ <https://www.assochem.org/uploads/files/Online%20gaming%20-Impact%20on%20the%20industry.pdf>

¹⁰ <https://web-assets.bcg.com/38/14/41fd494a9b84aaa32c47cc92b0/mobile-gaming-market-opportunity.pdf>,

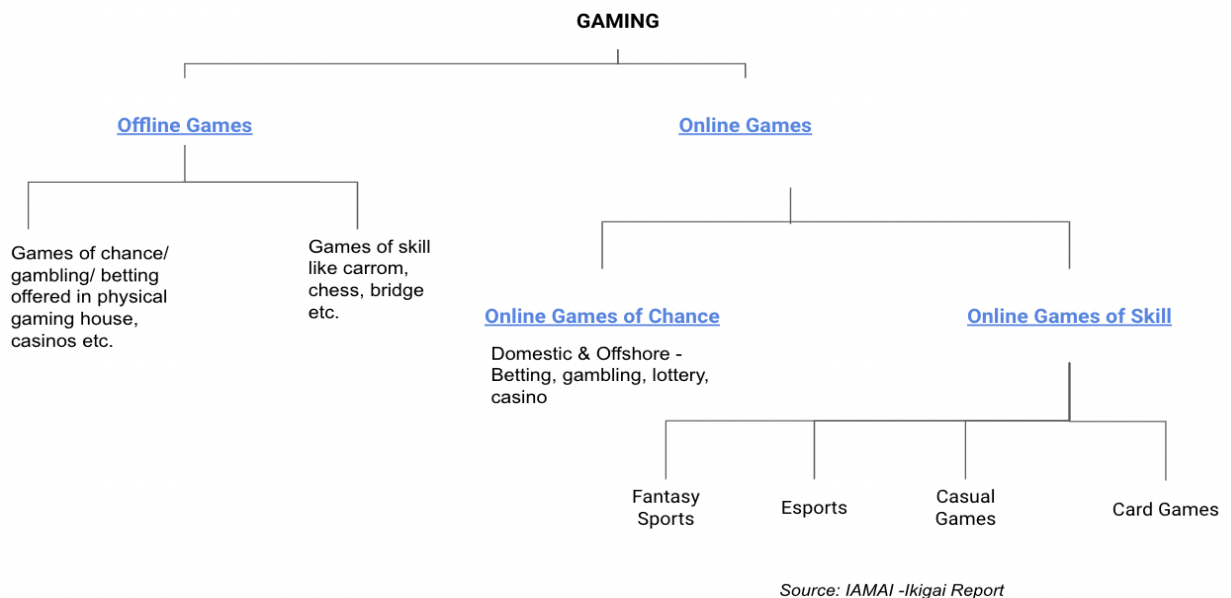
<https://www.techcircle.in/2022/10/13/cert-in-conducts-cyber-security-exercise-with-power-csirts>,

https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/media-and-entertainment/2022/ey-ficci-m-and-e-report-tuning-into-consumer_v2.pdf

¹¹ <https://www.assochem.org/uploads/files/Online%20gaming%20-Impact%20on%20the%20industry.pdf>

¹² <https://www.assochem.org/uploads/files/Online%20gaming%20-Impact%20on%20the%20industry.pdf>

- c. The Hon'ble Prime Minister of India, Shri Narendra Modi, in its [speech](#)¹³ stated that India is amongst the top five countries for the mobile gaming market and is expected to be worth INR 3 lakh crore (400 billion USD approximately) in the next two years.
- d. Currently, the gaming landscape is described below:



- e. From the above picture, it is clear that online gaming comprises online games of chance that are held by courts in India to be betting and gambling and res extra commercium in nature and online games of skill that are held to be legitimate business activity protected under Article 19(1)(g) of the Constitution of India.
- f. As depicted above, online games of skill formats range from fantasy sports to esports to card games to casual games.
- g. There are multiple formats of online gaming and variations of each of these formats. The proposed IT rules and the requirement for certification of games as not being gambling and betting by the Self-Regulatory Bodies will further simplify the classification of these games as per the taxation laws and tax administration.

¹³<https://www.narendramodi.in/text-of-prime-minister-narendra-modi-s-speech-at-at-aatmanirbhar-arthvyavastha-programme-via-video-conference-559870>

3. Gaming, Betting and Gambling - Concept, Definitions and the Legal Jurisprudence

a. Historical Jurisprudence on gaming, betting and gambling

- i. Gaming, betting and gambling has been as old as mankind and the approach towards each of them has varied across time and geography. Globally in most jurisdictions, since gambling and betting are legally permitted businesses, gaming has been subsumed under the same laws via a licensing framework. For instance, the United Kingdom Gambling Act, 2005¹⁴ has defined gambling to include betting, gaming and participation in a lottery.
- ii. It is important to note that the global best practice cannot be adopted in India as the Indian legal jurisprudence, social acceptance since long has distinguished between games of skill and gambling and betting.
- iii. Since the pre-independence era, the activity of gambling and betting has been prohibited via The Public Gambling Act, 1867 ('the Act'). Since the Act was not repealed after the commencement of the Constitution of India, the Act is still in force by way of Article 372 of the Constitution of India.
- iv. The Act uses the term gaming and gambling interchangeably as it uses terms like common gaming house, instruments of gaming etc. while prohibiting gambling activities. However, the Act creates a distinction between gambling and betting and games of mere skill. As per Section 12 of Public Gambling Act, 1872, the Act does not apply to games of mere skill wherever played.
- v. As per the Constitution of India, entry 34 (previously entry 45) of List II empowers the State government to regulate/prohibit the activity of betting and gambling. Entry 40 of List I empowers the Union Government to legislate on the subject matter of "*lotteries organised by the Government of India or the State Government.*"
- vi. During the Constituent Assembly Debates on 02 September 1949, a motion was taken up to add Entry 45 (present Entry 34) dealing with betting and gambling. The move was opposed by Shri Shibban Lal, Shri Lakshminarayan Sahu and Sardar Hukum Singh on adding the said entry as it may result in legalising betting and gambling. They stated that the very mention of these words would indicate that the Government favours the idea of encouraging betting and gambling.

¹⁴ <https://www.legislation.gov.uk/ukpga/2005/19/section/3>

- vii. On the contrary, Dr. B.R. Ambedkar brought to the notice of the Constituent Assembly that if the entry is omitted, then there would be no absolutely no control on betting and gambling. The entry if there can be used for the purpose of permitting betting and gambling or even for the purpose of prohibiting it. Entry 45 (now Entry 34) was thus agreed to be added to empower States to either regulate/prohibit the said activity.
- viii. Pursuant to entry 34 of List II, states either adopted Public Gambling Act, 1867 with minor modifications or introduced their own Gaming laws to either exempt/prohibit/regulate games of skill while prohibiting/regulating gambling and betting. The table below provides for a comprehensive summary of gambling/gaming/police laws applicable in different States:

S.No.	State	Act	Important Provisions
No exemption to Games of skill			
1.	Andhra Pradesh	Andhra Pradesh Gaming Act, 1974 with subsequent amendment in 2020	<ul style="list-style-type: none"> No exemption to games of skill Clause (d) Explanation (i) to Section 2 includes “<i>any act of risking money or playing stakes or otherwise on the result of a game or an event including on a game of skill</i>” in the definition of wagering or betting..
2.	Assam	The Assam Game and Betting Act, 1970	<ul style="list-style-type: none"> No exemption to games of skill. Section 2 defines betting which is wide enough to include money staked on any game and there is no exception in favour of game of skill under the Act.

3.	Telangana	Telangana Gaming Act 1974	<ul style="list-style-type: none"> • No exemption to games of skill. • Clause (d) Explanation (i) to Section 2 includes “<i>any act of risking money or playing stakes or otherwise on the result of a game or an event including on a game of skill</i>” in the definition of wagering or betting.
4.	Odisha	Orissa Prevention of Gambling Act, 1955	<ul style="list-style-type: none"> • No exemption to games of skill. • The definition of gambling and betting includes any game played for money.
Exemption or no applicability of Gambling Act to Games of skill			
5.	Arunachal Pradesh	The Arunachal Pradesh Gambling (Prohibition) Act, 2012	No applicability to games of skill as Section 2(1)(i) defines gambling specific to wagering or betting.
6.	Bihar, Jharkhand	Bengal Public Gambling Act, 1867	Section 10 exempts games of skill.
7.	Punjab, Haryana, Manipur, Chandigarh, Himachal Pradesh	Public Gambling Act, 1867 (with minor modification and amendments)	Section 18 exempts games of skill.
8.	Goa, Daman and Diu	The Goa, Daman and Diu Public Gambling Act, 1976	Section 13 exempts games of skill.
9.	Uttar Pradesh, Madhya Pradesh, Uttarakhand	Public Gambling Act, 1867	Section 12 exempts games of skill

10.	Maharashtra and Gujarat	The Bombay Prevention Gambling Act, 1887 and (Gujarat Amendment) Act, 1964	Section 13 exempts games of skill
11.	Delhi	The Delhi Public Gambling Act, 1955	Section 13 exempts games of skill
12.	Jammu and Kashmir	The Jammu and Kashmir Public Gambling Act, 1920	Section 12 exempts games of skill
13.	Karnataka	Karnataka Police Act, 1963	<ul style="list-style-type: none"> ● Section 176 exempts games of skill ● Karnataka Police (Amendment) Act, 2021 was introduced that prohibited even games of skill when played for money. ● The Amendment Act was challenged and struck down by the Karnataka High Court¹⁵. ● SLP against the judgment of the Karnataka High Court is pending before the Supreme Court.

¹⁵ Federation of Indian Fantasy Sports & Anr. v. State of Karnataka & Ors., W.P. 22371 of 2021

14.	Kerala	Kerala Gaming Act, 1960	<ul style="list-style-type: none"> • Section 14 exempts games of skill • Section 14A empowers the Government to exempt certain games as games of skill if they follow conditions. • Pursuant to Section 14A, the Government of Kerala issued notification dated 23.02.2021, whereby online rummy when played for stakes was not exempted. • This notification was challenged and struck down by the Kerala High Court¹⁶.
15.	Rajasthan	The Rajasthan Public Gambling Ordinance, 1949	<ul style="list-style-type: none"> • Section 12 exempts games of skill. • Recently, Rajasthan government introduced Rajasthan Virtual Online Sports (Regulation) Bill, 2022 to provide for a regulatory framework for fantasy sports and esports in India such as licensing of formats, formulation of a self-regulatory organisation and the gaming commission, and penalties for violations.
16.	Tripura	Tripura Gambling Act, 1926 (Based on the Public Gambling Act, 1867)	Section 11 exempts games of skill
17.	West Bengal	The West Bengal Gambling and Prize Competitions Act, 1957 (Based on the Public Gambling Act, 1867)	Section 12 exempts games of skill

¹⁶ Head Digital Works Private Limited v. State of Kerala, WP(C) NO. 7785 OF 2021

18.	Mizoram	The Public Gambling (Extention to Mizo District) Act, 1962	Section 12 exempts games of skill
19.	Chattisgarh	Chattisgarh Gambling Prohibition Act, 2022	Section 15 exempts games of skill
Regulates Games of skill			
20.	Tamil Nadu	Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Act, 2022	<ul style="list-style-type: none"> • Prohibit online gambling and regulate online games of skill. • Earlier, Tamil Nadu enacted a law prohibiting all games played for money, which was struck down by the Madras High Court¹⁷ as unconstitutional and arbitrary. • SLP against the judgement of the Madras HC is pending before the Supreme Court. <ul style="list-style-type: none"> • Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Act, 2022 is awaiting the governor's consent currently.
21.	Sikkim	Sikkim Online Gaming (Regulation) Act, 2008	<ul style="list-style-type: none"> • Regulates online games of skill and online games of chance through a licensing framework.

¹⁷ Junglee Games India Private Limited v. The State of Tamil Nadu, W.P.No.18022 of 2020

22.	Meghalaya	The Meghalaya Regulation of Gaming Act, 2021	<ul style="list-style-type: none"> Regulates online games of skill and online games of chance through a licensing framework. The Government is planning to repeal the Act following stiff opposition from churches and social organisations on the Act allowing setting up Casinos in the State.
23.	Nagaland	Nagaland Prohibition of Gambling and Promotion and Regulation of Gaming Act, 2016	<ul style="list-style-type: none"> Regulates online games of skill and online games of chance through a licensing framework.

- ix. Whenever States (such as Kerala, Karnataka and Tamil Nadu, Andhra Pradesh, Telangana, Odisha) have attempted to prohibit games of skill, the operators have challenged the relevant provisions and three different High Courts have also struck down such relevant provisions holding them to be unconstitutional and arbitrary.
- x. Further, the Indian legal jurisprudence treats prize competitions as a separate category from gambling. Accordingly, the Prize Competition Act, 1955 was enacted to regulate prize competitions. Section 2(d) of the Act defines the term “Prize Competition” as:
- “any competition (whether called a cross- word prize competition, a missing- word prize competition, a picture prize competition or by any other name) in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures.”*
- xi. However, it is important to note that the P.C. Jain Committee constituted in 2014 by the Prime Minister’s office to identify the Central Acts which are no longer relevant or needed or required, recommended that the Prize Competition Act, 1955 be repealed as most States have their own State Legislations to deal with ‘Betting and Gambling’.
- xii. Thus, from the above, it is clear that while the legislations have used the term ‘gaming’ and ‘gambling’ interchangeably, however, the distinction between games of skill and games of chance have been clearly added in such legislations.

b. The concept of gaming, gambling and betting

- i. The Finance Act, 1994¹⁸ defines “Betting or Gambling” under Section 65-B (15) as:
“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.”
- ii. Cambridge English Dictionary defines gambling as “the activity of risking money on the result of something, such as a game or horse race, hoping to make money¹⁹”.
- iii. According to the Black’s Law Dictionary, gambling is defined as “*the act of risking something of value for a chance to win a prize*”.
- iv. The Supreme Court in the case of Dr. K. R. Lakshmanan v. State of Tamil Nadu & Anr.²⁰ defined gambling as follows:
“Gambling in a nut-shell is payment of a price for a chance to win a prize. Games may be of chance, or of skill or of skill and chance combined. A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards, are all modes of chance...A game of skill, on the other hand - although the element of chance necessarily cannot be entirely eliminated - is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player. Golf, chess and even Rummy are considered to be games of skill.”
- v. The Calcutta High Court in Bimalendu De v. Union of India²¹ , referred to the definition of Gambling given in the Black’s Law Dictionary, and defined gambling as:
“Making a bet occurs when there is a chance for profit if a player is skilful and lucky...A play for value against an uncertain event in hope of gaining something of value...It involves not only chance, but a hope of gaining something beyond the amount played. Gambling consists of a consideration, an element of chance, and a reward...The elements of gambling are payment of a price for a chance to win a prize.”

¹⁸ The Finance Act, 1994

¹⁹ <https://dictionary.cambridge.org/dictionary/english/gambling#dataset-business-english>

²⁰ AIR 1996 SC 1153

²¹ AIR 2001 Cal 30.

- vi. From the above, it can be concluded that courts, legislations as well as academicians have limited gambling to game of chance.
- vii. Further, recently courts have also interpreted the term betting and gambling as mentioned in Entry 34 and have held that betting cannot be divorced from gambling and both the terms shall be read conjunctively. For instance, in the case of **M/s. Junglee Games India Pvt. Ltd. v. State of Tamil Nadu**, the Madras High Court has held that the term 'Betting' in Entry 34 of the Second List of Schedule 7 in the Constitution of India is limited to betting on activities based on chance only.
- viii. Further, the Karnataka High Court in the case of **All India Gaming Federation v. State of Karnataka** in **WP 18703/2021** has also similarly interpreted the scope of Entry 34 of the State List and defined the term 'Betting' as follows:

Quote "The two words namely "Betting" and "gambling" as employed in Entry 34, List II have to be read conjunctively to mean only betting on gambling activities that fall within the legislative competence of the State. To put it in a different way, the word "betting" employed in this Entry takes its colour from the companion word "gambling"." unquote.

- ix. From the above, it is clear that legally gambling and betting shall be read conjunctively to mean games of chance.

c. The test to determine game of skill and game of chance

- i. Globally, the following tests have been used by courts to distinguish games of skill from games of chance:
 - (i) *the dominant factor test, or predominance test, where games of skill and chance lie on a continuum between pure skill and pure chance,*
 - (ii) *the material test, which tests whether the role of chance in a game meaningfully determines its outcome.*
- ii. For instance, the Canadian court in case of *Rex v. Fortie*²² provided for the distinction between game of chance and game of skill stating that, "*[A] game of chance and a game of skill are distinguished on the characteristics of the dominating element that ultimately determines the result of the game.*"

²² 13 Q.B. 308

- iii. Further, in the case of *State v. Gupton*²³, the Supreme Court of North Carolina held that any athletic game or sport is not a game of chance. In the United States, the 'dominant factor test' is applied by many States to determine whether or not a particular game is a 'game of skill' or 'game of chance'.
- iv. As per Indian legal jurisprudence, the courts in India have at multiple occasions consistently held that it is not possible to qualify any game or gaming format as purely a game of chance or a game of skill. It will always involve an element of skill and chance. For instance, even chess that requires a considerable amount of skill has an element of chance of who gets the first move. Similarly, there is always an element of chance in playing any sport.
- v. The Indian judiciary has recognised the concept of game of mere skill wherein they have applied the predominance test and has held that a game is a game of mere skill if the element of skill predominates the element of chance. This test has been consistently used by courts in various judgments to hold fantasy sports, rummy or poker as a game of skill.²⁴ The courts have also held that a game of skill does not amount to gambling/betting and has a constitutional protection under Article 19(1)(g) as a legitimate business activity.
- vi. With respect to fantasy sports, it is a settled issue of law as there are several High Court judgments along with Supreme Court orders holding fantasy sports to be a game of skill not amounting to gambling, betting or wagering. Notably, the Hon'ble Supreme Court has held that the issue of Fantasy Sports being a game of skill is no longer *res integra*. Recently, the Hon'ble Supreme Court in the matter of *Varun Gumber v. Union Territory of Chandigarh*,²⁵ filed against the SC order dated 15.09.2017, dismissed the petition filed against the Hon'ble High Court of Punjab and Haryana on the grounds of merits and on the grounds of delay.

“Even otherwise on merits also, we are of the view that the order of which review has been sought does not suffer from any error apparent on the face of the record warranting its reconsideration.”

²³ 30 N.C. 271

²⁴ Avinash Mehrotra v. Union of India, Special Leave Petition (Civil) Diary No(s). 18478/2020; Saahil Nalwaya v. State of Rajasthan, D.B. Civil Writ Petition No. 2026/2021; Ravindra Singh Chaudhary v. Union of India, D.B. Civil Writ Petition No. 20779/2019; Chandresh Sankhla v. The State of Rajasthan, D.B. Civil Writ Petition No. 6653/2019; Gurdeep Singh Sachar v. Union of India, SLP(Criminal) Diary No. 43346/2019; Varun Gumber v. Union Territory, Chandigarh, Diary No(s). 27511/2017; Gurdeep Singh Sachar v. Union of India, Criminal Public Interest Litigation (St.) NO. 22 of 2019; Varun Gumber v. Union Territory, Chandigarh, CWP No.7559 of 2017.

²⁵ Review Petition (Civil) Diary No(s). 5195/2022

- vii. The Apex court in the case of *State of Bombay v. RMD Chamarbaughwala*²⁶ held gambling to be *res extra commercium* and hence has no protection under Article 19(1)(g) and Article 301 of the Constitution of India. It states as follows:

“We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient countries’ trade commerce or intercourse to be declared as free under Article 301... the real purpose of Articles 19(1)(g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and essence are extra commercium though the external forms, formalities and instruments of trade maybe employed and they are not protected either by Article 19(1)(g) or Article 301 of the Constitution.”

- viii. Further, even the 276th law commission report²⁷ discusses the test to determine whether a game amounts to gambling or not and states as follows:

“The main test to determine whether a game amounts to gambling or not is, what dominates/preponderates, whether skill or chance. Games of chance are those where the winner is predominantly determined by luck; the result of the game is entirely uncertain and a person is unable to influence such result by his mental or physical skill. The person indulging in game of chance wins or loses by sheer luck and skill has no role to play. On the other hand, the result of a game of skill is influenced by the expertise, knowledge and training of the player. In India, games of chance fall under the category of gambling, and are generally prohibited, while games of skill, falling outside the ambit of gambling are usually exempted.”

- ix. From the above, it is clear that legally as well as factually, games of skill and games of chance have been held to be distinct and different categories.

d. Government reports on legal framework for gaming, gambling and betting in India

There have been various government reports discussing the legal framework of gaming, gambling and betting in India.

- i. The 276th Law Commission Report on “Legal Framework: Gambling And Sports Betting Including In Cricket In India”²⁸**

²⁶ AIR 1957 SC 699

²⁷ <https://lawcommissionofindia.nic.in/reports/Report276.pdf>

²⁸ <https://lawcommissionofindia.nic.in/reports/Report276.pdf>



- In July 2017, the Supreme Court, while considering the Lodha Committee Report²⁹, in Board of Cricket Control in India v. Cricket Association of Bihar & Ors., made a reference to the Law Commission to examine the issue of betting in India.
- The law commission report highlighted blanket prohibition by States with respect to the betting and gambling industry and recommended that games of skill do not amount to betting and gambling and shall be exempted from such blanket prohibition.
- Further, it recommended that since online betting and gambling are offered pan India and on the internet, Centre shall be empowered to legislate on the subject matter under Entry 31 of List I, Seventh Schedule of the Constitution of India.

ii. **UP Law Commission Report on Prevention of Gambling in Uttar Pradesh**³⁰

- The Commission highlighted that the shift to the online world has become the major reason for introducing a new legislation of preventing gambling and exempting games of skill. Further, the report after analysing different State legislations and case laws recommends exempting games of skill from the UP Prevention of Gambling Act. It states that:

Quote “Uttar Pradesh is the most populous State in India that still follows 150 year old Gambling Laws. Many States including Karnataka, West Bengal and Tamil Nadu have made an exception for games of skill under legislation, which have otherwise prohibited all forms of gambling. On the other hand, Sikkim and Goa have adopted a liberal approach. Goa has permitted the operation of Casinos in Hotels. Sikkim, on the other hand, has legalized and regulated gambling and has prescribed areas in which gambling activities can be conducted.” unquote.

- The report also highlights how fantasy sports at various instances have been challenged to be gambling, however courts have consistently held that it is a game of skill not amounting to gambling, betting or wagering and is a legitimate business activity to be protected under Article 19(1)(g) of the Constitution of India. After analysing various judicial precedents on legality of fantasy sports, the UP Law commission report concludes that:

²⁹ http://gujaratcricketassociation.com/wp-content/uploads/2020/01/Lodha_Committee_Report.pdf

³⁰ <https://upslc.upsdc.gov.in/MediaGallery/18thReport.pdf>



Quote *“The judicial trend indicates that courts will adopt a substantive assessment of the game at hand to determine if online fantasy games require skill or not. Should it require a preponderance of skill, such games would be permissible.”* unquote.

iii. **Gujarat law commission report on “Steps needs to be taken to control cricket betting and online gambling by suitably amending the Gujarat Prevention of Gambling Act, 1887”.**

The Gujarat State Law Commission released a report in October, 2021 highlighting the need to control online gambling and betting and stated that if the game involves gambling, then it should be dealt with in a similar manner. It states as follows:

Quote *“If the online games involve “gambling” and if any website is operating in the State of Gujarat or is engaged in any gambling games, the same should be dealt with for which regulatory framework is needed to regulate “online gambling” and to curb any illegal activity, too. Reason is, many of such games result in money laundering or violation of laws relating to foreign exchange too.”* unquote.

iv. **NITI Aayog draft guideline titled ‘Guiding Principles for the Uniform National-level Regulation of Online Fantasy Sports Platforms in India’³¹**

The Draft Guiding Principles recognize the legitimacy and validity of the Fantasy Sports industry as a sunshine sector. It also recognized the legal ambiguity and lack of uniformity plaguing fantasy sport and the need to facilitate market development by way of a national safe harbour framework, principles-based guidelines to govern fantasy sports, and light-touch self-regulation backed by adequate oversight and grievance redressal mechanisms. The Discussion Paper goes on to suggest a number of guiding principles that ought to be kept in mind by fantasy sports platforms and regulators for supporting structured growth of the Indian fantasy sports sector.

v. **Inter-ministerial task force**

The Government of India has constituted an Inter-ministerial task force (IMTF) comprising Secretaries of Ministry of Finance (Department of Revenue), Niti Aayog CEO, Ministry of Home Affairs, Ministry of Electronics & Information Technology, Ministry of Youth Affairs and Sports, Department for Promotion of Industries & Internal Trade, Department of Consumer Affairs and Ministry of Information &

³¹ https://www.niti.gov.in/sites/default/files/2020-12/FantasySports_DraftForComments.pdf



Broadcasting to work on regulations for the online gaming industry and identify a nodal ministry to look after the sector.

Further, in [Budget 2022-23 speech](#)³², the Union Finance Minister, Smt. Nirmala Sitharaman indicated the importance of the mobile gaming industry in India and announced the formation of an Animation, Visual, Gaming and Comics (AVGC) promotion task force to make India a global hub for game development and gaming services.

“The animation, visual effects, gaming, and comic (AVGC) sector offers immense potential to employ youth. An AVGC promotion task force with all stakeholders will be set-up to recommend ways to realize this and build domestic capacity for serving our markets and the global demand.”

e. Proposed IT Rules

- i. On December 23, 2022, the Government of India (Allocation of Business) (Three Hundred and Seventieth Amendment) Rule, 2022 was notified in the official gazette, allocating matters relating to online gaming to the Ministry of Electronics and Information Technology (“MeitY”).
- ii. In furtherance to the allocation of online gaming to MeitY on January 2, 2023 issued Draft Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules (“Draft Rules”) to provide a responsible and accountable regulatory framework for the online gaming intermediaries (“OGI”).
- iii. The Minister of State for Electronics and IT, Shri Rajeev Chandrasekhar affirmed that “The rules are simple - we would like the online gaming ecosystem to expand & grow and be an important catalyst to India’s One trillion dollar Digital economy goal by 2025-26. We also envision a bigger role for startups in the online gaming industry”.³³
- iv. With the objective of introducing a light-touch regulatory environment and providing for safeguards for OGIs in relation to Section 69A of the IT Act, 2002, the Draft Rules have mandated the formation of Self Regulated Body (“SRBs”) to evolve a framework to secure:-
 - conformity with the interests referred to in section 69A of the Act
 - conformity with the interests referred to in section 69A of the Act.

³² https://www.indiabudget.gov.in/doc/Budget_Speech.pdf

³³ <https://pib.gov.in/PressReleasePage.aspx?PRID=1888143>



- the said interests, undertake testing and verification to establish conformity of online games with such framework, continuously update and further evolve such framework, testing and verification protocols. Further, the Draft Rules have introduced additional due diligence requirements for OGI.
- v. Further, the Draft Rules have mandated a KYC process to bring about uniformity in these practices across all companies.
- vi. The SRB has been provided quasi-adjudicatory powers to verify, certify, and grant registration to online games and online gaming intermediaries. The SRB will need to certify and register every game only if the game is not in the category of gambling/betting. Additionally, the SRB will also need to provide the bases for registering any online game to the government. The regulatory mechanism proposed by MeitY provides clarity for tax administration as well.

4. International Best Practices

- a. Gross gaming Revenue (“GGR”) Tax Model and Deposit or Turnover Tax Model (“CEA”) Tax Model are two prevalent taxation models for online gaming. Under the GGR Tax Model, the operator pays tax on the entry amount minus the amount ascertained towards the prize pool. To simplify, tax is payable in the hands of the operator only on the value apportioned towards their platform fee.
- b. While under the CEA Tax Model, tax is levied on the entire entry amount and there shall be no deductions of prize pool. Thus, entry amount will be the taxable value in a Deposit or Turnover Tax Model with very low tax rates. Globally countries are moving away from the Turnover tax model to GGR model to increase tax revenues and ease compliances.
- c. Globally, most countries are following a GGR tax model. Recently, a report titled “Taxation of the Digital Economy - International Best Practices in GST for Online Gaming”³⁴ analysed that the mature and developed gaming markets around the world have capped their tax rates to a high yielding percentage amount. As interpreted through studies of rates in various markets, most international nations have capped the rates between 15-20%³⁵ on GGR as it results in the highest revenue generation for their respective economies.

³⁴<https://www.lakshmisri.com/MediaTypes/Documents/International-Taxation-Practices-on-Online-Gaming.pdf>

³⁵ Copenhagen Economics: Report on licensing system for online gambling, 2016. [copenhagen-economics-2016-licensing-system-for-online-gambling.pdf](https://www.copenhageneconomics.com/licensesystemforonlinegambling.pdf) (copenhageneconomics.com)

- d. A few countries also follow a tax model wherein they differentiate between games of skill and games of chance, gambling etc. and accordingly charges different rate of tax, on games of skill, the tax rate is less than that on betting and gambling for instance in Austria the rate of tax on the lottery is 18% but the rate of tax on games of skill is 5%.
- e. Apart from the rates at which tax is levied, the monetary value on which it is determined is also of significance. Markets like France which earlier used to tax the entire amount, or the entire prize pool and contribution have now shifted to taxing only the GGR due to operators resorting to black markets, loss of revenue and non-compliance with the licensing and regulatory system.

5. Proliferation of offshore betting and gambling

- a. India has one of the fastest growing internet populations in the world and currently accounts for the second highest number of internet users in the world with over 650 million active internet users.³⁶ The rise in internet consumption has also paved the way for the growth of multiple electronic and/or internet based services in the country. The supply of such services may originate from outside India as well. The tax policy in India is framed in such a manner to adequately account for such services, however evasion of Goods and Services Tax remains a key concern for certain services that are operating in the country.
- b. In this part, we shall refer to the mushrooming of online betting and gambling platforms that are ostensibly operating from countries like Malta, Cyprus, Curacao³⁷ and are not paying any GST for the service rendered by them in the country.
- c. Under the Integrated Goods and Service Tax Act, 2017, the import of services is also liable to be taxed. Section 12 of IGST Act³⁸ clearly states that the place of supply of

³⁶ <https://datareportal.com/reports/digital-2022-india>

³⁷ <https://timesofindia.indiatimes.com/blogs/voices/curbing-offshore-online-betting-and-gambling/?source=app&frmapp=yes>

³⁸ The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Explanation.—For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following noncontradictory conditions are satisfied, namely:—

- (a) the location of address presented by the recipient of services through internet is in the taxable territory;
- (b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;
- (c) the billing address of the recipient of services is in the taxable territory;
- (d) the internet protocol address of the device used by the recipient of services is in the taxable territory;
- (e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;
- (f) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;



services shall be the location of the retrieval of services. Therefore, to the extent, the services are being received in the territory of India and any of the two conditions laid out in Section 12 are met, such services are liable to be taxed. To this end, any offshore online betting and gambling companies that are generating revenues from persons located in India are liable to pay Goods and Services Tax.

- d. Further, the proviso to Section 14(2) of the IGST Act puts an onus on any offshore OIDAR service to appoint a person for the purpose of paying integrated tax.
- e. From the aforementioned analysis of legal provisions, it is clear that offshore betting and gambling services are liable to pay IGST to the extent their services are received by persons in India. However, it is also important to note that these platforms have not appointed any local representative in India who has been registered to pay integrated tax on behalf of these services nor have these companies applied for any registration under the Simplified Registration Scheme in Form GST REG-10. Therefore, to this end, there appears to be prima facie case of tax evasion on part of such companies which is resulting in arguably significant loss to the exchequer.

Estimating Revenue Leakage and Legal Violations

- f. Currently, there is no official estimate on the size of the offshore betting and gambling in India and the revenue that they are generating through their activities in the country. However, as per a Report by the International Center for Sports Security, published in 2017, the underground betting and gambling market in India is worth USD 150 Billion or nearly 10 lakh crore.³⁹ FICCI had also undertaken a study in 2013 which revealed that betting and gambling to the tune of INR 300,000 crore takes place annually in India. At that time, the calculated loss of revenue was pegged in the range of INR 12000 Crore to INR 19000 crore.⁴⁰ According to recent media report, the current deposits on only a few major offshore betting platforms alone is to the tune of USD 1 billion per month⁴¹ which amounts to a tax revenue leakage of approximately Rs 27,000 crore on these platforms alone. However, given the proliferation of such activities coupled with the rise of internet usage, it may be readily argued that the resultant revenue loss to exchequer is significantly more than any such estimates.

(g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

³⁹ <https://www.hindustantimes.com/business/with-200-million-on-every-odi-match-illegal-betting-thrives/story-5CDullgCrykqM2smIPn7dl.html>

⁴⁰ https://www.stxaviersjaipur.org/new_2020/Illuminatus%202020%20Final.pdf

⁴¹ <https://www.livemint.com/companies/news/regulate-betting-banning-it-helps-no-one-parimatch-11671727219971.html>

- g. Notably, a preliminary probe into the method of operations employed by offshore betting and gambling companies reveals that users are also potentially being lured to misusing the Liberalised Remittance Scheme (LRS) of the RBI by misdeclaring the purpose for which they are making foreign transactions.⁴² It has also been noted that many such platforms allow collection of cash for placing bets or for defrauding customers. The Enforcement Directorate (ED) has recently conducted extensive raids on one such company, E-nuggets, where it seized INR 17.82 crores in cash and 150.22 bitcoins worth 22.82 crores.⁴³ Most importantly, the ED has found that more than 300 accounts were used to launder money and the app was operated by Chinese nationals or Chinese entities.⁴⁴
- h. Further, in a recent report by Esya Centre⁴⁵, it has been observed that these companies are in potential violation of multiple applicable laws in the country. A table highlighting potential violations is mentioned below.

Legislation	Description
Information Technology Act, 2000 and Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021	Intermediaries are liable to ensure that their platform is not used to publish or share certain content, including content relating to or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws in force.
Consumer Protection (E-commerce) Rules 2020	The rules obligates e-commerce entities to perform certain duties such as: <ul style="list-style-type: none"> ● Establish a grievance redressal mechanism ● Publish contact details of customer care and grievance officers ● Appointing a nodal person resident in India to ensure legal compliance

⁴²https://www.business-standard.com/article/economy-policy/entities-misusing-rbi-s-lrs-for-illegal-betting-overseas-under-lens-122110201363_1.html

⁴³<https://www.thehindu.com/news/national/e-nuggets-gaming-app-case-enforcement-directorate-freezes-bitcoins-worth-2282-crore/article66123948.ece>

⁴⁴<https://inc42.com/buzz/gaming-app-e-nuggets-probe-ed-seizes-bitcoins-worth-inr-22-82-cr-in-binance-wallet/>

⁴⁵<https://www.esyacentre.org/documents/2022/7/7/offshore-online-betting-and-gambling-in-india-a-risk-assessment>

Foreign Exchange Management Act, 1999	Remittance of income from lottery winnings, racing/riding, sweepstakes etc are prohibited under FEMA 1999 read with Rule 3 and Schedule I of the Foreign Exchange Management (Current Account Transaction) Rules, 2000
Prevention of Money Laundering Act, 2002	All entities offering games to be played for cash or its equivalent, whether online or offline are required to adhere to the provisions of the Act and rules. Section 12 of the Act requires “reporting entities” (which include persons carrying on activities for playing games of chance for cash or king and includes such activities associated with casino) to maintain records of transactions and documents showing the identity of their clients in accordance with rules.
Tax Laws	<ul style="list-style-type: none"> • As per Section 194B of the Income Tax Act, any winnings from lotteries, card games etc. need to have TDS deducted if such winnings exceed INR 10,000. • As per current CGST Act, betting and gambling service providers are required to pay 28% GST on the whole entire contest amount. Rule 64A of CGST Rules, requires that every registered person providing online information and database access or retrieval services from a place outside India to a person in India other than a registered person shall file return in FORM GSTR-5A on or before the twentieth day of the month succeeding the calendar month or part thereof

- i. Further, these platforms have also become the source of significant cybercrime. As per the Report by Esya Centre, 5091 complaints were registered against online gambling websites on the National Cybercrime Portal between August 31, 2019 and December 31, 2021. The Report further states that while there is no clear distinction provided by the Ministry of Home Affairs between offshore and onshore businesses, media reports suggest that a significant share of grievances related to offshore gambling websites.



- j. Notably, other ministries of the Central Government have also taken note of the proliferation of such platforms and the societal concerns that ensue from adoption of such services in the country. In light of the significant financial and socio-economic risk for the consumers, especially youth and children, the Ministry of Information and Broadcasting (MIB) in October issued two Advisories, one for private television channels and the other for digital news publishers and OTT platforms strongly advising them to refrain from showing advertisements of online betting sites and surrogate advertisements of such sites. The Advisories were supplemented with evidence which contained direct and surrogate advertisements of offshore betting platforms such as Fairplay, PariMatch, Betway, Wolf 777, and 1xBet.
- k. The Advisories issued by the Ministry have clearly stated that since betting and gambling is illegal in most parts of the country, advertisements of these betting platforms as well as their surrogates are also illegal. The Advisories relied upon the provisions of the Consumer Protection Act 2019, Cable TV Network Regulation Act 1995 and the IT Rules, 2021. MIB has stated that such advertisements are not in conformity with various related laws and has strongly advised TV channels as well as digital news publishers from broadcasting such betting platforms or their surrogate news websites, reminding TV channels that violation may invite penal action. MIB has also advised online advertisement intermediaries to not target such advertisements towards Indian audiences.
- l. In summation, it is increasingly evident that apart from the fact that there is significant tax evasion and loss of revenue on account of the unchecked operation of such platforms, they are in violation of multiple laws of the land and the revenue being generated by them could potentially be used to engage in illicit or anti-national activities. To this end, it is imperative that a sustained and coordinated effort is undertaken across the government with a view to assess the revenue loss incurred by the exchequer till date and enforce laws that can prevent such platforms from operating with impunity in the country.
- m. To curb the offshore betting and gambling activity, there is a need for identification of such platforms and direction to the Enforcement Directorate and Department of Revenue Intelligence to conduct investigations.
- n. Further, there is a need to issue necessary instructions to ISPs and application store providers to block any URLs or apps belonging to such platforms as per the procedure laid down in Section 69A of the Information Technology Act read with Information



Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

6. Tax jurisprudence on betting and gambling and online gaming

The indirect tax jurisprudence has in pre-GST as well as post-GST regime always made a distinction between betting and gambling and online gaming while determining the rate of tax and value of supply.

The indirect tax regime has seen a major shift in 2017 with the introduction of goods and service tax. Prior to the The Constitution (One Hundred and First Amendment) Act, 2016 (101st Constitutional amendment) that brought amendments to the Constitution of India pertaining to Goods and Service Tax, the tax on betting and gambling was the prerogative of the State government via Entry 62 of List II, Seventh Schedule of the Constitution of India i.e. *“Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling”*.

a. Pre-GST regime

- i. The term “betting or gambling” was defined in the Finance Act, 1994 (“Service Tax”) under Section 65B(15). It states as follows:

*“(15) “Betting or gambling” 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;**”*

- ii. Before the 101st Constitutional Amendment, taxes on betting and gambling was with the State Government. Entry 62 of List II, Seventh Schedule of the Constitution of India stated as follows:

“62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.”

- iii. Section 66D of the Finance Act, 1994 provided for a negative list of services that included betting, gambling or lottery. Thus, betting, gambling or lottery was not charged with Service Tax as it was the prerogative of State legislation.

iv. The indicative list of the State Betting Tax Acts are described in the below table⁴⁶:

Sr. No	Act	Provisions
1.	The Andhra Pradesh Horse Racing and Betting Tax Regulation 1358 F	<ul style="list-style-type: none"> ● Section 13 provides that tax shall be levied and paid to the Government out of all monies paid into any totalisator by way of stakes or bets, a tax on backers at the rate not exceeding 15% of sum so paid. ● Section 16 provides that a tax shall be levied and paid to the Government out of all monies paid by backer to a license bookmaker in respect of bet at the rate not exceeding 15% of sum so paid. ● Betting tax to be collected or deducted by the licensed bookmaker from such monies and shall be deemed to have been paid by backer on account of the tax. ● "totalisator" means a totalisator in an enclosure which the stewards controlling a race meeting have set apart in accordance with the Andhra Pradesh Gambling Act, 1974 and includes any instrument, machine or contrivance known as the totalisator or any other instrument, machine or contrivance of a like nature or any scheme for enabling any number of persons to make bets with one another on the like principles. ● "backer" includes any person with whom a licenced book-maker bets. ● "licence book-maker" means any person who carries on the business or vocation of or acts as book-maker or turf commission agent under a licence or permit issued by any racing club or by the stewards thereof enable him to carry on his business or vocation under the provisions of the Andhra Pradesh Gambling Act, 1974 as specified in the licence or permit;

⁴⁶ <https://cbic-gst.gov.in/pdf/compensation/notification-acts-subsumed-into-GST.pdf>

2.	The Assam Amusements and Betting Tax Act, 1939	<ul style="list-style-type: none"> • Section 3 provides a tax on entry to entertainment activities at a rate ranging between 20% to 50% depending on the activities. • Section 15 provides that there shall be charged, levied a tax on all monies paid into any totalisator by way of stakes or bets amount to <u>5% of every sum so paid</u> and every sum so paid into a totalisator shall be deemed to have been paid by the backer on account of the totalisator tax. • Section 18 provides that a tax shall be charged on all monies paid to licenced bookmaker for horse-race for bets made at the rate of <u>10%</u>. • The betting tax on horse race shall be deducted or collected by the licenced bookmaker for horse-race from such monies, or in the case of credit bets at such time as may be prescribed and shall be deemed to have been paid by the backer on account of the tax, and shall be retained by the licenced bookmaker for horserace on behalf of Government.
3.	The Delhi Entertainment and Betting Tax Act, 1996	<ul style="list-style-type: none"> • Section 19 provides that tax shall be levied and paid to the Government, <u>out of all moneys paid</u> into any totalizator by way of stakes or bets not exceeding <u>20%</u> of every sum so paid. • Section 21 provides that tax shall be levied and paid to the Government by the backer, a betting tax not exceeding <u>20% on all moneys paid.</u> • "backer" includes any person with whom a licensed book-maker bets • "book-maker" means any person who, whether on his own account or as servant or agent of any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets or who in any manner holds himself, out or permits himself to be held out in any manner, as a person, who receives or negotiates bets, or conducts such operations, and includes a 'turf commission agent'; so, however, that a person shall not be deemed to be a book-maker by reason only of the fact that he operates, or is employed in operating, a totalizator;

4.	The Mysore Betting Tax Act, 1932	<ul style="list-style-type: none"> • Section 3 provides that tax shall be levied and paid to the State Government out of <u>all moneys paid into any totalisator</u> by way of stakes or bets at such rate not exceeding <u>25%</u> of every sum so paid • Section 6 provides that betting tax shall be levied and paid to the State Government <u>out of all moneys paid</u> to a licensed bookmaker by a backer in respect of a bet made at a rate not exceeding <u>25%</u> of all such moneys • Betting tax to be collected or deducted by the licensed bookmaker from such monies and shall be deemed to have been paid by backer on account of the tax. • “Backer” includes any person who bets with a licensed bookmaker or at a totalisator;
5.	The Maharashtra Betting Tax Act, 1925	<ul style="list-style-type: none"> • Under Section 5 of the Bombay Betting Tax Act, 1925, a tax is to be charged and paid to the government <u>out of all the monies paid</u> into any totalisator by ways of bets at a rate not exceeding <u>25%</u> of the total value of bets. • Further, Section 7 of the Bombay Betting Tax Act, 1925 provides that a tax is to be charged levied and paid to the government <u>out of all the monies paid</u> into any licensed bookmaker at a rate not exceeding <u>30%</u> of the value of the bet. • As per the Bombay Entertainment Act, 1923, tax is to be paid on the gross value of the entry ticket to be paid for various events. The rate of tax varies from <u>20%-40%</u> on the gross value of the entry Ticket.

6.	The Tamil Nadu Betting Tax Act, 1935	<ul style="list-style-type: none"> ● Under Section 4, a tax is to be levied on the backers in respect of the total money paid by them to the totalizator by the way or stakes or bets, provided that the rate of tax does not exceed <u>12.5%</u> of every sum paid into the totalisator. ● Further Section 5 provides that a tax shall be levied on book-makers in respect of all money paid or agreed to be paid by them to backers in consequence of the winning by the by latter of bets made in a place within the race enclosure, provided that the rate of tax <u>does not exceed 12.5% of every sum pay out by a bookmaker to the winner backer, the amount of bet being excluded.</u> ● “backer” includes any person who bets at a totalizator or with a bookmaker
----	--------------------------------------	--

<p>7.</p>	<p>The Telangana Horse Racing and Betting Tax Regulations, 1358f</p>	<ul style="list-style-type: none"> ● Section 13 provides that tax shall be levied and paid to the Government <u>out of all monies paid</u> into any totalisator by way of stakes or bets, a tax on backers at the rate not exceeding 15% of sum so paid. ● Section 16 provides that a tax shall be levied and paid to the Government <u>out of all monies paid</u> by backer to a license bookmaker in respect of bet at the rate not exceeding 15% of sum so paid. ● Betting tax to be collected or deducted by the licensed bookmaker from such monies and shall be deemed to have been paid by backer on account of the tax. ● "totalisator" means a totalisator in an enclosure which the stewards controlling a race meeting have set apart in accordance with the Andhra Pradesh Gambling Act, 1974 and includes any instrument, machine or contrivance known as the totalisator or any other instrument, machine or contrivance of a like nature or any scheme for enabling any number of persons to make bets with one another on the like principles. ● "backer" includes any person with whom a licenced book-maker bets. ● "licence book-maker" means any person who carries on the business or vocation of or acts as book-maker or turf commission agent under a licence or permit issued by any racing club or by the stewards thereof enable him to carry on his business or vocation under the provisions of the Andhra Pradesh Gambling Act, 1974 as specified in the licence or permit;
-----------	--	--

8.	The Uttar Pradesh Entertainment and Betting Tax Act, 1979	<ul style="list-style-type: none"> • Section 16 provides that there shall be charged, levied and paid to the State Government, <u>out of all moneys paid into any totalizator</u> by way of stakes or bets, a totalizator tax at the prescribed percentage, <u>not exceeding ten per cent</u>, of every sum so paid. • Section 18 provides that a betting tax at a rate <u>not exceeding ten per cent on all moneys paid</u> or agreed to be paid to a licensed bookmaker by a backer, as a bet on any race. The betting tax shall be collected by the licensed bookmaker along with the money laid by the backer with him and in case of credit bets at such times as may be prescribed. • Section 3 provides that there shall be a tax, <u>not exceeding 150% of each payment</u>, for admission to the prescribed activities of entertainment.
9.	The Uttarakhand Entertainment and Betting Tax Act, 1979	<ul style="list-style-type: none"> • Section 16 provides that there shall be charged, levied and paid to the State Government, <u>out of all moneys paid into any totalizator</u> by way of stakes or bets, a totalizator tax at the prescribed percentage, <u>not exceeding ten per cent</u>, of every sum so paid. • Section 18 provides that a betting tax at a rate <u>not exceeding ten per cent on all moneys paid</u> or agreed to be paid to a licensed bookmaker by a backer, as a bet on any race. The betting tax shall be collected by the licensed bookmaker along with the money laid by the backer with him and in case of credit bets at such times as may be prescribed. • Section 3 provides that there shall be a tax, <u>not exceeding 150% of each payment</u>, for admission to the prescribed activities of entertainment.

- v. While betting and gambling was in the negative list, online gaming was a part of the definition of online information data access or retrieval services (OIDAR) as defined under rule 2(1)(ccd) of Service Tax Rules, 1994.
- vi. Thus, during the Service Tax regime, online gaming and gambling and betting were treated distinctively.

b. Post GST

- i. The 101st Constitutional Amendment omitted Entry 62 of List II, Seventh Schedule of the Constitution of India and introduced Article 246A that empowered the Legislature of State and Parliament to make laws with respect to goods and services tax. The provision read as

“246A. (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

- ii. The Integrated Goods and Service Tax Act, 2017 ('IGST') was introduced to make provisions for levy and collection of tax on inter-State supply of goods or services or both by the Central Government. Under Section 2(17) of the IGST Act,

“(17) “online information and database access or retrieval services” means services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention and impossible to ensure in the absence of information technology and includes electronic services such as,—

(i) advertising on the internet;

(ii) providing cloud services;

(iii) provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet;

(iv) providing data or information, retrievable or otherwise, to any person in electronic form through a computer network;

(v) online supplies of digital content (movies, television shows, music and the like);

(vi) digital data storage; and

*(vii) **online gaming;**”*

- iii. It is important to note that while the definition provides an indicative list of services which may fall under OIDAR services, this definition is not exhaustive in nature. In fact, the following three part test may be employed to determine whether any service would fall under the classification of OIDAR



- Whether Provision of service mediated by information technology over the internet or an electronic network?
 - Whether it is Automated and impossible to ensure in the absence of information technology?
 - Based on the answer for I and II, whether the service will classify as OIDAR?
- iv. Currently, online gaming operators pay GST at a rate of 18% on Gross Gaming Revenue/Platform fees under Chapter Heading 998439 that pertains to Other Online Content. The Explanatory Note of this Heading to Scheme of Classification of Service states as follows:

*Quote “This service code includes games that are intended to be played on the Internet such as role-playing games (RPGs), **strategy games, action games, card games, children's games**; software that is intended to be executed on-line, except game software; mature theme, sexually explicit content published or broadcast over the Internet including graphics, live feeds, interactive performances and virtual activities; content provided on web search portals, i.e. extensive databases of Internet addresses and content in an easily searchable format; statistics or other information, including streamed news; other on-line content not included above such as greeting cards, jokes, cartoons, graphics, maps*

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

This service code does not include:

- software downloads, cf. 998434
- **on-line gambling services**, cf. 999692
- adult content in on-line newspapers, periodicals, books, directories, cf. 998431.” unquote

- v. For online gambling services, GST is paid at the rate of 28% under Chapter Heading 999692 that pertains to Gambling and betting services including similar online services. The Explanatory Note of this Heading to Scheme of Classification of Service states as follows:

Quote “This service code includes:

- i. on-line gambling services*
- ii. on-line games involving betting/gambling.*
- iii. off-track betting,*



- iv. casino and gambling house services*
- v. gambling slot machine services vi. other similar services.”*

vi. Section 7 of the CGST Act, 2017 provides for the scope of supply. Section 7(2) of CGST Act, 2017 specifies that activities or transactions listed in Schedule III shall neither be treated as supply of goods nor supply of services. It states as follows:

“(2) Notwithstanding anything contained in sub-section (1),—

a. activities or transactions specified in Schedule III; or

b. such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services.”

vii. **Serial No. 6 of Schedule III** of the Central Goods and Service Tax Act, 2017 treats actionable claims, other than in the case of lottery, betting or gambling, neither as supply of goods nor supply of services. It states as follows:

“ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES

1...

2...

3...

4...

5...

6. Actionable claims, other than lottery, betting and gambling.”

viii. As per the current provisions under CGST Rules, in case of lottery, betting, gambling and horse racing, Rule 31A of the CGST Rules, 2017 provides for the value of supply wherein it states as follows:

“(3) The value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator.”

ix. A Group of Ministers (GoM) was constituted by the GST Council in 2021 whose terms of reference were as follows:

- To examine the issue of valuation of services provided by Casinos, race courses and online gaming portals and taxability of certain transactions in a casino, with reference to the current legal provisions and orders of Courts on related matters.
 - To examine whether any change is required in the legal provisions to adopt any better means of valuation of these services.
 - To examine the administration of such valuation provision if an alternative means of valuation is recommended
 - To examine impact on other similarly placed services like lottery.
- x. The government has created a distinction between online gaming and gambling and betting while determining rate of tax and value of supply, however the government has been constantly facing the issue of how to determine what constitutes online gaming and gambling and betting. This has also resulted into multitude of litigations and tax uncertainty for both the government as well as the industry.

7. Litigations and current issues on taxation of Online Gaming

- a. Due to lack of principles or law distinguishing online gaming with gambling and betting, the tax department in past few years have witnessed multiple litigations pertaining to the applicability of rate of tax and valuation of supply in online gaming.
- b. In 2019, a Criminal Public Interest Litigation was filed by the Petitioner seeking the following:
- A criminal action to be taken against Dream11 for conducting illegal operations of betting/gambling/wagering.
 - The widespread evasion of GST in calculated and systematic manner causing huge loss to the exchequer in utter regard of the GST Law and rules made thereunder.
- c. The Bombay High Court dismissed the petition holding that Dream11 format of fantasy sports is a game of skill and not betting, gambling and wagering. Further the court with respect to the issue of taxation held as follows:
- “Since the Online Fantasy Sports Gaming of respondent No.3 are not gambling services, the respondent No. 3 is not in error in paying GST under this entry for its on-line gaming activities, by paying applicable GST @ 18%.”*
- d. The above judgment was challenged before the Hon’ble Supreme Court by:



- Varun Gumber in [SLP (Criminal) Diary No. 35191 of 2019] which was dismissed on October 4, 2019 praying to pass an order that the High Court has erroneously concluded that fantasy sports is a game of skill.
- Gurdeep Singh Sachar in SLP (Criminal) Diary No. 43346 of 2019 and Union of India in SLP(Criminal) Diary No. 41632 of 2019 praying to dismiss the order passed by the Bombay High Court which was dismissed on December 12, 2019.
- Union of India filed a clarification application in Misc. Application No. 502 of 2020 in the above SLP praying to modify the order dated December 12, 2019 passed by the Supreme Court to permit Union of India to file a review even with respect to issue of whether fantasy sports amounts to gambling/betting in order to decide the issue of GST. The clarification application was dismissed stating that:

“It is reiterated that in accordance with our order dated 13.12.2019, the only scope of the review filed in the Bombay High Court is with respect to GST and not to revisit the issue as to whether gambling is or is not involved.”

- State of Maharashtra in *State of Maharashtra vs. Gurdeep Singh Sachar vs Ors.* in Special Leave Petition (Criminal) Diary No. 42282 of 2019 and the order was passed staying operations of the Bombay High Court judgment until further orders.
 - However, multiple other judgments of the Supreme Court have held that fantasy sports offered by Dream11 is a game of skill and does not amount to gambling and betting.
- e. A matter is also pending before the Karnataka High Court in the case of Gameskraft Technology Private Limited v. Directorate General of Goods and Service Tax⁴⁷ on the issue of whether the game of rummy played on the operators platform is a game of skill or betting and gambling and the issue of applicability of tax.
- f. The Hon’ble High Court of Rajasthan in the matter of Myteam11 Fantasy Sports Pvt. Ltd. vs. Union of India⁴⁸ observed that the issue regarding the nature of format of Fantasy Sports similar to that of Dream11 is no longer res-integra and has been decided by catena of the authorities to hold that the said fantasy sports format are game of skill and would not be covered as games of chance or gambling. The Hon’ble Court while

⁴⁷ Writ Petition No. 19561 of 2022.

⁴⁸ D.B. Civil Writ Petition No. 1100/2023



determining the allegation that petitioner, by undertaking activities in the form of betting, avoided tax, observed

“11. In view of the totality of the facts and circumstances of the case, we are prima facie satisfied that some of the games offered by the petitioners online have already been held to be games of skill rather than that of chance or that of betting/gambling. This when the matter is so settled by various Courts, the issuance of the impugned show cause notice is nothing but an abuse of the process of law.”

- g. Once the game is a game of skill, it is ipso facto, outside the purview of betting and gambling, and thus in any event are outside the purview of the exception carved out for betting and gambling in Entry 6 of Schedule III of the CGST read with Section 7 of the CGST Act.
- h. The draft IT Rules by MeitY, with the mandate to legislate on issues related to online games, has clearly defined “online games” by narrowing the scope to skill-based games i.e games which are not gambling and betting. With close to 20,000 games across the spectrum with several game formats, and business & revenue models (entry fee, subscription model, in-app purchases, etc), and the size & scale of the gaming industry, the clarity and distinction between online gaming and gambling & betting under IT rules to be certified by the Self Regulatory Bodies will improve ease of tax administration.

8. Canons of Taxation

- a. Before delving into formulation of tax policy for online gaming and gambling and betting, it is important to look into the principles of taxation that are the basis of building any tax policy in India.
- b. The principles of taxation has a long history starting from Kautilya’s “Arthashastra” that enunciated set of principles of taxation remarkably similar to modern day criteria first formulated by Adam Smith as “Canons of taxation” in his Wealth of Nations. Adam Smith in his famous book ‘Wealth of Nation’ presented 4 canons of taxation which are also commonly referred to as the Main Canons of Taxation. They are as follows:
 - i. Canon of equality or equity: The Canon of equality states that the burden of taxation must be distributed equally or equitably in relation to the ability of the taxpayers.

- ii. Canon of Certainty: This canon argues that the tax which an individual has to pay should be certain and not arbitrary with respect to the time of payment, the manner of payment, the quantity to be paid (tax liability) etc.
 - iii. Canon of Economy: This canon implies that the cost of collecting a tax should be as minimum as possible. Any tax that involves high administrative cost and unusual delay in assessment and high collection of taxes should be avoided altogether.
 - iv. Canon of Convenience: According to this canon, taxes should be levied and collected in such a manner that it provides the greatest convenience not only to the taxpayer but also to the government.
- c. Some modern writers such as Charles Francis Bastable (Irish classical economist:1855–1945) have also provided following additional canons of taxation:
- i. Canon of Productivity: A tax is said to be a productive one only when it acts as an incentive to production. Accordingly, this canon implies that a tax must yield sufficient revenue and not adversely affect production in the economy.
 - ii. Canon of Elasticity: According to this canon, an ideal system of taxation should be fairly flexible in nature in accordance with the requirements of the country. Flexible taxes are more suited for bringing social equality and achieving equal distribution of wealth.
 - iii. Canon of Simplicity: The system of taxation should be made as simple as possible as complicated tax is bound to yield undesirable side-effects. In other words, every tax must be simple and intelligible to the people so that the taxpayer is able to calculate without any difficulty.
 - iv. Canon of Diversity: This canon simply implies that taxation must be dynamic which means that there should be a multiple tax system of diverse nature rather than having a single tax system. A dynamic or a diversified tax structure will result in the allocation of burden of taxes among the vast population resulting in a low degree of incidence of a tax in the aggregate.
 - v. Canon of Expediency: This canon states that a tax should be determined on the ground of its economic, social and political expediency.

9. Benefits of a clear tax policy for online gaming:



a. Prevent revenue leakage due to misclassification :

- i. As noted above, legally and factually games of skill are distinct from gambling/betting. The IT rules clearly provide for certification of games and create clear distinction between online gaming and gambling/ betting. The regulatory framework by MeitY will improve the ease of tax administration as well and prevent revenue leakage.
- ii. Further, clubbing game of skill with gambling/betting, even for the purposes of GST alone would actually and factually have the effect of nullifying the Hon'ble Supreme Court and High Court orders and altering the constitutionally protected position of the online skill gaming industry to an activity that is *res extra commercium* and not entitled to constitutional protection.
- iii. A lack of classification and high taxation regime for the legitimate industry will result in leakage of thousands of crores in tax revenue as users may shift to illegitimate offshore and grey market operators who pay no taxes in India, as evidenced by studies in other countries. The high prevalence of Indian users already engaging on offshore betting platforms is evident from various reports on the volume of revenues being generated on the offshore platforms.

b. Prevent multitude of litigations :

- i. Due to the absence of a clear distinction between online gaming and gambling and betting, there have been multitude of litigations as noted in Chapter 5. The large number of tax litigations leads to overburdening of the judiciary and consequential delay in resolving these disputes. Tax litigations further add stress to budgetary collections.
- ii. Protracted tax litigation also causes a deterrent in creating a favorable economic environment, both by way of litigation costs and uncertainty created regarding the incidence of tax. A backlog of tax cases signals difficulties in doing business which drives away investment.

c. Tax certainty for revenue growth:

- i. As noted above, under pre-GST regime, online gaming and gambling and betting were treated distinctly and different treatment was applied to both the categories. Further, the online gaming industry since a decade has been paying service tax on



Gross Gaming Revenue i.e. platform fees and nothing factually has changed in the operations of such platforms. **The legitimate expectation of the online skill gaming industry would be to have certainty in terms of paying tax similarly as to what they have been paying since last decade.**

- ii. Even Worldwide, the levy of VAT / GST is confined to the GGR/platform fees in majority of countries such as the US, UK, Australia etc. The fitment committee has earlier also acknowledged that GGR is internationally prevalent practice for taxation and the value of supply may be fixed as GGR (in the 37th GST Council Meeting Agenda Volume 3, Annexure V, SI No. 4 - reproduced below)

“The value of supply may be fixed as Gross Gaming Revenue (GGR) which is internationally prevalent. Tax rate to be suitably decided or the rate applicable be clarified. Gross Gaming Revenue (GGR) is the amount wagered minus the winnings returned to players (Stakes minus winnings).”

- iii. Any change in the taxation regime that results in overburdening the legitimate industry with more taxation may result in an unsustainable market for the industry and many small operators may be forced to exit the market. This may hamper revenue growth in the longer run as the industry may die out soon. This is not in consonance with the vision of PM and the AVGC task-force constituted by the government.

d. Key to scaling up Venture Capital and Private Equity Investment:

- i. The cumulative worth of investments in Indian gaming companies is today more than Rs.20,000 crore⁴⁹. Several leading investors - within India and outside - have made significant investments into Indian gaming startups, particularly those in their early and middle stages of growth.
- ii. Investors are, therefore, wary of regulatory uncertainty that could potentially lead to value deterioration. Furthermore, the sustained inflow of investments, which is crucial to holistic growth of India’s startup ecosystem, is contingent on regulatory certainty and a fair and proportionate tax regime. To this effect, the Government of India has constituted an Expert Committee, under the Chairmanship of Mr. M Damodaran, Former Chairman of SEBI, to examine and suggest appropriate measures to address regulatory and other issues to enable scaling up investments by Venture Capital and Private Equity investment.

⁴⁹ <https://www.assochem.org/uploads/files/Online%20gaming%20-Impact%20on%20the%20industry.pdf>

10. Recommendations

- a. Taking the above into consideration, we recommend a progressive, stable and comprehensive GST tax policy for online gaming that is in consonance with the principles of taxation and international best practices, where the basis for calculation of GST is the gross gaming revenue and not the total consideration.
- b. Online gaming to be treated distinctly from gambling and betting for taxation purposes as has been held by various courts. The IT rules also provide for a distinction between online gaming and gambling/ betting including the proposed amendments to income tax act which provide for separate provisions for taxation of online gaming.
- c. A task force may be set up under the Ministry of Finance along with experts from academia, industry etc. to Comprehensively study the taxation issues faced by the legitimate online gaming industry to ensure growth of tax revenue as well as responsible growth of the legitimate industry;
- d. Collaborate with the self-regulatory body for online gaming to determine what constitutes a game of skill and what constitutes as gambling/ betting as laid out in the IT Rules;
- e. May consider increasing the GST on gross gaming revenue from 18% to 28%. This would result in a 55% increase in tax revenue while not creating an adverse impact on the growth prospects of the online gaming sector. It is also to be noted that a deviation from current practice of taxing on gross gaming revenue to total consideration will lead to a 1000% growth in tax burden and render the entire online gaming industry unviable.
- f. For curbing the offshore betting and gambling activity and revenue leakage, a -task force with representatives from the RBI, Central Board of Indirect Taxes and Customs, Financial Intelligence Unit and the Department of Revenue Intelligence may be constituted with the mandate to:
 - Evaluate the misdeclaration of Liberalised Remittance Scheme for the purpose of transacting on offshore betting and gambling platforms;
 - Assess the tax evaded by such platforms in the last 5 years under the GST regime;
 - Propose measures to banks for ensuring no abuse of Liberalised Remittance Scheme specifically for remittances made to such platforms;
 - Propose measures for recovery of GST dues by such platforms.