



Roadmap for Resolving Retrospective Taxation **on Online Gaming**

January 2024

EXECUTIVE SUMMARY

“A retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing today by rules that will be enacted tomorrow is to talk in blank prose.” - Lon Fuller, The Morality of Law

The quote by American Legal Philosopher, Lon Fuller aptly covers the challenges that a retrospective application of law creates for the rule of law in a country. India has gone through its fair share of learning curve on retrospective taxation and the ripple effect it can have on investor sentiment, viability of an entire industry, India's global image & tax certainty.

To this end, the Taxation Laws Amendment Act (2021) was brought in to settle retrospective tax claims estimated to be over INR 90,000 crores in 2021 for following reasons as per the legislative note:

- “invited criticism from stakeholders as this militate against the principle of tax certainty;
- has not been complementing the reforms that were introduced in the financial and infrastructure sector to create a positive environment for investment in the country;
- damaging India's reputation as an attractive destination;
- were proving to be a “sore point” with potential investors;
- and needs to be nullified to attract foreign investments as these investments play an important role in promoting faster post pandemic economic recovery, growth and employment.”

Online gaming industry is now faced with a similar issue, albeit under indirect tax regime i.e the GST. The Indian online gaming industry has witnessed remarkable growth, reaching revenues of INR 16,428 crores in FY23, with projections to hit INR 33,243 crores by FY28, according to a report by EY. However, recent regulatory changes and tax amendments have introduced challenges that demand careful consideration.

The sector, hosting 1,400 startups with INR 22,931 crores in investments between FY20 and FY24 YTD, is a significant contributor to India's economic landscape. In response to the industry's rapid growth, the government introduced significant regulatory changes, including amendments to the Income Tax Act, 1963, a co-regulatory framework through

amendments to IT Rules 2021, and a new GST taxation regime from October 1, 2023. The amendments to the provisions in the GST Acts specific to online money gaming has triggered a series of Show Cause Notices to 71 online gaming companies so far for the period from July 2017 to September 2023 amounting to over INR 1.12 lakh crores, not including penalty up to 100% of the tax demand & interest.

This report aims to provide a comprehensive understanding of the retrospective taxation challenges faced by the Indian online gaming industry and recommend potential solutions to resolve the issue, given India's learnings and history on retrospective taxation. It covers the industry overview, regulatory changes based on decisions of GST Council, current litigations, industry impact, potential resolutions, and recommendations for a balanced resolution of the issue.

The issue of GST taxation on Online Gaming has been a major concern for the industry and investors. The GST Council discussions, spanning multiple meetings, have oscillated between taxing online gaming at 28% on the full face value of bets or 28% on the Gross Gaming Revenue (GGR). The recent recommendation to uniformly tax casinos, horse racing, and online gaming at 28% has raised industry concerns about operational viability under such a tax burden.

The retrospective tax notices have led to a wave of litigations, with 71 show-cause notices issued to numerous online gaming platforms. Currently, 12 matters are pending before the High Courts and Supreme Court. The industry contends that the retrospective tax demands may drive startups to insolvency, causing stagnation and substantial revenue loss to the exchequer. Illegitimate and offshore gaming platforms continue to pose risks to user safety and significant GST revenue leakage.

To address these challenges, potential options for resolution include adjudication, litigation, and seeking clarification from the GST Council. Seeking adjudication involves a detailed assessment procedure, while litigation allows online gaming platforms to seek constitutional remedies through writ petitions. Alternatively, a clarification by the GST Council on an "as-is" basis could regularize past practices and bring much-needed clarity to the industry.

To this end, the Report evaluates the recent developments in the indirect taxation regime pertaining to the online money gaming industry, its corresponding impact and highlights how a clarification by the GST Council on an "as-is" basis to regularize past practices of the

industry may emerge as mutually beneficial for the industry and the government. It is to be noted that such an exercise has been done in the past as well to give relief to a sector. More importantly, such a measure will help in delivering the right signal to the investor community and ensure that the Government of India's revenue goals from the sector remain intact while avoiding protracted and expensive litigation. It would be prudent to rely on the experience in the "Vodafone Saga" wherein the Government of India rightly amended its direct tax laws to provide certainty and clarity to the telecom sector even though it led to writing off a significant tax demand. The consequent impact of such a move can be witnessed by the fact that India is today seen as an attractive investment destination and is consistently improving its "ease of doing business" rankings.

In conclusion, the report recommends that it is imperative for the GST Council to expeditiously address and resolve the prevailing issues in the industry on an "as-is" basis. The significance of such a resolution extends beyond mere regulatory clarity, impacting crucial aspects such as investments, job creation, Ease of Doing Business (EoDB), valuations, and overall economic growth. A swift and comprehensive resolution by the GST Council will be essential and critical for fostering a conducive environment for tax certainty.

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I. Background:

1. The Indian online gaming industry has grown at a CAGR of 28% over the last 3 years to reach INR 16,428 crore in FY23 and, is expected to grow to INR 33,243 crore by FY28, at a CAGR of 15%, as per a report by EY. Boasting a robust economic landscape, it features 1,400 startups and has attracted INR 22,931 crore of investments between FY20 and FY24 YTD. Notable growth in recent years, marked by new startups, three gaming unicorns, strategic exits, and a successful IPO, is driven by the Real Money Gaming (RMG) segment, fostering innovation in non-RMG and eSports as well. Further, with 65-70% of gamers under the age of 34, the user base is projected to grow from 42.5 crore in FY23 to 53.8 crore by FY28 at a 5% CAGR. The industry currently sustains around one lakh jobs, with an expected increase to 250,000 jobs by 2025, primarily consisting of high-skilled roles. Further, from FY24-FY28, the online gaming sector is poised to exceed the nation's GDP growth estimate of 6-7 percent.
2. In the past year, India witnessed significant regulatory changes in the online gaming sector. The Finance Act, 2023 amended the Income Tax Act, 1961 introducing distinct sections for online gaming taxation. The Government vide Amendment to Allocation of Business Rules on December 23, 2022 allocated “online gaming” matters to the Ministry of Electronics and Information Technology (“MeitY”), appointing it as the nodal ministry. Further, in April 2023, MeitY implemented a co-regulatory framework for online gaming through amendments to the Information. Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“IT Rules 2021”), involving independent self-regulatory bodies in the approval process. A new taxation regime by way of amendments to CGST Act, 2017 and IGST Act 2017 has been brought from 1st October 2023 with 28% taxation on the deposit amount in the case of Casinos, and online money gaming. A new classification heading of CTH 9807 was also introduced for online real money gaming, casinos and horse racing etc. Specific provisions for the valuation of online gaming supplies were inserted into the CGST Rules, 2017.
3. Regulatory uncertainty including GST has been one of the major concerns of the online gaming industry & investors. This issue was under discussion by the GST Council since the 33rd GST Council meeting.

- a. In February 2019, the 33rd GST Council Meeting discussed lottery tax rates, proposing the inclusion of online gaming in the GoM's terms to address multiple taxation issues.¹ In June 2019, the 35th GST Council² expanded the GoM's scope to include issues like casinos and online gaming, recommending referral to the fitment/law committee. By December 2019 (38th GST Council Meeting)³, pending matters on online gaming, casinos, and horse racing were directed to the Law/Fitment Committee, with industry representation advocating taxation based on online platform fee, value after prize distribution.
- b. One of the most pivotal moments towards resolution of the GST issue on online gaming was the constitution of a Group of Ministers (GoM) vide Office Memorandum dated 24 May, 2021 to address taxation issues related to GST on casinos, horse racing, and online gaming⁴. This GoM was reconstituted on 10 February, 2022 with Chief Minister of Meghalaya as Convener of the GoM to examine, discuss and suggest any changes to be introduced in the legal regime of valuation services provided by casinos, race courses and online gaming.
- c. In June 2022, the GoM submitted its initial report, prompting discussions at the 47th GST Council meeting.⁵ The GoM in its report intended to bring in uniformity in the rates and valuation while understanding the method of functioning of online gaming, horse racing and casino, as these were different activities.
- d. However, due to unresolved debates on whether online gaming, horse racing, and casinos should be taxed at 28% on the full face value of bets or on the Gross Gaming Revenue (GGR), the matter was revisited. The GoM's second report in November 2022, presented at the 50th GST Council meeting (July,

¹<https://gstcouncil.gov.in/sites/default/files/Signed%20Minutes%20-%2033rd%20GST%20Council%20Meeting.pdf>

²<https://gstcouncil.gov.in/sites/default/files/Minutes/Signed%20Minutes%20-%2035th%20GST%20Council%20Meeting.pdf>

³ https://gstcouncil.gov.in/sites/default/files/Minutes/Signed_Minutes_38th_GST_Council_Meeting.pdf

⁴<https://gstcouncil.gov.in/sites/default/files/GoM-Dynamic/OM%20dated%2011.06.2021GoM%20Casinos.pdf>

⁵ https://gstcouncil.gov.in/sites/default/files/Agenda/47_MINUTES.pdf

2023), recommended that all three entities—Casino, Horse Racing, and Online Gaming—should be taxed uniformly at the rate of 28%. This raised concerns about the viability of operating under such a high tax burden. Among the participating states, three distinct options emerged:

- Option 1 - Gross Gaming Revenue (GGR): States such as Goa, Gujarat, Tamil Nadu, Telangana, and Meghalaya supported this option. They recognized the crucial distinction between games of skill and games of chance, influencing their recommendation for the valuation of online gaming based on GGR.
- Option 2 - Full Face Value: Uttar Pradesh, West Bengal, and Sikkim leaned towards the full face value approach.
- Option 3 - Abatement: Maharashtra.

e. Despite the absence of consensus, the 50th GST Council decided-

“The Council decided to clarify that actionable claims supplied in Casinos, Race course and Online gaming are also under the purview of GST to be taxed at the rate of 28% on full face value irrespective of whether the activities are a game of skill or chance. Accordingly, the law may be amended to provide clarity on the matter.”

f. Further, during the 50th GST Council meeting⁶, it was proposed to amend the law to address the ambiguity in the taxation of online gaming activities. Online gaming companies have asserted in Courts that their services constitute actionable claims which are exempted from GST under Schedule III of the CGST Act, 2017. To eliminate interpretational uncertainties, the Council recommended amending Entry 6 of Schedule III to explicitly include Casino, Race Course, and Online Gaming alongside Lottery, Betting, and Gambling. The amendment aims to remove the exemption for online gaming, subjecting them to a 28% GST rate on the full face value, regardless of whether they involve skill or chance. The aim of the legislative amendment was to seek legislative clarity on the taxation, rate, and value aspects of actionable claims in the specified domains.

⁶ https://gstcouncil.gov.in/sites/default/files/Minutes/Minutes_of_50th.pdf

- g. The 51st GST Council meeting in August 2023 further solidified these concerns⁷. The Council not only reiterated the 28% tax rate but also recommended amendments to the CGST and IGST Acts for taxation of online gaming. Further, to achieve tax parity and eliminate repetitive taxation, it was recommended that the valuation for online gaming and casinos shall be the deposit amount and not the contest entry amount.
4. The clarity was imperative for the online gaming industry, since in the Service Tax regime, online gaming and gambling/betting were treated distinctly. While betting and gambling were in the negative list, online gaming fell under the definition of Online Information Data Access or Retrieval Services (OIDAR):
 - a. 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;”
 - b. Before the 101st Constitutional Amendment, taxes on betting and gambling were 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.”
 - c. 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.⁸ Further, as per Section 65(44) of Finance Act, 1994, service excludes “actionable claim”.

⁷ https://gstcouncil.gov.in/sites/default/files/Minutes/Minutes_of_51st.pdf

⁸ The Assam Amusements and Betting Tax Act, 1939; The Delhi Entertainment and Betting Tax Act, 1996; The Mysore Betting Tax Act, 1932; The Maharashtra Betting Tax Act, 1925; The Tamil Nadu Betting Tax Act, 1935; The Telangana Horse Racing and Betting Tax Regulations, 1358f; The Uttar Pradesh Entertainment and Betting Tax Act, 1979; The Uttarakhand Entertainment and Betting Tax Act, 1979; The Andhra Pradesh Horse Racing and Betting Tax Regulation 1358 F

The definition of online information data access or retrieval services (OIDAR) as defined under rule 2(1)(ccd) of Service Tax Rules, 1994, states as follows:

“(ccd) “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 via 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, etc.);

(vi) digital data storage; and

(vii) online gaming;”

5. When the GST regime was introduced in July, 2017, the industry continued to pay GST on the GGR, as service providers. Further, online gaming continued to be classified under OIDAR under section 2(17) of the IGST Act. In January 2018, the new concept of tax on actionable claims of betting, gambling and horse racing was introduced by amendments and introduction of Rule 31A of CGST Rule 2017. However, since online skill gaming did not constitute betting and gambling as held by various Courts, the industry continued to pay GST @18% on GGR or the platform fee.

II. CGST, IGST, SGST Amendment Acts & Rules, 2023

6. Based on the recommendations of the 50th and the 51st GST Council, amendments including definition of “specified actionable claims”, “online gaming”, “online money gaming”, Rule 31B, rate notification, etc., were introduced for CGST Act & IGST Act.

Similar amendment as that of CGST Act was introduced in the SGST Acts by the states. The details are annexed herewith as “**Annexure - A**”.

III. Show Cause Notices to Online Gaming Industry

7. In 2022, Directorate General of Goods and Services Tax Intelligence (“DGGI”) issued a Rs.21,000 Crore GST notice against Gameskraft Technologies Pvt. Ltd., an online gaming platform.
8. The Hon’ble High Court of Karnataka, vide order dated May, 2023 quashed the show cause notice (SCN) to Gameskraft Technologies for deposit of GST due totalling Rs. 21,000 crore by relying on previous judgments, and affirmed that rummy is a game of skill, distinct from betting and gambling. The Court emphasized that both online and offline rummy are skill-based and not subject to CGST on full face value. The court clarified that games predominantly skill-based, even with an element of chance, are not considered gambling, extending this principle to various online games.
9. Show cause notices have also been issued to the following online gaming platforms on the central and common issue alleging that online gaming platforms shall pay tax in accordance with Rule 31A of the CGST Rules, 2017.
 - a. Witzeal Technologies Pvt. Ltd. vs. Union of India⁹

On 20th September, 2021, Punjab and Haryana High Court directed the GST department to not take any coercive action against an online gaming operator, Witzeal Technologies Private Limited, till an empowered Group of Ministers (GoM) set up to look into online gaming, casinos and lotteries submits its report.
 - b. Myteam11 Fantasy Sports Private Limited vs. Union of India¹⁰

Order dated 18th January, 2023 was passed by the Hon’ble Rajasthan High Court staying the SCN under Section 74(1) of the CGST, 2017 on the basis of previous Hon’ble High Courts and Supreme Court’s order upholding fantasy sports to be games of skill not amounting to betting and gambling. The SCNs alleged misclassification of supply as service instead of actionable claims which are goods and by undertaking activities in the form of betting has avoided tax.

⁹ CWP No. 18780 of 2021

¹⁰ D.B. Civil Writ Petition No. 1100/2023

c. M/s Probo Media Technologies Private Limited vs. Union of India¹¹

Tax authorities have issued a notice of Rs 1,500 crore to M/s Probo Media Technologies Private Limited, accusing it of misclassifying its services. Order dated 25th May, 2023, Punjab and Haryana High Court directed the State GST department to not initiate any coercive action against the online gaming platform.

10. On August 18, 2023, an amendment to the CGST Act, 2017 was enacted, effective from October 1, 2023, explicitly incorporating actionable claims supplied in Casinos, Race Courses, and Online Gaming within the scope of GST. The amendment stipulates that these activities are to be taxed at a uniform rate of 28%, aimed at offering clarity in GST regulations, particularly concerning the valuation and taxation of online money gaming.
11. However, on September 6, 2023 the Supreme Court stayed the Karnataka High Court's decision that had set aside the show cause notice issued by the GST department.
12. Following the amendments to the GST Acts on including online money gaming in specified actionable claims and the vacation of stay by the Hon'ble Supreme Court, DGGI has raised tax demand for the period 2017-2023 vide issuance of SCNs to several online gaming platforms. As per the response to a Parliament question, notices have been issued to 71 online gaming companies so far, amounting to Rs 1.12 lakh crore.¹²
13. Further, it appears from various petitions filed before several courts by the online gaming companies that the notices have been issued under section 74, CGST Act, 2017

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“Section 74 - Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement

¹¹ LQ/PunjHC/2021/14850

¹² <https://indianexpress.com/article/business/economy/gst-evasion-of-rs-1-51-lakh-crore-detected-till-october-71-notices-to-online-gaming-companies-9056122/>

or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

.....

Explanation 2.*For the purposes of this Act, the expression suppression shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer....*

14. This has triggered a wave of litigation by various online gaming companies across multiple courts on the following issues:

- a. Whether offline/online games which are mainly/preponderantly/substantially based on skill and not on chance, whether played with/without stakes tantamount to “gambling or betting” as contemplated in Entry 6 of Schedule III of the GST Act, 2017?
- b. Whether Rule 31A(3) of the CGST Rules, 2017 is *ultra vires* of Section 2(31), Section 7, Section 9, and Section 15 of the CGST Act?
- d. Whether Section 15(5) of the CGST Act is *ultra vires* Article 246A, Article 366(12A) of the Constitution of India and Section 15(1) and 15(2) of the CGST Act?
- e. Whether the supply of actionable claims, even if considered, is by the users & not the platforms?

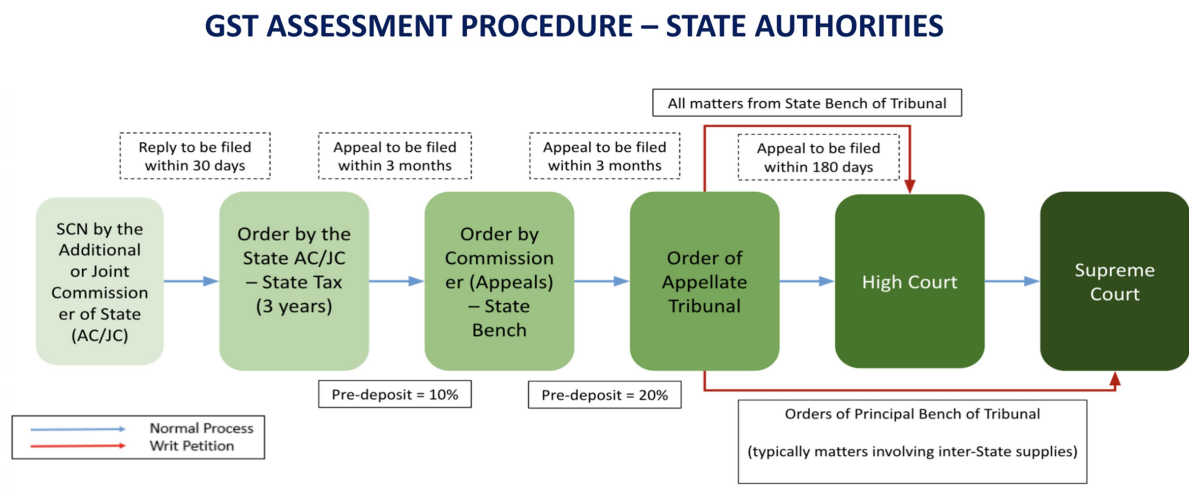
15. The details of the current pending litigations on the issue of show cause notices issued by the DGGI or other relevant state departments are annexed herewith as “**Annexure - B**”.

Litigations and current issues on retrospective taxation of Online Gaming

16. The primary legal argument lies in the fundamental distinction between games of skill and games of chance. The settled jurisprudence in India recognizes this distinction, exempting games of skill from the ambit of gambling and betting.
17. However, the SCN issued by the tax department challenged this classification, terming online games as “betting and gambling” and therefore subject to the higher GST rate applicable to gambling and betting.
18. The increased tax burden by way of amendments and ongoing litigation has had a significant impact on the Indian online gaming industry. Many companies have been forced to scale back operations, lay off employees, and re-evaluate their business models. The potential for foreign investment has dwindled, and the industry's growth has been significantly hampered. Additionally, the retrospective tax demands have the potential to damage India's reputation as an investor friendly destination.

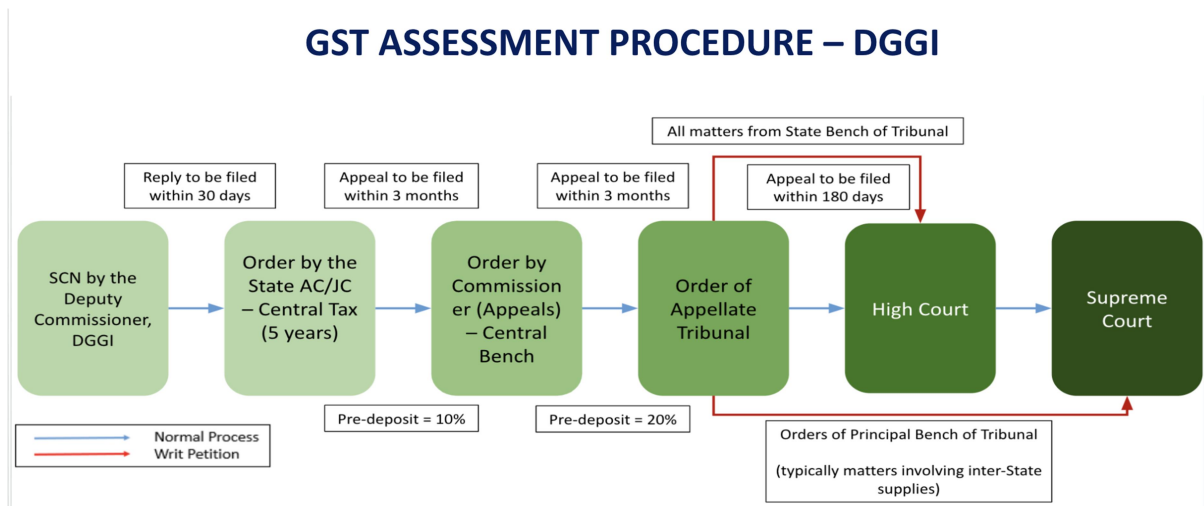
IV. Potential Options for Industry & Authorities to resolve the issue

A. Adjudication



19. GST assessment procedure before state authorities involves filing a reply to the SCN within 30 days, followed by adjudication by the Additional or Joint Commissioner of State (AC/JC) within 3 years (in case of adjudication before DGGI, the period extends to 5 years). An appeal can then be made to the Commissioner (Appeals) within 3

months with a pre-deposit of 10%. Subsequently, an appeal to the appellate tribunal can be made within 3 months with a pre-deposit of 20%.



B. Litigation

20. Alternatively, the online gaming platforms have the option to seek constitutional remedy through writ petitions (“WP”), filing them before either the High Court or the Supreme Court.

21. In the scenario of filing a WP before the High Court, the company faces three potential options:

- Option 1 - involves seeking a stay;
- Option 2 - entails the dismissal of the appeal; and
- Option 3 - pertains to the HC passing a final order.

22. In cases where the decision of the High Court is contested, an appeal can be elevated to the Hon'ble Supreme Court. The entire duration of this procedural journey may span across several years, depending on the timelines associated with each stage and potential legal delays.

23. The issuance of SCNs by the DGGI and other state departments has already, as mentioned above, triggered numerous legal battles across various High Courts and the Supreme Court. This ongoing legal battle is indicative of the complexities surrounding

the taxation of online gaming and the divergent views on the classification of activities as either games of skill or games of chance.

24. **The fact that, as of now, 71 SCNs appear to have been issued, with only a fraction currently before the Courts, suggests that the volume of litigation is likely to significantly escalate. The evolving legal landscape, coupled with the nuanced nature of the legal questions at hand, implies that the resolution of these disputes could be a time-consuming process.**
25. The anticipation of a manifold increase in litigation further underscores the need for a comprehensive and definitive legal and policy framework to address the complexities surrounding the taxation of online gaming.

C. Clarification by GST Council

26. The concept of an "as-is" basis involves regularizing past practices to avoid disputes with the tax department. This approach is particularly relevant in cases of ambiguity, genuine doubts, and evolving interpretations. By applying this principle to the online gaming industry, the GST Council can provide much-needed clarity on the applicability of GST for the period before amendments, bringing an end to the uncertainty that has plagued the sector.
27. Several instances of amendments in the GST rate or exemptions granted for past periods through modifications in the Finance Act, along with clarifications provided through circulars before recommendations and decisions established in GST Council Meetings.

V. History of Interventions & Clarifications issued by GST Council & Tax Authorities

A. Regularization of issues on "as is" basis during the GST period.

28. Various GST clarifications have been issued to regularize matters on an "as-is" basis for raw cotton, desiccated coconut, biomass briquettes, plates, and cups made from areca leaves, as well as ice cream parlors. These clarifications address past periods, resolving interpretational issues and ensuring compliance. The GST Council's recommendations as well as the emphasis to regularize to prevent litigation, fostering clarity and

consistency in tax treatment for different commodities. The details are annexed herewith as “**Annexure - D**”.

B. Regularization of issues on "as is" basis during the pre-GST period.

29. Several directives issued by the Central Government reflect a consistent adherence to the "as-is" basis principle. During specified periods, excise duty on various goods, such as jute intermediates¹³, bicycle parts¹⁴, reprocessed plastic granules¹⁵, and more, is not mandatory if it was not levied according to the prevailing practice. This principle is extended to diverse sectors, including agricultural grade zinc sulphate¹⁶, cocoa products¹⁷, and aerated waters¹⁸. The government recognizes and respects historical non-levies, exemplifying a commitment to maintaining existing practices during specific periods.
30. Furthermore, from June 16, 2005, to February 1, 2017, various notifications exempted service tax on specific services, emphasizing an "as-is" basis. This included membership fees by industry associations¹⁹, road management²⁰, repair of non-commercial government buildings²¹, Indian Railways services before October 1, 2012²², and services by the Employees State Insurance Corporation before July 1, 2012²³. Additionally, exemptions were granted for services related to irrigation works²⁴,

¹³ Notification No.33/2002-Central Excise (N.T.) dated 30.9.2002

¹⁴ Notification No. 15/2003-C.E. (N.T.), dated 11-3-2003

¹⁵ Notification No. 55/2003 - Central Excise (N.T.) dated 12.6.2003

¹⁶ Notification No. 13/2009-C.E. (N.T.), dated 5-6-2009

¹⁷ Notification No. 31/2005-C.E. (N.T.), dated 27-7-2005

¹⁸ Notification no.20/2000- C.E.(NT), dated 6-3-2000

¹⁹ Section 96J Special Exemption from service tax in certain cases; Inserted by the Finance Act, 2011 w.e.f. 8.4.2011

²⁰ Section 97 Special provision for exemption in certain cases relating to management, etc., of roads; Inserted by Finance Act, 2012 w.e.f 28.5.2012

²¹ Section 98 Special provision for exemption in certain cases relating to management, etc, of non commercial government buildings; Inserted by the Finance Act, 2012 w.e.f 28.5.2012

²² Section 99 Special provision for taxable services provided by the Indian Railways; Inserted by the Finance Act, 2013 w.e.f 10.5.2013

²³ Section 100 Special provision for taxable services provided by Employees State Insurance Corporation; Inserted by the Finance (No.2) Act, 2014, w.e.f 6.8.2014

²⁴ Section 101 Special provision for exemption in certain cases relating to construction of canal, dam, etc; Inserted by the Finance Act, 2016, w.e.f. 14.5.2016

construction, and maintenance of specified structures²⁵, airports, and ports, all based on contracts entered into before specific dates. The "as-is" principle continued for services provided by State Government industrial development corporations and Army, Naval, and Air Force Group Insurance Funds during defined periods²⁶. The details are annexed herewith as **“Annexure - E”**.

31. These notifications suggest the legislative intention to acknowledge and accept the existing state of affairs or trade practices prevailing at the time of the notification. Notably, there is a focus on addressing uncertainties and ensuring that past GST payments align with the prevailing legislative framework. The intention is to provide relief and certainty to businesses that face genuine doubts regarding the applicable tax rates during specific periods.

Retrospective Taxation in Direct Tax Regime in India: A Case Study

Background

²⁵ Section 102 Special provision for exemption in certain cases relating to construction of government buildings; Inserted by the Finance Act, 2016, w.e.f. 14.5.2016

²⁶ Section 105 Special provision for exemption in certain cases relating to life insurance services provided to members of armed forces of Union; Inserted by the Finance Act, 2017 w.e.f. 31.3.2017

Retrospective Taxation in Direct Tax Regime in India: A Case Study

In 2012, the Indian government introduced retrospective amendments to tax laws vide amendment to Section 9(1)(i) of the Income Tax Act, 1961. This amendment aimed to tax capital gains arising from the transfer of shares of a foreign company if the underlying assets were located in India.

This move was primarily aimed at addressing concerns related to tax evasion and ensuring that the Indian government received its due share of tax revenue. However, the telecom industry, a vital sector for economic growth and connectivity, had far-reaching consequences, creating an environment of uncertainty and skepticism among investors.

Key Tax Demands:

1. Vodafone International Holdings BV²⁷:

- In 2012, the Supreme Court of India ruled in favor of Vodafone in a case related to the acquisition of Hutchison Essar Limited. However, in response to the judicial decision, the Indian government introduced the retrospective tax amendment in 2012.
- Vodafone faced a retrospective tax demand of Rs 11,218 crores and penalty, creating significant financial strain on the company.

2. Vedanta India Ltd. (Now Vedanta Limited)²⁸:

- Vedanta India Ltd. faced a retrospective tax demand of Rs 20,495 crores (including interest of Rs 10,247 crore) in relation to the Cairn India Ltd. acquisition. The retrospective taxation issue was pivotal in Vedanta's corporate structure and its subsequent merger with Cairn India.

3. Other Companies:

- Earlyguard Limited²⁹, Sanofi³⁰, Vedanta Resources (Richter Limited and Westglobe Limited)³¹ also received retrospective tax demands, amounting to Rs 2,400 crores, Rs 2,000 crores, etc.,

²⁷ taxguru.in/wp-content/uploads/2012/03/Vodafone-International-Holdings-B.V.-Vs-Union-of-India-Anr.-Supreme-Court-of-India.pdf

²⁸ <https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/vedanta-withdraws-cases-against-govt-to-settle-retro-tax-dispute/articleshow/88260048.cms?from=mdr>

²⁹ <https://www.businesstoday.in/latest/economy-politics/story/after-cairn-energy-mitsuis-british-arm-challenges-indias-rs-2400-cr-retro-tax-demand-296489-2021-05-19>

³⁰ <https://economictimes.indiatimes.com/industry/banking/finance/retro-tax-i-t-department-withdraws-sanofi-appeal-from-supreme-court/articleshow/91875989.cms?from=mdr>

³¹ <https://www.vedantaresources.com/MediaDocuments/PR%20on%20Retrospective%20Tax%20on%20Richter%20Holding%20and%20Westglobe%20Ltd.pdf>

Retrospective Taxation in Direct Tax Regime in India: A Case Study

Investor Confidence and Economic Impact:

The imposition of retrospective taxation on the telecom sector led to a decline in investor confidence, deterring foreign direct investment (FDI) in the industry. International investors became wary of India's regulatory environment and its commitment to honoring legal decisions. The negative impact on investor sentiment extended beyond the telecom sector, affecting India's image as an investment-friendly destination.

The retrospective taxation had severe financial implications for the industry which was already facing financial challenges due to intense competition, regulatory issues, and high spectrum costs.

Industry Response and Legal Battles:

The telecom industry responded vehemently to the retrospective taxation, expressing concerns about the unpredictability of the regulatory environment. Several telecom companies, including Vodafone and other industry players, initiated legal battles against the tax demands. These legal disputes added another layer of complexity to an already challenging business environment.

Resolution and Reforms:

In 2021, the Taxation Laws (Amendment) Act was enacted to address some of the concerns related to retrospective taxation. The amendment aimed to provide relief to certain taxpayers by withdrawing retrospective tax demands and providing a mechanism for resolving pending disputes through a dispute resolution committee.

VI. Justification for application of “As-is” basis to retrospective tax demands for the online gaming industry

A. Contrary to statutory provisions and prevailing practice

32. In indirect taxation, both before and after the implementation of the GST, a consistent differentiation has been maintained between betting, gambling, and online gaming while determining the applicable tax rate and the valuation of the supply.

- a. In the Service Tax regime, online gaming and gambling/betting were treated distinctly. While betting and gambling were on the negative list, online gaming

fell under the definition of Online Information Data Access or Retrieval Services (OIDAR).

- b. Even under the GST regime, the laws maintained a clear distinction between online gaming and online gambling services. Online gaming operators paid GST at a rate of 18% on Gross Gaming Revenue/Platform fees, while online gambling services incurred a higher tax rate of 28%. The Schedule III of the CGST Act, 2017, treated actionable claims related to lottery, betting, or gambling as a supply, whereas actionable claim related to skill-based online gaming is neither a supply of goods nor services.

B. Contrary to settled jurisprudence

33. This was also in contradiction to the settled jurisprudence distinguishing between games of chance and games of skill, including games of mere skill. The judiciary has recognized 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.³² 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.

C. Contrary to the legislative intention

34. The Central government had a clear legislative intention to distinguish between Games of Skill and Games of Chance-

- a. Amendment to the Income Tax Act, 1961 - The Finance Bill 2023 provides for distinctive treatment of online gaming from gambling or betting by introducing separate sections 194BA and Section 115BBJ, recognizing online games as a separate and new-age industry. The amendment has distinguished online

³² 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.

gaming from gambling/betting and made separate provisions for the taxation of winnings from online gaming.³³

- b. Inter-Ministerial Task Force (IMTF) Report: The Government of India had constituted an IMTF comprising Secretaries of:
- i. Ministry of Finance (Department of Revenue),
 - ii. Niti Aayog CEO,
 - iii. Ministry of Home Affairs,
 - iv. Ministry of Electronics & Information Technology,
 - v. Ministry of Youth Affairs and Sports,
 - vi. Department for Promotion of Industries & Internal Trade,
 - vii. Department of Consumer Affairs, and
 - viii. Ministry of Information & Broadcasting

The objective and the mandate of the IMTF was to work on regulations for the online gaming industry and identify a nodal ministry to look after the sector.³⁴

The IMTF submitted its final recommendations which included creating a regulatory body to classify online games as based on skill or chance.³⁵

- c. On December 23, 2022, **the Government of India (Allocation of Business) Rules, 1961** have been amended to include “Matters relating to online gaming” via Entry 5A under the heading “Ministry of Electronics and Information Technology (Electroniki aur Soochana Praudyogiki Mantralaya) and the Ministry of Electronics and Information Technology (“MeitY”) has been appointed as the nodal ministry.³⁶
- d. On April 6, 2023 issued Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules (**“Rules”**) to provide a responsible and accountable regulatory framework for online gaming intermediaries.³⁷

³³ https://www.indiabudget.gov.in/doc/Finance_Bill.pdf

³⁴ (Source : [Economic Times](#) dated May 26, 2022).

³⁵ (Source : [Reuters](#) dated September 15, 2022).

³⁶ https://cabsec.gov.in/writereaddata/allocationbusinessrule/amendment/english/1_Upload_3515.pdf

³⁷ <https://www.meity.gov.in/writereaddata/files/244980-Gazette%20Notification%20for%20IT%20Amendment%20Rules%2C%202023-%20relating%20to%20online%20gaming%20%26%20false%20information%20about%20Govt.%20business.pdf>

35. This distinction and its importance were also recognised in the 2nd GoM report³⁸, which states that the current law is not adequate to tax online gaming at full value and amendments would be needed to bring the same into effect. The relevant paragraphs of GoM report are as follows:

“The difference between games of skill and chance is significant in light of the provisions of the CGST Act, 2017, wherein while “actionable claims” have been stated as being outside the purview of taxation, an exception has been created in the cases of “lottery, betting and gambling”. The Hon’ble Supreme Court, in the above cited cases, has found activities that are primarily dependent on skill for success, as not being gambling/betting activities, which would include horse racing as well.

20. The sense/perception which emerges out of such wide interactions is that both horse racing and online gaming are games of skill and not games of chance and that it is excluded from the purview of Serial no. 6 of schedule III of Section 7 of the CGST/SGST Acts, i.e. actionable claims can be taxed under GST, only if they pertain to lottery, betting and gambling, duly substantiated and supported by various court rulings, which have held that games where there is preponderance of skill do not amount to gambling and that the betting and gambling have to be read together, i.e. tax can be levied only on betting on the game of chance and not on the game of skill.”

36. The contradiction arises from the fact that, on one hand, the established statutory provisions, settled legal principles, and legislative intent aimed at differentiating between games of skill and chance, which guided the practices of the online gaming industry. This included the classification of games based on the predominance of skills and the corresponding tax payments.

37. While on the other hand, the GST Council’s discussions on the taxation of online gaming, proposing an increase in tax rates and introducing a new mechanism for determining the value of online gaming supplies, led to evolving interpretations.

³⁸ <https://gstcouncil.gov.in/sites/default/files/Agenda/Agenda-Volume-4-for-47th-GSTCM.pdf>

38. Moreover, the GST Amendment Act, 2023 exempted all actionable claims from GST, except specified actionable claims. As per Section 2(102), specified actionable claim included online money gaming. Thus, the exemption enjoyed earlier by virtue of being a pure actionable claim was withdrawn by classifying it as a specified actionable claim. **These developments introduced a new tax regime for the online skill gaming industry, deviating from the established jurisprudence and legislative intent to distinguish between games of skill and chance.**
39. Hence, considering the established legal principles distinguishing between "games of skill" and "games of chance," the genuine classification made by online gaming platforms offering skill-based games should be formalized based on the "as-is" basis. The emphasis should be on resolving uncertainties and ensuring that past Goods and Services Tax (GST) payments conform to the legislative framework that was applicable at that time.
40. Furthermore, in the plethora of cases it is a settled position that in the matter of classification if there is ambiguity with regard to the classification & two views are possible then the benefit of doubt should go to the assessee.
- a. It was held by the Hon'ble Supreme Court in the case of Mauri Yeast India Pvt. Ltd vs CCE³⁹ that it is now a well settled principle of law that when two views are possible, one which favours the assessee should be adopted.
 - b. In Poulouse and Mathen vs CCE⁴⁰ , it was held that where two opinions are possible, the assessee should be given the benefit of doubt and that opinion which is in its favour should be given effect to. In the light of the above, it is unnecessary to adjudicate the other points involved in the appeal on the merits.
 - c. In Commissioner of Trade Tax, U.P. v. S.S. Ayodhya Distillery⁴¹ it was held that if an entry contained in a notification imposing tax is ambiguous, the assessee cannot suffer therefor. Furthermore, if there is a doubt or dispute as to whether paddy husk or the rice husk denotes the same commodity or not, the benefit thereof shall be given to the assessee.

³⁹ [2008 (225) ELT 321 (SC)]

⁴⁰ [1997 (90) ELT 264 (SC)]

⁴¹ [2009] 19 VST 251 (SC); [2009] 233 ELT 146 (SC)

VII. Conclusion & Recommendations

41. The fate of the Indian online gaming industry has been shaped by a series of events, from the formation of the GoM to the recommendations and decisions of the GST Council. The sector's journey through taxation uncertainties, legal battles, and compliance measures underscores the challenges and dynamism of the industry.
42. The case for seeking clarification gains strength by underscoring the industry's economic significance, the potential pitfalls of prolonged litigation, and the substantial contributions to government revenues:-
- a. The dynamic growth of the online gaming industry, marked by 1,400 startups and INR 22,931 crore investments from FY20 to FY24 YTD. Notable successes, including three gaming unicorns, strategic exits, and a successful IPO, are driven by the Real Money Gaming (RMG) segment. The sector currently provides approximately one lakh jobs, expected to reach 250,000 by 2025, with a focus on high-skilled roles. Anticipating an 13% CAGR from FY24-28E, the industry is poised to surpass the nation's GDP growth estimate of 6-7%, highlighting its significant economic impact.
 - b. Litigation poses significant challenges due to its time and cost-intensive nature. The Vodafone tax case serves as a poignant example, enduring a protracted legal battle lasting 5 years in India and a total of 13 years, including international arbitration. The adverse impact of retrospective legislation is evident, contributing to uncertainties and negatively affecting business stability.
 - c. The retrospective tax application may drive numerous online gaming startups toward insolvency, causing stagnation and an estimated overall revenue loss of 75,000 crores.⁴² The Indian exchequer faces additional losses due to unregistered offshore entities, resulting in an annual GST leakage of about 2 lakh crores. Moreover, the 30% TDS on players' earnings adds another 1.5 lakh crores in direct tax losses, summing up to a total tax loss of

⁴² EY report, titled New frontiers – Navigating the evolving landscape for online gaming in India.

over 3.5 lakh crores⁴³. Illegitimate gaming platforms pose risks to user safety and contribute to substantial GST revenue leakage, leading to financial distress for the legitimate domestic industry and impacting government tax revenue.

43. The Indian online gaming industry has the potential to be a major contributor to the country's economy. However, achieving this potential requires a collaborative effort from the policy makers and the industry.

In conclusion, it is imperative for the GST Council to expeditiously address and resolve the prevailing issues on an "as-is" basis. The significance of such resolution extends beyond mere regulatory clarity, impacting crucial aspects such as investments, job creation, Ease of Doing Business (EoDB), valuations, and overall economic growth. Failure to promptly address these issues may not only hinder the current business landscape but also result in a loss of future revenue for the government. Therefore, a swift and comprehensive resolution by the GST Council is essential to foster a conducive environment for tax certainty.

⁴³ Extracts of report titled "State of the betting & gambling industry in India" from think Change forum accessed through multiple news article.

Annexure - A (List of amendments vide CGST Amendment Acts & Rules, 2023)

- a. **Definition of “specified actionable claims”⁴⁴** - Section 2(102A) was introduced in the CGST Act to stipulate that suppliers of specific actionable claims are obligated to remit Central Goods and Services Tax (CGST).

These specified actionable claims, as defined by the Amendment Act, encompass those related to:

- (i) betting,
- (ii) casinos,
- (iii) horse racing,
- (iv) lottery,
- (v) gambling, or
- (vi) online money gaming.

- b. **Definition of “online gaming”⁴⁵ and “online money gaming”⁴⁶** -

The term "online games" denotes games accessible over the internet or an electronic network.

The term "online money gaming" pertains to internet-based games wherein participants contribute or deposit funds, including virtual digital assets, with the expectation of winning money or money's worth.

This encompasses any form of game, scheme, competition, or activity, irrespective of whether the outcome is contingent on skill, chance, or a combination of both.

Notably, it encompasses online money games, regardless of their permissibility or prohibition under prevailing legislation.

- c. **Definition of supplier of specified actionable claim⁴⁷** - The Act includes and defines a supplier of actionable claim as a person who organises or arranges the supply

⁴⁴ Section 2(102A)

⁴⁵ Section 2(80A)

⁴⁶ Section 2(80B)

⁴⁷ Proviso to Section 2(105)

of specified actionable claims will be deemed to be their supplier. This includes persons who own, operate, or manage digital or electronic platforms for such supply.

Notably, this classification is independent of the method through which the consideration for the supply of such claims is transmitted or made available to the individual. The consideration may encompass monetary funds or equivalent value, including virtual digital assets.

d. **Compulsory Registration for Designated Online Money Gaming Suppliers⁴⁸**

- The legislation mandates the obligatory registration of specific suppliers. It stipulates that entities engaging in the supply of online money gaming from locations outside India to individuals within India are also required to register under the provisions of the Act.

e. **HSN Code for Online Money Gaming⁴⁹**

Before the GST amendments, online gaming fell under the category of "service" for taxation. However, the reclassification of online gaming as specified actionable claims shifted its nature from services to goods, prompting a change in codification.

New tariff codes were added to the Customs Tariff Act, 1975, specifically under Chapter "9807 Specified actionable claim", encompassing online gaming within the realm of goods for the purpose of GST identification, classification, measurement, and applicability.

"9807 Specified actionable claim"

Tariff Item	Description of goods	Rate of duty
9807 10 00	Actionable claim involved in or by way of	- Nil -

⁴⁸ Section 24(xia)

⁴⁹ Notification No. 72/2023-Customs (N.T.), dated 30th September, 2023

	<i>betting</i>	
9807 20 00	Actionable claim involved in or by way of casinos	- Nil -
9807 30 00	Actionable claim involved in or by way of gambling	- Nil -
9807 40 00	Actionable claim involved in or by way of horse racing	- Nil -
9807 50 00	Actionable claim involved in or by way of lottery	- Nil -
9807 60 00	Actionable claim involved in or by way of online money gaming	- Nil -

f. **Specific provisions for the valuation of online gaming supplies**⁵⁰

Rule 31B has been introduced to determine the value of the supply of online gaming, including the supply of actionable claims involved in online money gaming.

31B. Value of supply in case of online gaming including online money gaming.–

Notwithstanding anything contained in this chapter, the value of supply of online gaming, including supply of actionable claims involved in online money gaming, shall be the total amount paid or payable to or deposited with the supplier by way of money or money's worth, including virtual digital assets, by or on behalf of the player:

Provided that any amount returned or refunded by the supplier to the player for any reasons whatsoever, including player not using the amount paid or deposited with the supplier for participating in any event, shall not be deductible from the value of supply of online money gaming.

g. **Rate Notification**⁵¹

⁵⁰ Central Tax Notification 45/2023 dated September 6, 2023

⁵¹ Notification No. 14/2023- Integrated Tax (Rate), dated September 29, 2023

Serial number 227A is incorporated in Notifications No.1/2017-Integrated Tax (Rate), imposing an increased tax at the rate of 28% on specific actionable claims, including online gaming.

"227A: Any Chapter Specified actionable claim;

Explanation: "specified actionable claim" as defined in section 2(102A) of the CGST Act, 2017 means the actionable claim involved in or by way of—

- (i) betting;*
- (ii) casinos;*
- (iii) gambling;*
- (iv) horse racing;*
- (v) lottery; or*
- (vi) online money gaming;"*

Annexure - B - (Table of all the current pending litigations)

<u>Parties</u>	<u>Court</u>	<u>Court's Order/ Direction</u>
Witzeal Technologies Pvt. Ltd. vs. Union of India	Hon'ble Punjab and Haryana High Court	20th September, 2021 High Court directed the GST department to not take any coercive action against an online gaming operator
Myteam11 Fantasy Sports Private Limited vs. Union of India	Hon'ble Rajasthan High Court	18th January, 2023 Rajasthan High Court staying the show cause notice under Section 74(1) of the Central Goods & Services Tax, 2017
M/s Probo Media Technologies Private Limited vs. Union of India	Hon'ble Punjab and Haryana High Court	25th May, 2023 High Court directed the State GST department to not initiate any coercive action against the online gaming platform.
Director General of Goods and Services Tax Intelligence & Ors v Gameskraft Technologies Private Limited & Ors ⁵²	Hon'ble Supreme Court of India	06th September, 2023 Stayed Karnataka High Court's order which quashed the Goods and Service Tax (GST) department's show notice to online gaming company GamesKrraft Technologies seeking payment of Rs 21,000 crore dues.
NXGN Sports Interactive Private Limited vs. Union of India ⁵³	Hon'ble High Court of Gujarat at Ahmedabad	03rd November, 2023 GST SCN stayed, restraining the GST department from taking any further steps on the adjudication of the show cause notice.
Delta Corp Limited Thr Its Auth Rep. Ashish Kapadia & Anr. ⁵⁴	Hon'ble Bombay High Court at Goa	23rd October, 2023 the represents will not pass any final orders

⁵² SLP (C) Nos 19366-19369 of 2023

⁵³ R/SCA/19183/2023

		on the show cause notice without leave of this Court.
Delta Corp Limited & Anr. vs Union of India & Ors. ⁵⁵	Hon'ble Sikkim High Court	20th October, 2023 The Hon'ble Court directed that the status quo be maintained.
Deltatech Gaming Ltd. & Anr vs. Union of India & Ors. ⁵⁶	Hon'ble Calcutta High Court	30th November, 2023 High Court has granted interim relief to DGL and directed that no effect shall be given to any order passed by the Tax Authority in relation to the show cause notice for the above demand without the leave of the Hon'ble High Court
M/s. Playerzpot Media Pvt. Ltd. & Anr. vs. Union of India & Ors. ⁵⁷	High Court of Bombay	6th December, 2023 & 11th December, 2023, respectively Allowed the hearing of the show cause notice against the petitioners by the Adjudicating Officer. However, the Adjudicating Officer cannot issue a final decision on the show cause notice without permission from the court.
Sachar Gaming Pvt. Ltd. vs. Union of India & Ors. ⁵⁸	High Court of Bombay	
M/s Khud Ka Karobar Infotech Pvt Ltd. & Anr, vs. Union of India & Ors. ⁵⁹	High Court of Rajasthan, at Jaipur	7th December, 2023 The authority may proceed with the adjudication, however, the final orders on the show cause notice shall not be passed without the leave of this Court.
M/s Joy Plus Technology Pvt. Ltd. vs Union of India & Ors. ⁶⁰	Hon'ble Punjab and Haryana High Court	13th December, 2023 The authority may proceed with the adjudication, however, in case of any of any adverse order being passed the same be not acted upon.
M/s E-Gaming Federation & Anr. vs. Union of India &	Hon'ble Supreme Court of India	8th January 2024

⁵⁴ W.P. No.716 of 2023;

⁵⁵ W.P. (C) No. 41 of 2023

⁵⁶ W.P 26373 of 2023.

⁵⁷ W.P.(L) No. 31946/2023

⁵⁸ Writ Petition (L) No.31216 OF 2023 dated 11 December, 2023

⁵⁹ D.B. Civil Writ Petition No. 19668/2023 dated 7 December, 2023

⁶⁰ CWP-28011-2023

Ors. ⁶¹ & PlayGames24x7		Hon'ble Supreme Court refused to grant an interim relief against GST demand notices and issued notice and sought the centre's response on a batch of petitions filed by online gaming companies.
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Annexure - C (Regularization of issues on "as is" basis during the GST period)

I. Clarification issued by GST Council vide Circulars

<u>Goods/Services</u>	<u>Amendment Extract</u>
Raw cotton ⁶²	<p>The clarification states that the supply of raw cotton, including kala cotton, from agriculturists to cooperatives is taxable under the reverse charge mechanism at a rate of 5% GST.</p> <p><u>In view of prevailing genuine doubts, the issue for the past periods prior to issue of this clarification is hereby regularized on "as is basis".</u></p>
Desiccated coconut ⁶³	<p>It has been decided to regularize the matters relating to dessicated coconut for the period 1.7.2017 to 27.7.2017 on "as is basis" <u>in view of genuine interpretational issues.</u></p> <p><u>Circular:</u> As per recommendation of the GST Council, in view of the prevailing genuine interpretational issues regarding the applicability of GST rate on the desiccated coconut, falling under CTH 0801, the issue for past period from 01.07.2017 up to and inclusive of 27.07.2017 is hereby regularized on "as is" basis.</p>
Biomass briquettes ⁶⁴	<p>It has been decided to regularise the issues relating to GST on biomass briquettes for the period 01.7.2017 to 12.10.2017.</p> <p><u>As per recommendation of the GST Council, in view of the prevailing genuine interpretational issues regarding the applicability of GST rate on the Biomass briquettes, falling under any chapter, the issue for past</u></p>

⁶¹ W.P.(C) No. 1374/2023

⁶² Circular No. 200/12/2023-GST-Dated the 1st August,2023

⁶³ Circular No. 200/12/2023-GST-Dated the 1st August,2023

⁶⁴ Circular No. 200/12/2023-GST-Dated the 1st August,2023

<u>Goods/Services</u>	<u>Amendment Extract</u>
	period from 01.07.2017 up to and inclusive of 12.10.2017 is hereby regularized on “as is” basis.
Plates, cups made from areca leaves ⁶⁵	<p>It has been decided to regularise the issues relating to GST on plates and cups made of areca leaves prior to 01.10.2019.</p> <p>As per the recommendation of the GST Council, issues relating to GST on plates and cups made from areca leaves are hereby regularized on “as is basis” for the period prior to 01.10.2019.</p>
Ice cream parlour ⁶⁶	<p><u>Regularisation on “As-is” basis to avoid litigation</u></p> <p>In response to the GST Council's recommendation, a circular dated 06.10.2021 clarified that ice cream parlors, selling pre-manufactured ice cream and lacking the characteristics of a restaurant, are subject to the standard GST rate of 18% with Input Tax Credit (ITC).</p> <p>Subsequently, representations were received, urging the application of the 18% GST rate on ice cream supplies by parlors from 06.10.2021.</p> <p>Parlors, previously uncertain about the applicable rate, paid GST at 5% without ITC, thereby forgoing significant benefits.</p> <p>To address this, it is clarified that past instances of GST payment at 5% without ITC will be deemed fully paid, avoiding litigation. However, no refund is permitted for payments made at 18%.</p> <p>As of 6.10.2021, ice cream parlors are obligated to pay GST at 18% with ITC for ice cream supplies.</p>
Byproducts of milling of Dal/Pulses such as Chilka, Khanda and Churi ⁶⁷	<p>In the 47th GST Meeting, the Council approved a clarification that byproducts of milling Dal/Pulses, like Chilka, Khanda, and Churi, used for manufacturing cattle feed, attract a GST rate of 5%. These byproducts have dual use— as animal feed and ingredients, with Nil GST for cattle feed and 5% when used in manufacturing cattle feed, creating an end-use-based exemption.</p> <p>To address implementation issues, husk of pulses (including Chilka) and concentrates (including chuni/churi, khanda) are unconditionally exempt from GST. A clarification aims to regularize the intervening period on an "as-is" basis from the last circular (3.08.2022) due to</p>

⁶⁵ Circular No. 200/12/2023-GST-Dated the 1st August,2023

⁶⁶ Circular No. 177/09/2022-TRU

⁶⁷ Circular No. 189/01/2023-GST:

<u>Goods/Services</u>	<u>Amendment Extract</u>
	<p>genuine doubts.</p> <p>In the 48th GST Meeting, the Council recommended full exemption for the mentioned goods, regardless of end use.</p> <p>Further, as per recommendation of the GST Council, in view of genuine doubts regarding the applicability of GST on subject goods, matters that arose during the intervening period are hereby regularized on "as is" basis.</p>

II. Amendments made through Finance Act – as is basis

<u>Goods/Services</u>	<u>Amendment Extract</u>
Uranium Ore Concentrate	<p>113. Amendment of notification number G.S.R. 674(E) issued under sub-section (1) of section 11 of Central Goods and Services Tax Act, retrospectively. —</p> <p>(1) In the notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 674(E), dated the 28th June, 2017, issued by the Central Government on the recommendations of the Council, under sub-section (1) of the section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), in the Schedule, after S. No. 103 and the entries relating thereto, the following S. No. and the entries shall be inserted and shall deemed to have been inserted retrospectively with effect from the 1st day of July, 2017, namely :-</p> <p>(1) (2) (3)</p> <p>“103A 26 Uranium Ore Concentrate”.</p> <p>(2) For the purposes of sub-section (1), the Central Government shall have and shall be deemed to have the power to amend the notification referred to in sub-section (1) with retrospective effect as if the Central Government had the power to amend the said notification under sub-section (1) of section 11 of the said Act, retrospectively, at all material times.</p> <p>(3) No refund shall be made of all such tax which has been collected, but which would not have been so collected, if the notification referred to in sub-section (1) had been in force at all material times.</p>

<u>Goods/Services</u>	<u>Amendment Extract</u>
<u>Fish Meal</u>	<p>132. Restrospective exemption from, or levy or collection of, central tax in certain cases.</p> <p>(1) Notwithstanding anything contained in the notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 673(E), dated the 28th June, 2017, issued by the Central Government, on the recommendations of the Council, in exercise of the powers under sub-section (1) of section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017.),-</p> <p>(i) no central tax shall be levied or collected in respect of supply of fishmeal (falling under heading 2301), during the period commencing from the 1st day of July,2017 and ending with the 30th day of September,2019 (both days inclusive);</p> <p>(ii) central tax at the rate of six per cent. shall be levied or collected in respect of supply of pulley, wheels and other parts (falling under heading 8483) and used as parts of agricultural machinery (falling under headings 8432, 8433 and 8436), during the period commencing from the 1st day of July,2017 and ending with the 31st day of December,2018 (both days inclusive).</p> <p>(2) No refund shall be made of all such tax which has been collected, but which would not have been so collected, had sub-section (1) been in force at all material times.</p>
<u>Unintended waste generated during the production of fish meal</u>	<p>117. Retrospective exemption from, or levy or collection of, central tax in certain cases. —</p> <p>(1) Notwithstanding anything contained in the notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 673(E), dated the 28th June, 2017 issued by the Central Government, on the recommendations of the Council, in exercise of the powers under sub- section (1) of section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017), no central tax shall be levied or collected in respect of supply of unintended waste generated during the production of fish meal (falling under heading 2301), except for fish oil, during the period commencing from the 1st day of July, 2017 and ending with the 30th day of September, 2019 (both days inclusive).</p> <p>(2) No refund shall be made of all such tax which has been</p>

<u>Goods/Services</u>	<u>Amendment Extract</u>
	collected, but which would not have been so collected, had sub-section (1) been in force at all material times.

Annexure - D (Regularization of issues on "as is" basis during the pre-GST period)

<u>Goods/Services</u>	<u>Notification</u>	<u>Amendment Extract</u>
Aerated water prepared and dispensed by vending machines	Notification no.20/2000-C.E.(NT), dated 6-3-2000	Between March 1, 1997, and December 9, 1998, excise duty on such aerated waters was not imposed under section 3 of the Act.

<u>Goods/Services</u>	<u>Notification</u>	<u>Amendment Extract</u>
		The government, acknowledging this historical non-levy, now declares that excise duty need not be paid on aerated waters for the mentioned period, maintaining an "as-is" basis.
Aviation Turbine Fuel	Notification No. 24/2002-Central Excise (N.T.) dated 15th July, 2002	Entire excise duty payable under section 3 of the mentioned Act for Aviation Turbine Fuel, which would have been applicable but for the established practice, shall not be obligatory for payment concerning such fuel on which the excise duty was not levied during the specified period
Bodies built by independent body builders on the motor vehicle chassis	Notification No.27/2002-Central Excise (N.T.) dated 23.7.2002	Excess excise duty payable on bodies built by independent body builders on motor vehicle chassis, which would have been applicable but for the established practice, shall not be obligatory for payment concerning such bodies.
Jute intermediates	Notification No.33/2002-Central Excise (N.T.) dated 30.9.2002	Excise duty payable on jute intermediates, consumed captively in the same factory for the further manufacture of jute products, would not be mandatory for payment, considering the established practice. This applies to instances where the excise duty was not levied on such jute intermediates during the specified period, in accordance with the legal and "as-is" basis principle.
Recorded video cassettes in U-matic and Betacam formats,	Notification No. 40/2002-Central Excise (N.T.) dated 21.11.2002	Excise duty payable on recorded video cassettes in U-matic and Betacam formats, intended for television broadcasting, would not be mandatory for payment, considering the established practice. This applies to instances where the excise duty was not levied on such recorded video cassettes during the specified periods, in accordance with the legal and "as-is" basis principle.
Softy ice cream and non-alcoholic beverages dispensed through vending machines	Notification No 16 /2002 - Central Excise (N.T.) dated 12.3.2003	Entire excise duty payable on softy ice cream and non-alcoholic beverages dispensed through vending machines, which was not being levied during a specified period, shall not be mandatory for payment. This directive aligns with the legal and "as-is" basis principle, recognizing the prevailing practice.
Cotton yarn in the form of cops, cones and in other forms	Notification No. 50/2003 - Central Excise (N.T.) dated 20.5.2003	The excise duty on cotton yarn, in various forms like cops and cones, sent outside the factory for conversion into plain straight reel hanks, shall not be obligatory if the duty was not levied during the specified period, adhering to the existing practice and the "as-is" basis principle.
Intermediate goods	Notification No.	Excise duty on intermediate goods under Chapter 28,

<u>Goods/Services</u>	<u>Notification</u>	<u>Amendment Extract</u>
falling under Chapter 28 arising during manufacture of gold jewellery	51/2003-C.E. (N.T.), dated 6-6-2003]	generated in the manufacturing of gold jewellery under Chapter 71, during the period from 1-4-1996 to 17-8-2002, need not be paid, adhering to the existing practice and the "as-is" basis principle.
Plastic granules (reprocessed) manufactured by EOU/FTZ units and cleared to DTA	Notification No. 55/2003 - Central Excise (N.T.) dated 12.6.2003	Excise duty on reprocessed plastic granules, produced and released by a hundred per cent export-oriented undertaking or a unit in a free trade zone in the Domestic Tariff Area (DTA), during the specified period, need not be paid. This decision aligns with the existing practice and the principle of "as-is" basis.
Bicycle parts	[Notification No. 15/2003-C.E. (N.T.), dated 11-3-2003]	Excise duty payable on bicycle parts, which was not being levied during a specific period in accordance with the prevailing practice, shall not be mandated to be paid. This directive adheres to the principle of the "as-is" basis.
Cocoa beans, shells, husks, skins and other waste	Notification No. 31/2005-C.E. (N.T.), dated 27-7-2005]	Cocoa beans, whole or broken, raw or roasted" and "Cocoa shells, husks, skins and other cocoa waste," but for a particular practice, is not mandatory. This directive clarifies that the duty need not be paid for the mentioned cocoa products during the specified period, following the "as-is" basis.
Newsprint in reels	Notification No. 32/2005-C.E. (N.T.), dated 22-8-2005	The duty of excise, which would have been levied under the specified Act on "Newsprint, in reels," but for a particular practice, is not mandatory.
Agricultural grade Zinc Sulphate	Notification No. 13/2009-C.E. (N.T.), dated 5-6-2009]	Duties of excise payable under the said Act on Agricultural grade Zinc Sulphate ordinarily used as a micronutrient, but for the mentioned practice, shall not be required to be paid. This exemption applies to Agricultural grade Zinc Sulphate used as a micronutrient on which the said duties of excise were not being levied during the mentioned period from 1-1-2007 to 8-10-2007, in accordance with the said practice.
Brand name used on packing materials	Notification No. 24/2009-C.E. (N.T.), dated 21-10-2009	Duty of excise leviable under the said Act on goods manufactured by a unit, where the manufacturer has affixed the specified goods with a brand name or a trade name of another person who is not eligible for the exemption under the relevant notification, and has not paid the excise duty leviable thereon on the reasonable belief that he was entitled to the benefit of the said notification, shall not be required to be paid

<u>Goods/Services</u>	<u>Provision Finance Act</u>	<u>Amendment Extract</u>
Membership fee collected by a club or association formed for representing industry or commerce	Section 96J Special Exemption from service tax in certain cases Inserted by the Finance Act, 2011 w.e.f. 8.4.2011	During the period from June 16, 2005, to March 31, 2008, no service tax shall be imposed on or collected for the membership fee collected by a club or association representing industry or commerce, as per Section 66. Refunds will be issued for service tax collected during this period, which would not have been collected if the relevant provision had been in effect.
Management, maintenance or repair of roads	Section 97 - Special provision for exemption in certain cases relating to management, etc., of roads Inserted by Finance Act, 2012 w.e.f 28.5.2012	From June 16, 2005, to July 26, 2009, Section 66 stipulates that no service tax shall be imposed or collected for the management, maintenance, or repair of roads. Refunds will be granted for any service tax collected during this period,
Management, maintenance or repair of non-commercial Government buildings	Section 98 - Special provision for exemption in certain cases relating to management, etc, of non commercial government buildings Inserted by the Finance Act, 2012 w.e.f 28.5.2012	Between June 16, 2005, and the effective date of Section 66B on July 1, 2012, no service tax shall be imposed or collected for the management, maintenance, or repair of non-commercial Government buildings.
Services provided by the Indian Railways	Section 99 - Special provision for taxable services provided by the Indian Railways Inserted by the Finance Act, 2013 w.e.f 10.5.2013	No service tax shall be imposed or collected on taxable services provided by the Indian Railways before October 1, 2012, regardless of the provisions in section 66 before July 1, 2012, or section 66B.
Services provided by the Employees State Insurance Corporation set up under the Employees State Insurance Act, 1984 (34 of 1948)	Section 100 - Special provision for taxable services provided by Employees State Insurance Corporation Inserted by the Finance (No.2) Act, 2014, w.e.f 6.8.2014	No service tax shall be imposed or collected on taxable services provided by the Employees State Insurance Corporation, as established under the Employees State Insurance Act, 1984 (34 of 1948), during the period before July 1, 2012, irrespective of the provisions in section 66 as it stood before July 1, 2012.
Services provided to an authority or a board or any other body- (i)Set up by an Act	Section 101 - Special provision for exemption in certain cases relating to construction of canal, dam, etc	No service tax shall be imposed or collected from July 1, 2012, to January 29, 2014, for taxable services provided to an authority, board, or body set up by an Act of Parliament or a State Legislature, or established by the Parliament, with 90% or more

<u>Goods/Services</u>	<u>Provision Finance Act</u>	<u>Amendment Extract</u>
of Parliament or a State Legislature; or (ii) Established by the Parliament	Inserted by the Finance Act, 2016, w.e.f. 14.5.2016	participation in equity or control, to carry out functions entrusted to a municipality under article 243W of the Constitution related to construction, erection, commissioning, etc., of irrigation works.
Services provided to the Government, a local authority or a Governmental authority	Section 102 - Special provision for exemption in certain cases relating to construction of government buildings Inserted by the Finance Act, 2016, w.e.f. 14.5.2016	No service tax shall be imposed or collected between April 1, 2015, and February 29, 2016, for taxable services provided to the Government, a local authority, or a Governmental authority related to construction, erection, commissioning, etc., of civil structures, educational, clinical, or art/cultural establishments, and residential complexes, under a contract entered into before March 1, 2015, with appropriate stamp duty paid before that date.
Services pertaining to an airport or port	Section 103 Special provision for exemption in certain cases relating to construction of an airport or port	Between April 1, 2015, and February 29, 2016, no service tax shall be imposed or collected for services related to the construction, erection, commissioning, or installation of original works for airports or ports under a contract executed before March 1, 2015, with appropriate stamp duty paid before that date. The Ministry of Civil Aviation or the Ministry of Shipping in the Government of India must certify the pre-March 1, 2015, contract.
Lease of industrial plots	Section 104 - Special provision for exemption in certain cases relating to long term lease of industrial plots Inserted by the Finance Act, 2017 w.e.f. 31.3.2017	Between June 1, 2007, and September 21, 2016, no service tax shall be imposed or collected on a one-time upfront amount (premium, salami, cost, price, development charge, or by any other name) for taxable services provided by a State Government industrial development corporation or undertaking to industrial units through a grant of a long-term lease of thirty years or more for industrial plots.
Life Insurance service to armed forces members	Section 105 Special provision for exemption in certain cases relating to life insurance services provided to members of armed forces of Union Inserted by the Finance Act, 2017 w.e.f. 31.3.2017	Between September 10, 2004, and February 1, 2017, no service tax shall be imposed or collected on taxable services provided by the Army, Naval, and Air Force Group Insurance Funds for life insurance to members of the Army, Navy, and Air Force under the Central Government's Group Insurance Schemes.