

Games like rummy, whether played online or physical, with or without stakes, are 'games of skill' and subject to test of predominance – Karnataka HC

14 May 2023



Summary

According to the Karnataka High Court (HC), rummy is a game where predominantly skill is exercised to control the outcome of the game and not one where the outcome is predicted. The HC noted that there is a clear distinction between games of skill and games of chance, and therefore, games like rummy, whether played online or physically, with or without stakes, are games of skill and subject to a test of dominance. The HC referred to the concept of 'Res Extra Commercium' and held that there is sufficient jurisprudence to demonstrate that lottery, betting, and gambling will be perceived as noxious and, per se, classified 'res extra commercium' as beyond commerce.

In addition, the HC observed that the terms 'betting' and 'gambling' in Entry 6 of Schedule III of the Central Goods and Services Tax Act (CGST Act) do not and cannot include games of skill within its ambit. Further, such an entry excludes actionable claims from the purview of supply, which would clearly apply to games of skill, and only games of chance, such as lottery, betting, and gambling, would be taxable. Therefore, taxing games of skill like rummy is outside the scope of supply.

The HC differentiated that a game of chance, whether played with stakes, is gambling. However, a game of skill, whether played with or without stakes, is not gambling. As a result, the HC quashed the impugned show cause notice (SCN) demanding INR 21,000 crore, considering it illegal, arbitrary, and without jurisdiction or authority of law.

Facts of the case

- M/s Gameskraft Technologies Private Limited (the Petitioner) is an online intermediary company that operates technology platforms that allow users to play skill-based online games.
- The Revenue conducted search and seizure operations at GTPL's premises and passed provisional attachment orders attaching GTPL's bank accounts, which was subsequently confirmed.
- The petitioner filed a writ petition challenging the attachment order before the Karnataka HC. The HC, vide the interim order, permitted the petitioner to operate the bank accounts for the delineated limited purposes.
- Subsequently, the petitioner received an intimation notice under Section 74(5) of the CGST Act, requiring depositing a

sum of INR 2,09,89,31,31,501 (around INR 21,000 crores) with interest and penalty. The HC granted an interim stay against the said notice. Without affording any time, the respondents issued SCN to the petitioner and its founders, CEO, and CFO (collectively 'Petitioners').

- The petitioners, vide writ petitions, challenged the SCN. The main issues raised in these petitions were whether offline/online games such as rummy, which are mainly based on skill rather than on chance, whether played with/without stakes, constitute 'gambling or betting' as contemplated in Entry 6 of Schedule III of the CGST Act.

Submissions of petitioners

- The SCN was illegal, arbitrary, untenable, and without jurisdiction or authority of law.

- The SCN wrongly alleged that the petitioner is involved in betting/gambling and is guilty of GST evasion by misclassifying their supply as services instead of actionable claims, which are goods.
- There is a distinction between 'games of skill' and 'games of chance', which is discernible by applying the 'predominance' test. Moreover, whether a game of skill is performed physically or online, the same 'predominance' test applies to determine the true character of the game, as had been held in multiple judicial precedents.
- The petitioner's arguments are entirely covered by the apex court's judgements in the State of Bombay v. RMD Chamarbaugwala (RMDC-1), RMD Chamarbaugwala v. Union of India (RMDC-2), Satyanarayana, Sivani, Lakshmanan, and the Karnataka HC's judgements in the case of All India Gaming Federation, Junglee Games India Private Limited (Madras), Head Digital Works Private Limited (Kerala), etc.
- Games of skill played with monetary stakes do not partake in the character of betting and remain within the realm of games of skill only. Further, the petitioner has no right, lien, or interest over the prize pool, which is merely held in trust by the petitioner.

Karnataka HC observations and order [Writ petition nos. 19570 of 2022 C/W 22010 of 2021, 18304 of 2022, 19561 of 2022, 20119 of 2022 and 20120 of 2022 (T-res), order dated 11 May 2023]

- **Res extra commercium:** The HC referred to the concept of 'res extra commercium', which means 'things outside commerce'. This doctrine limits the scope by excluding certain 'immoral' or 'noxious' trade activities from the

scope of Article 19(1)(g) and depriving them of constitutional protection. Relying on various SC decisions, the HC held that the doctrine of res extra commercium could be applied to regard the obnoxious nature of trade. Further, gambling activities are extra-commercium and not entitled to protection under Article 19(1)(g) of the Constitution. Thus, the HC held that there is sufficient jurisprudence to show that lottery, betting, and gambling will be seen as noxious and per se classified 'res extra commercium' as beyond commerce.

- **Definition of business to include lottery, betting, and gambling:** The HC analysed the concept of supply under GST, the definition of a business to include betting, gambling, lottery, the meaning of wager or any other similar activity, betting and gambling, an actionable claim under Schedule III of the CGST Act and the law elaborating 'game of skill' vs. 'game of chance'. The HC noted that games of skill and games of chance had been differentiated by various courts wherein it had been held that protection under Article 19(1)(g) is not available for lottery, betting, and gambling, which does not amount to a business. Further, the HC noted that Schedule III clearly mentions and excepts lottery, betting, and gambling from the generic term of actionable claims to ensure that it could be taxed.
- **Applicability of RMDC-1 and RMDC-2 cases:** The HC noted that in RMDC-1, the SC had held that any game/competition that relies substantially upon the exercise of skill could not be classified as 'gambling'. The HC stressed upon the 'test of predominance' and noted that despite the element of chance that persisted in each game, it is the element of skill that must prevail in a

game of skill. Going by that principle, any competition wherein success depends on correctly forecasting the future result or past result, which has not been ascertained, is not necessarily a game of chance. Further, in RMDC-2 case, the SC, while interpreting Entry 34 of List II, had held that the phrase 'betting and gambling' does not include games of skill. Therefore, the HC held that a close examination of the ratios established in RMDC-1 and RMDC-2 demonstrates that they totally support the case of the petitioners and intervenors.

- **Rummy is a game of skill:** The HC drew reference from the Madras HC's decision in *Junglee Games India Private Limited* wherein it had been held that games like rummy and poker are based on skill because they involved considerable memory, working out percentages, the ability to follow the cards on the table and constantly adjusting to the changing possibilities of the unseen cards. The HC noted that merely because a game is played online does not make it a game of chance, as had been held by the SC in the cases of *M.J. Sivani* and *All India Gaming Federation*.
- **Principle of Nomen Juris:** The HC emphasised the nomen juris principle, which stipulates that words should be interpreted in their legal sense rather than their common usage. The HC relied on this principle to assert that the terms 'gambling' and 'game of chance' had been held to involve chance predominantly, whereas in games of skill, the predominant skill controls chance. Therefore, the terms 'betting' and 'gambling' does not include games of skill.
- **Interpretation of betting and gambling under GST:** The terms 'gambling' and

'betting' in Entry 6 of Schedule III of the CGST Act must be interpreted in accordance with Entry 34 of List II of the Seventh Schedule to the Constitution and the Public Gambling Act of 1867, as well as the courts' interpretations. As a result, games of skill are not and cannot be included in the definition of 'betting' and 'gambling' in Entry 6 of Schedule III of the CGST Act.

- **Taxation of games of skill outside scope of supply:** The HC stated that though wagering contracts are included in the term 'business', this would not imply that lottery, betting, and gambling are equivalent to games of skill. Further, Entry 6, which excludes actionable claims from the purview of supply, would clearly apply to games of skill, and only games of chance, such as lottery, betting, and gambling, would be taxable. Therefore, the taxation of games of skill is outside the scope of supply.
- **Rummy is not gambling:** The HC held that rummy is substantially and preponderantly a game of skill and not of chance. Further, there is no difference between physical rummy and online/electronic/digital rummy. Therefore, online games, which are substantial games of skills, whether played with or without stakes, are not gambling.

Our comments

The GST implications on the online gaming industry has been a long pending matter before the GST Council. The issue that whether a game is of 'chance' or 'skill' is to be decided on a case-to-case basis. Further, from the taxation perspective, it is important to understand the applicable legal provisions in respect of a game of chance and a game of skill. Under GST, games of skills are covered in Entry 6 of Schedule III of the CGST Act, and hence, not taxable. However, games of chance are taxable @28% under GST.

The main question in the present case was to decide whether offline/online games such as rummy, which are mainly based on skill rather than on chance, whether played with/without stakes, constitute 'gambling or betting' as contemplated in Entry 6 of Schedule III. In this respect, the apex court had earlier declared rummy as a game of skill in various judgements, including the State of Andhra Pradesh vs. K. Satyanarayana, K.R. Lakshmanan v State of Tamil Nadu. In the case of K. Satyanarayana, the SC specifically tested the game of rummy on the principle of 'skill versus chance' and held that rummy is not a game entirely based on 'chance' like the 'three-card' game.

Relying upon various historic judgements, the Karnataka HC finally concluded that rummy is substantially a game of skill and not of chance. Therefore, the games of skills, including rummy, are outside the scope of supply, and only games of chance such as lottery, betting and gambling would be taxable under GST. This is a welcoming ruling for India's entire online gaming industry, although the possibility of the tax authorities turning to the apex court is intriguing.

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