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**20<sup>TH</sup> SURANA AND SURANA NATIONAL CORPORATE LAW  
MOOT COURT COMPETITION 2022 – 23**

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Before

**THE HIGH COURT OF KARNATAKA**

WP No. 1001-1004 of 2023

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IN THE MATTER OF

**MIDAS ONLINE GAMES INDIA PVT. LTD..... PETITIONER**

v.

**DIRECTORATE GENERAL OF GST INTELLIGENCE ..... RESPONDENT**

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**MEMORIAL ON BEHALF OF THE PETITIONER  
DRAFTED AND FILED BY THE COUNSELS FOR THE PETITIONER**

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**INDEX OF ABBREVIATIONS**


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<b>SL. NO.</b>	<b>ABBREVIATIONS</b>	<b>EXPANSION</b>
1.	<b>&amp;</b>	And
2.	<b>AIR</b>	All India Reporter
3.	<b>Anr.</b>	And others
4.	<b>Cal</b>	Calcutta
5.	<b>CoC</b>	Committee of Creditors
6.	<b>Del</b>	Delhi
7.	<b>Guj</b>	Gujarat
8.	<b>ILR</b>	Indian Law Reporter
9.	<b>¶</b>	Paragraph
10.	<b>§</b>	Section
11.	<b>SC</b>	Supreme Court
12.	<b>SCC</b>	Supreme Court Cases
13.	<b>Sikk.</b>	Sikkim
14.	<b>UP</b>	Uttar Pradesh
15.	<b>v./vs.</b>	Versus
16.	<b>TN</b>	Tamil Nadu
17.	<b>Ors.</b>	Others
18.	<b>BOM</b>	Bombay
19.	<b>SCR</b>	Supreme Court Reporter
20.	<b>GST</b>	Goods and Service Tax

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21.	<b>IBC</b>	Insolvency and Bankruptcy Code
22.	<b>NCLT</b>	National Company Law Tribunal
23.	<b>NCLAT</b>	National Company Law Appellate Tribunal
24.	<b>P&amp;H</b>	Punjab and Haryana
25.	<b>CGST</b>	Central Goods and Services Tax
26.	<b>Ed.</b>	Edition
27.	<b>SCN</b>	Show Cause Notice

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**INDEX OF AUTHORITIES**

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**STATUTORY COMPILATIONS:**

- 1) The Constitution of India, 1949
- 2) The Insolvency and Bankruptcy Code, 2016
- 3) The Insolvency and Bankruptcy Board of India Regulations, 2016
- 4) Companies Act, 2013
- 5) The Central Goods and Services Act, 2017
- 6) The Karnataka Police (Amendment) Act, 2021

**BOOKS, COMMENTARIES & DIGESTS:**

- 1) Taxmann, Insolvency and Bankruptcy Code 2016, As amended by Insolvency & Bankruptcy Code (Second Amendment) Act, 2020, 13<sup>th</sup> Ed., October 2020.
- 2) Kamal Garg, voluntary Liquidation of Companies Under Insolvency and Bankruptcy Code 2016, Ed. November, 2018.
- 3) Ashish Makhija, Insolvency and Bankruptcy Code of India, Ordinance of 2018 and Third Amendment to CIRP Regulations, Lexis Nexis.
- 4) Aditya Shiralkar, Thomson's Commentary on Insolvency and Bankruptcy code, 2016, Vol. 1, Ed. 2021.
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- 6) Soumitra Lahiri, CIRP & Liquidation: A Comprehensive Commentary (As per Insolvency and Bankruptcy Code, 2016), Ed 2020.

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- 8) D.D Basu, Introduction to the Constitution of India 448 (21st Ed. 2013).
- 9) M.P.Jain Indian Constitutional Law 670 (6th Ed. 2010).
- 10) Rakesh Garg & Sandeep Garg, GST Law Manual Acts, Rules and Form (7th Ed.)
- 11) C.A. (Dr.) Arpit Haldia, Taxman’s GST Law & Practice (2nd Ed.)

**WEBSITES:**

- 1) [www.scconline.com](http://www.scconline.com)
- 2) [www.indiankanoon.org](http://www.indiankanoon.org)
- 3) [www.manupatrafast.com](http://www.manupatrafast.com)
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2.	<i>B.R Enterprises v. State of UP</i>	(1999) 9 SCC 700
3.	<i>Bangalore Turf Club Ltd. v. State of Karnataka</i>	MANU/KA/2134/2021
4.	<i>Bar Council of Delhi v. Surjeet Singh</i>	AIR 1980 SC 1612
5.	<i>Bharat Mint and Allied Chemicals v. Commissioner Commercial Tax</i>	(2022) ILR 3All787
6.	<i>Bombay Stock Exchange v. V.S. Kandalganekar &amp; Ors</i>	AIR 2015 SC 193

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7.	<i>BP Sharma v. Union of India</i>	2003 Supp (2) SCR 684
8.	<i>Chandresh Sankhla v. State of Rajasthan</i>	2020 SCC OnLine Raj 264
9.	<i>Chintaman Rao v. State of Madhya Pradesh</i>	1951 AIR 118
10.	<i>Commissioner of Income Tax v. Chhabil Das Aggrawal</i>	(2014) 1 SCC 603
11.	<i>Commonwealth v. Two Ecle. Poker Game Machines</i>	465 A.2d 973, 977 (Pa. 1983)
12.	<i>Dena Bank v. Bhikhabhai Prabhudas Parekh &amp; Co.</i>	(2000) 5 SCC 694.
13.	<i>Deputy Commissioner of Income Tax v. Bhuvan Madan RP for Diamond Power Infrastructure Ltd. &amp; Anr.</i>	2019 SCC OnLine NCLT 8411
14.	<i>Director General of Police v. Mahalakshmi Cultural</i>	2012 SCC OnLine Mad 1130
15.	<i>Embassy Property Development Pvt. Ltd. v. State of Karnataka</i>	MANU/SC/1661/2019
16.	<i>Executive Club Formed by Latitha v. State of Andhra Pradesh</i>	1998 (5) ALD 126
17.	<i>Executive Engineer v. Sectarian Rice Mill</i>	(2012) 2 SCC 108
18.	<i>Gamescraft Technologies Pvt Ltd. v. State of Karnataka</i>	MANU/KA/2053/2019
19.	<i>Gorkha Security Services v. Government of NCT Delhi &amp; Ors.</i>	(2014) 9 SCC 105



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20.	<i>Gurdeep Singh Sachar v. Union of India</i>	MANU/MH/1451/2019
21.	<i>Harbanslal Sahnia v. Indian Oil Corporation Ltd.</i>	(2003) 2 SCC 107
22.	<i>Haryana State Lotteries v. Govt. of NCT Delhi</i>	1998 (46) DRJ
23.	<i>Head Digital works Pvt. Ltd v. State of Kerala</i>	2020 SCC OnLine Raj 264
24.	<i>I.T.O., Hundi Circle I, Madras v. K.A. Govindaswamy &amp; Ors.</i>	1978 113 ITR 593 Mad.
25.	<i>Indian Legal and Economic Forum v. Union of India</i>	(1997) 10 SCC 728
26.	<i>Jalgaon Janta Sahakari v. Joint Commissioner of Sales</i>	MANU/NULL/46114/2022.
27.	<i>Jaywant Balkrishna Sail v. State of Maharashtra</i>	2012 SCC OnLine Bom 832
28.	<i>Junglee Games India Pvt Ltd v. State of Tamil Nadu</i>	2021 SCC OnLine Mad 2762
29.	<i>K.R Lakshmanan v. State of Tamil Nadu</i>	1996 SCC (2) 226
30.	<i>L. Hriday Narain v. Income Tax Officer</i>	(1970) 2 SCC 355
31.	<i>M/s Edelweiss Asset Reconstruction v. M/s Tax Recovery Officer</i>	MANU/MH/1863/2021.
32.	<i>M/s Gaussain Network Pvt Ltd. v. Ms. Monica Lakhanpal</i>	2012 SCC OnLine Dis Crt (Del) 1
33.	<i>M/s Magadh Sugar &amp; Energy Ltd. v. State of Bihar</i>	2021 SCC OnLine SC 801
34.	<i>M/s Mohan Agencies v. State of UP &amp; Anr</i>	(2022) ILR 3 All 58
35.	<i>Manoranjithan Manamayil Mandram v. State of Tamil Nadu</i>	AIR 2005 Mad 261

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MEMORANDUM ON BEHALF OF THE PETITIONER

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36.	<i>Metal Forgings v. Union of india</i>	2002 SCC OnLine SC 1108
37.	<i>MJ Shivani v. State of Karnataka</i>	(1995) 6 SCC 289
38.	<i>Mohd Faruk v. State of MP</i>	(1969)1 SCC 853
39.	<i>Pleasantime Products v. Commissioner of Central Excise Mumbai</i>	(2010) 1 SCC 265
40.	<i>Pr. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.,</i>	2018 SCC Online SC 3465.
41.	<i>Pr. Director General of Income Tax (Admin. &amp; TPS) v. M/s. Synergies Dooray Automotive Ltd. &amp; Others</i>	2019 SCC OnLine NCLAT 691.
42.	<i>R.C Cooper v. Union of India</i>	1970 AIR 564
43.	<i>R.v. Diary Produce Quota Tribunal</i>	(1990) 2 AII ER 434
44.	<i>Rabindranath Bose &amp; Ors. v. Union of India &amp; Ors.</i>	AIR 1970 SC 470
45.	<i>Raghav International v. Union of india &amp; anr.</i>	2014 SCCOnline Del 3577
46.	<i>Raja Textile v. Income Tax Officer</i>	AIR 1973 SC 1362
47.	<i>S.A Kini v. Union of India</i>	AIR 1985 SC 893
48.	<i>S.V Kondaskar v. V.M Deshpande</i>	AIR 1972 SC 878
49.	<i>Satish Chandra v. Union of India</i>	AIR 1953 SC 250
50.	<i>Skill lotto Solutions Pvt. Ltd. v. Union of India</i>	2020 SCC OnLine SC 990
51.	<i>SREI Equipment Finance Ltd v. Additional, Joint/ Deputy/ Assistant Unilever Industries Private Ltd.</i>	2022 SCC OnLine Cal 1370
52.	<i>State of Andra Pradesh v. K. Satyanarayana</i>	1968 SCR (2) 387

53.	<i>State of Bombay v. RMD Chamarbaugwala</i>	1957 SCR 874
54.	<i>State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd.</i>	(2005) 6 SCC 499
55.	<i>State of West Bengal v. North Adjai Coal Ltd.</i>	1971 (1) SCC 309
56.	<i>State Trading Corporation of India Ltd. v. Commercial Tax Officer</i>	1963 AIR 1811
57.	<i>Sundaresh Bhatt v. Central Board of Indirect Taxes and Customs</i>	(2023) 1 SCC 472
58.	<i>Sunrise associates v. Government of NCT Delhi &amp; Ors.</i>	(2006) 5 SCC 603
59.	<i>Swiss Ribbons Pvt. Ltd. &amp; Anr. v. Union of India &amp; Ors.</i>	(2019) 4 SCC 17.
60.	<i>U.S.A v. Lawrence Dicristina</i>	886 F. Supp. 2d 164
61.	<i>Union of India v. G.M. Kokil,</i>	1984 Supp SCC 196, ¶11.
62.	<i>Varun Gumber v. Union Territory of Chandigarh</i>	2017 SCC OnLine P&H 5372
63.	<i>Whirlpool Corporation v. Registrar of Trademarks, Mumbai and Ors.</i>	(1998) 8 SCC 1

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**STATEMENT OF JURISDICTION**

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The Petitioner has approached the Hon’ble High Court of Karnataka under Article 226 (1) of the Indian Constitution, 1949, challenging the orders of the GST Department and proceedings initiated against the Petitioner.

**ARTICLE 226:**

*(1) “Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.”*

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**STATEMENT OF FACTS**

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1. Midas Online Games India Pvt Ltd is a registered company involved in online betting games.
2. It borrowed huge loans from the National Bank of India for which it consistently paid interest and owed dues worth INR 5,000 crores as of August 31, 2022.
3. The GST department issued show cause notices (SCN) and statements asking the company to pay tax at 28% on the entire amount received by it.
4. The company believed it was liable to pay GST at 18% only on the admission fee collected from the participants, which it paid promptly, ever since its inception.
5. The software service provider, with which the Petitioner was not satisfied, filed an application before the NCLT to declare the company as insolvent and initiate the corporate insolvency resolution process (CIRP).
6. The NCLT directed the initiation of the CIRP under section 14 of the IBC and ordered moratorium.
7. The NBI filed its claim as an operational creditor for INR 5,000 crores, while the GST Department claimed INR 11,000 crores.
8. The COC when constituted, found that the claims filed by the GST Department were unsustainable under IBC and resolved to file writ petitions before the Hon'ble Karnataka High Court challenging the orders passed by the GST department.
9. The writ petitions are now up for hearing in the Karnataka High Court.

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**STATEMENT OF ISSUES**

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**ISSUE 1:**

WHETHER THE PETITION BEFORE THE HON'BLE COURT IS  
MAINTAINABLE?

**ISSUE 2:**

WHETHER GST IS PAYABLE ON THE ENTIRE CONSIDERATION?

**ISSUE 3:**

WHETHER THE GST DEPARTMENT SHOULD BE TREATED AS SECURED  
CREDITOR INSTEAD OF AN OPERATIONAL CREDITOR UNDER  
INSOLVENCY AND BANKRUPTCY CODE 2016?

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**SUMMARY OF ARGUMENTS**

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**I. THAT THE WRIT PETITIONS FILED BY THE COMPANY ARE MAINTAINABLE**

The writ petition filed by the Company under Article 226 of the Constitution is maintainable as a) the GST Department classified all the online games organized by the company as gambling, thereby violating the fundamental rights of the company, b) no proper hearing opportunity was provided by the GST Department, depriving the company of its right to natural justice and c) the demand orders issued by the Department were unsustainable as it neither served the notice on time nor did it give sufficient time to the company to respond to the Department's separate orders.

**II. THAT THE COMPANY IS LIABLE TO PAY ON ENTIRE CONSIDERATION**

The Company is a service provider and is liable to pay tax on the services. Since it engages in the services of online gaming which includes games of skill and not games of chance, the Company pays 18% tax to the GST Department and not 28%. The participation fee consists of the admission fee and the pooling fee of the participants. The latter, being actionable claims are neither good nor services and hence do not come under the ambit of taxation under the CGST Act.

**III. THAT THE GST DEPARTMENT CANNOT BE TREATED AS A SECURED CREDITOR AND IS AN OPERATIONAL CREDITOR UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016**

The GST Department cannot be treated as a secured creditor as A) there is no security interest; B) it would be against the scheme of the IBC; and C) it would be contrary to the non-obstante clause contained in the IBC. Additionally, the GST Department and its dues cannot be afforded priority over or equated with the dues of secured creditors as Section 53 of the IBC comprises a separate level of priority for government dues.

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**ARGUMENTS ADVANCED**

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**CONTENTION 1: THAT THE PETITION BEFORE THE HON'BLE COURT IS MAINTAINABLE**

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1. It is humbly submitted before the Hon'ble Court that the Resolution Professional (RP) as the legal representative of Midas Online Games India Pvt. Ltd. (hereinafter referred to as the Petitioner) has filed four writ petitions challenging the orders and recovery proceedings under the Central Goods and Services Tax, 2017 (hereinafter referred to as CGST Act) initiated by the GST Department<sup>1</sup> (hereinafter referred to as the Respondent). The writ petition filed by the company is maintainable under Article 226 of the Constitution of India as **(1.1)** the fundamental rights of the Petitioner have been violated; **(1.2)** the principles of natural justice have been violated; and **(1.3)** the proceedings are wholly without jurisdiction.
2. The counsel submits that the case was initiated through the National Company Law Tribunal (NCLT) by the Software service company under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (Hereinafter referred to as the Code). The Interim Resolution Professional (IRP) gathered the claims made by the GST Department, the National Bank of India, and the software service company and assessed the financial status of the company. The IRP formed the Committee of Creditors (hereinafter referred to as the COC) and they agreed that the claims made by the GST Department were not valid under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as The Code), particularly because the demands themselves were in violation of GST laws.<sup>2</sup> In light of the same, it is contended that the

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<sup>1</sup> ¶12, Moot Proposition, 20<sup>th</sup> Surana and Surana National Corporate Law Moot Court Competition, 2022–23.

<sup>2</sup> ¶11, Moot Proposition, 20<sup>th</sup> Surana and Surana National Corporate Law Moot Court Competition, 2022–23.



Respondent was acting beyond its rights under the GST laws and that the statements, notices, and demand orders issued by the department were completely arbitrary, egregious, and illegal.

3. It is a well-established principle that the availability of an alternative remedy does not completely prevent the filing of a writ petition<sup>3</sup> under Article 226 of the Indian Constitution.<sup>4</sup>

The requirement for exhausting statutory remedies before granting a writ is a rule of policy, convenience, discretion or a self-imposed restraint.<sup>5</sup> Therefore, the company's writ petitions are maintainable.

4. In the case of *Whirlpool Corporation v. Registrar of Trademarks, Mumbai & Ors.*<sup>6</sup>, the Court ruled that the existence of an alternative remedy has consistently been determined by this Court not to act as a complete barrier in at least three situations, which are when:

- (i) the writ petition has been filed for the enforcement of any of the Fundamental Rights, or
- (ii) there has been a violation of the principle of natural justice, or
- (iii) the order or proceedings are whole without jurisdiction.

#### 1.1. FUNDAMENTAL RIGHT IS VIOLATED

5. It is submitted that a catena of judgments has clarified that games that involve a predominance of skill are categorized as games of skill and are legal in India. It was held in the case of *State of Bombay v. RMD Chamarbaugwalla*<sup>7</sup>, that competitions substantially involving skills that

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<sup>3</sup> L. Hriday Narain v. ITO, (1970) 2 SCC 355.

<sup>4</sup> Bharat Mint and Allied Chemicals v. Commissioner Commercial Tax, (2022) ILR 3 All 787.

<sup>5</sup> State of West Bengal v. North Adjai Coal Co. Ltd, 1971 (1) SCC 309.

<sup>6</sup> (1998) 8 SCC 1. See also Harbanslal Sahnia v. Indian Oil Corpn. Ltd, (2003) 2 SCC 107; CIT v. Chhabil Dass Agarwal, (2014) 1 SCC 603; Bar Council of Delhi v. Surjeet Singh, AIR 1980 SC 1612; Executive Engineer v. Seetaram Rice Mill, (2012) 2 SCC 108.

<sup>7</sup> State of Bombay v. RMD Chamarbaugwalla, AIR 1957 SC 699.

are not gambling activities but commercial activities are protected under Article 19 (1)(g) of the Indian Constitution. The Respondent has categorized all online games hosted by the company as gambling, asserting that they are predominantly games of chance rather than skill<sup>8</sup>. This classification by the Respondent infringes on the Company's fundamental rights.<sup>9</sup>

**1.2.THERE HAS BEEN A VIOLATION OF NATURAL JUSTICE OF THE COMPANY**

6. The Petitioner respectfully contends that the Respondent's impugned order, which imposes tax, interest, and penalty, was issued without affording an opportunity to be heard, as outlined in Section 75(4) of the CGST Act. Ensuring a hearing opportunity upholds the rules of natural justice and enables the respondent to deliver well-reasoned and suitable orders that serve justice while also facilitating better understanding during the appeal process.<sup>10</sup> As a result, the Respondent violated the principle of natural justice, which mandates a hearing for the person facing tax or penalty charges or any unfavorable decision upon receipt of a written request.<sup>11</sup>

**1.3.ORDER OR PROCEEDINGS HELD WHOLLY WITHOUT JURISDICTION**

7. It is argued that a writ petition can be filed before the High Court when taxing authorities have exceeded their jurisdiction.<sup>12</sup> The demand orders issued by the Respondent are untenable, as the proceedings were conducted in an arbitrary and unlawful manner. The Respondent neither delivered the notice in a timely fashion nor allowed the company adequate time to respond to separate orders. Regrettably, the Petitioner was unable to challenge the orders for the

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<sup>8</sup> ¶4, Moot Proposition, 20<sup>th</sup> Surana and Surana National Corporate Law Moot Court Competition, 2022–23.

<sup>9</sup> State Trading Corporation of India Ltd. v. the Commercial Tax Officer, 1963 AIR 1811.

<sup>10</sup> M/s Mohan Agencies v. State of U.P. And Another, Writ Tax No. 58 of 2023.

<sup>11</sup> *Supra* Note 3.

<sup>12</sup> State of HP v. Gujarat Ambuja Cement Ltd, (2005) 6 SCC 499.

subsequent two days, as this had been strategically planned. Moreover, the department froze all the Petitioner's bank accounts without proper authorization and imposed charges. The Supreme Court reaffirmed that a writ is maintainable if an officer has erroneously assumed jurisdiction.<sup>13</sup>

8. It is humbly submitted that maintainability of writ petition for enforcement of fundamental rights can be questioned only on the ground of laches<sup>14</sup>, delays and acquiescence<sup>15</sup>, drafting of petition in an undignified manner<sup>16</sup>, malicious in nature<sup>17</sup>, where disputed question of facts are involved or question of law has been raised in the abstract<sup>18</sup> or enforcement of private or contractual rights are sought to be enforced<sup>19</sup>. In the instant case, none of the aforementioned exceptions exist. The petition has been filed in time, question of facts are involved and fundamental rights are sought to be enforced.

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**CONTENTION 2: THAT GST IS NOT PAYABLE ON ENTIRE CONSIDERATION**

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9. It is humbly submitted that Petitioner engages in the business of online gaming, primarily involving games of skill rather than games of chance. It is a service provider under Section 2(102) of CGST Act, 2017<sup>20</sup>. The Act states that GST is to be levied on all intra-state supplies

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<sup>13</sup> 1973 (1) SCC 633.

<sup>14</sup> Rabindra Nath Bose & Ors v. Union of India & Ors, AIR 1970 SC 470.

<sup>15</sup> R. v. Dairy Produce Quota Tribunal, (1990) 2 AII ER 434.

<sup>16</sup> M.K Mallick, Law and Practice, 47 (12th ed., 2012).

<sup>17</sup> S.A. Kini v. Union of India, AIR 1985 SC 893; See also R. v. Customs and Excise Commissioner ex parte Cooke and Stevenson, 1 AII ER 1068 (1970, Queen Bench Division, Divisional Court).

<sup>18</sup> Indian Legal and Economic Forum v. U.O.I, (1997) 10 SCC 728.

<sup>19</sup> Satish Chandra v. Union of India, AIR 1953 SC 250.

<sup>20</sup> The Central Goods and Services Tax Act, 2017, § 2(102).

of goods, services, or both. On account of this, the services provided by the company also become taxable at 18% to the Respondent in accordance with the SAC (Services Accounting Code) 998439.<sup>21</sup> Therefore, the company is exercising its lawful rights.

10. On account of being service providers, the services provided by online gaming platforms fall under the definition of "supply" in Section 7(1) of the CGST Act, 2017, making the company liable to pay tax only on the services it offers.<sup>22</sup> These services are that of providing a platform for a participant to play the said games, for which an admission fee is charged.
11. Actionable claims, which are exempt from taxation under Section 7(2)(a) of the CGST Act, specify that activities or transactions listed in Schedule III shall not be considered as a supply of goods or services.<sup>23</sup> In the current case, the company is not obligated to pay GST on the pooling fee, which constitutes the actionable claims of all participants.
12. It is humbly submitted that the GST Department has wrongfully issued Show Cause Notices (hereinafter referred to as SCN) and statements for the company for FY 2017-18, FY 2018-19, FY 2019-20, and FY 2020-21<sup>24</sup>, and have falsely classified all the games as gambling, substantially involving games of chance rather than games of skill. This is contended to be entirely baseless and unsustainable under Rule 31A (3) of GST Rules 2017, Section 73(2) and Section 74(2) of CGST Act, 2017.

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<sup>21</sup> Central Board of Indirect Taxes and Customs, Notification No. 48/2012.

<sup>22</sup> Gurdeep Singh Sachar v. Union of India, MANU/MH/1451/2019.

<sup>23</sup> Ayurveda Pharmacy & Anr. v. State of Tamil Nadu, (1989) 2 SCC 285.

<sup>24</sup> *Supra* Note 8.

**2.1. THAT COMPANY IS NOT LIABLE UNDER RULE 31A(3) OF CGST RULES 2017**

13. Rule 31A (3) of the CGST & SGST Rules, 2017 was declared ultra vires in the case of *Bangalore Turf Club Limited vs. The State of Karnataka*<sup>25</sup> on June 2, 2021, wherein the petitioners challenged the legislative intent behind holding them liable for paying GST on the entire bet amount received by the totalisator.

14. In the present case, the value of the online gaming supply<sup>26</sup>, governed by Section 15 of the GST Act, 2017, is 25% of the total consideration received from participants, including the pooling fee. The Petitioner pays GST on the 25% of the fee retained as Pooling Fee by the online host, as this is a service provided by the Petitioner. No GST is paid on the 75% of the entry fee pooled as prize money by the online platform host (platform fees), based on the position that such monies are 'actionable claims' for a game of skill. The Pooling Fee gets transferred to the escrow account received from all the participants and so the company does not generate any income from this account. Thus, the amount which was not “actually paid” to the platform should not be taxed and the value of supply should be levied on the 25%, which is the income of the Petitioner.<sup>27</sup>

15. It is contended that the amount pooled in the escrow account constitutes an 'actionable claim', as it is to be distributed among the winning participants based on the game's outcome.<sup>28</sup> These actionable claims fall under the exception of Entry 6 of Schedule III under Section 7(2) of the CGST Act and are not considered a supply of goods or services. Consequently, they are outside

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<sup>25</sup> MANU/KA/2134/2021.

<sup>26</sup> The Central Goods and Services Act, 2017, § 2.

<sup>27</sup> The Central Goods and Services Act, 2017, § 2.

<sup>28</sup> Gurdeep Singh Sachar v. Union of India, MANU/MH/1451/2019.

the scope of GST valuation, allowing the company to rightfully pay only 18% tax instead of 28%.

16. In the instant case, the SCNs and Statements<sup>29</sup> issued by the Respondent are absolutely unsustainable in law since the Petitioner is not at all required to pay GST on the entire consideration received by it since all the games operated by it online are only ‘games of skill’ and not ‘games of chance’ and hence they are not subject to GST.

**2.2. THAT COMPANY IS NOT INVOLVED IN BUSINESS OF GAME OF CHANCE**

22. In the instant case, the Petitioner is involved in the business of online betting games such as card games like rummy, poker, and the like; fantasy cricket; horse racing; lottery; etc.<sup>30</sup> which are games of skill as per the case of *State of Bombay v. RMD Chamarbaugwalla*<sup>31</sup>. The playing of online games involves an exercise of superior knowledge, judgment and attention of the participant, for instance, forming a team of players determines the success or failure of the game and requires skill for the same.<sup>32</sup>

23. Various courts have ruled that if a game involves an element of chance or luck, but skill predominates the outcome, it would be considered a 'mere skill' game.<sup>33</sup> Whether a game is, a 'game of chance' or a 'game of skill', is to be adjudged on the basis of the modalities of each

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<sup>29</sup> *Supra* Note 8.

<sup>30</sup> ¶1, Moot Proposition, 20<sup>th</sup> Surana and Surana National Corporate Law Moot Court Competition, 2022–23.

<sup>31</sup> *State of Bombay v. RMD Chamarbaugwalla*, AIR 1957 SC 699.

<sup>32</sup> *Varun Gumber v. Union Territory of Chandigarh & Ors.*, 2017 SCC OnLine P&H 5372.

<sup>33</sup> *State of Andhra Pradesh v. K. Satyanarayana*, 1968 SCR (2) 387.

case<sup>34</sup> and by applying the Predominance Test, which entails a game involving substantial degree of skill, is not a game of chance, but is only a game of skill and that it does not cease to be one even when played with stakes.<sup>35</sup> In the present case, the GST Department's classification<sup>36</sup> is entirely unfounded. This is because the games organized by the company exhibit a predominance of skill, as demonstrated by the following:

(a) Rummy

24. Rummy is a game of skill and not gambling.<sup>37</sup> The game requires skill as the fall of the cards in the game, needs to be memorized and the holding and discarding of cards requires anticipation, and skill.<sup>38</sup>

(b) Poker

25. Poker has been recognized as a mind sport involving the application of skill by the International Mind Sports Association, a member of the General Association of International Sports Federations. It is pertinent to note that some of the top Universities have recognized Poker as an accredited academic subject which further emphasizes on the fact that in poker the outcome depends upon an element of knowledge, expertise, physical ability of the person.<sup>39</sup>

(c) Horse Racing

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<sup>34</sup> Manoranjithan Manamyil Mandram v. State of Tamil Nadu, AIR 2005 Mad 261; See also Pleasantime Products v. Commissioner of Central Excise, Mumbai-I, (2010) 1 SCC 265; Commonwealth v. Two Elec. Poker Game Machines (Two Elec.), 465 A.2d 973, 977 (Pa. 1983); MJ Sivani v. State of Karnataka, (1995) 6 SCC 289.

<sup>35</sup> Gamescraft Technologies Private Limited v. State of Karnataka, MANU/KA/2053/2019.

<sup>36</sup> *Supra* Note 8.

<sup>37</sup> MJ Shivani v. State of Karnataka, (1995) 6 SCC 289.

<sup>38</sup> *Supra* Note 31.

<sup>39</sup> M/S Gaussian Network Pvt. Ltd v. Ms. Monica Lakhanpal, 2012 SCC OnLine Dis Crt (Del) 1.

26. In betting on horse racing, various factors had to be judged before a person places a bet on the horse, these include capacity, strength, potential, variety of the animal, capability of the jockey, the length of the field, the previous performance of the horse etc. These factors had to be assessed by the racegoers before placing a bet on the horse. Hence, it is contended that betting on horse racing is a game of skill and not gambling.<sup>40</sup>

(d) Fantasy Cricket

27. It is humbly submitted that in the case of *Varun Gumber v. UT of Chandigarh*, it was held that for a participant to choose players for his team in fantasy cricket, and organize the same, skill is required and applied. The bet is placed on their knowledge and efficiency and not just luck. Despite the existence of some element of chance, if the game is preponderantly skill based, it would be classified as a game of ‘mere skill’.<sup>41</sup>

### **2.3. THAT DEMAND ORDERS WERE UNSUSTAINABLE**

#### *2.3.1. Section 73(2) of CGST ACT, 2017 is not maintainable*

28. It is submitted that the Petitioner is not liable under Section 73(1) of CGST Act, 2017 and since the company was paying the tax of 18%, the department has no authority to issue SCNs. The Department issued SCNs on April 1, 2022 for the FY 2018-19 under Section 73(2) of GST Act 2017.

29. In the instant case, the Respondent passed demand orders on 03.10.2022. confirming the demands and asking the Petitioner to pay the entire amount of INR 11,000 crores.<sup>42</sup> The

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<sup>40</sup> K.R. Lakshmanan v. State of Tamil Nadu, 1996 SCC (2) 226.

<sup>41</sup> 2020(4) RLW 3322 (Raj.).

<sup>42</sup> The Central Goods and Services Tax Act, 2017, § 73(9).



demand orders were passed after four years i.e. on 03.10.2022 from the due date. This clearly shows a delay on part of the Respondent. Further, it is a settled legal position that tax authorities cannot issue SCNs after a period of three years for the assessment period.<sup>43</sup> Accordingly, notice cannot be issued beyond the period of 3 years of payment. It is thus respectfully contended that the demand orders be quashed immediately. Moreover, in the instant case, there has been no case of fraud or any willful misstatement or suppression of facts as required under Section 74(1) of the CGST Act. Hence, the demand orders passed by the Respondent should be quashed.

30. Arguendo, even if the demand orders were not prima facie illegal, the persistence of the same post-implementation of moratorium<sup>44</sup> by RP makes it untenable. Authorities can only take steps to determine the tax, interest, fines or any penalty which is due.<sup>45</sup> However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium.

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**CONTENTION 3: THAT THE GST DEPARTMENT CANNOT BE TREATED AS SECURED CREDITOR AND IS AN OPERATIONAL CREDITOR UNDER INSOLVENCY AND BANKRUPTCY CODE 2016.**

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31. It is humbly submitted before the Hon'ble Court that 1) The GST Department is not a secured creditor as security interest cannot be linked with tax imposition; 2) It cannot be afforded priority over secured creditors; 3) It is, at best, an operational creditor.

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<sup>43</sup> Raghav International Vs Union Of India & Anr., 2014 SCC OnLine Del 3577.

<sup>44</sup> SREI Equipment Finance Ltd. v. Additional/Joint/Deputy/Assistant Unilever Industries Private Limited & Anr, MANU/WB/1209/2022.

<sup>45</sup> S.V. Kondaskar v. V.M. Deshpande, AIR 1972 SC 878.

### **3.1 THE GST DEPARTMENT IS NOT A SECURED CREDITOR**

It is contended before the Hon'ble Court that the GST Department cannot be treated as a secured creditor as (3.1.1) there is no security interest; (3.1.2) it would be against the scheme of the IBC; and (3.1.3) it would be contrary to the non-obstante clause contained in the IBC.

#### **3.1.1. There is no security interest**

32. The GST Department and its relationship with businesses registered under it inherently involves an obligation of the latter to collect the tax. To be classified as a "security interest" under the IBC, a claim must be backed by a transaction or an agreement/arrangement that guarantees payment or performance of an obligation. The definition of "security interest"<sup>46</sup> in the IBC pertains to a right, title, interest, or claim established in favor of a secured creditor "by a transaction," usually a consensual financial transaction between parties that creates a charge on the property to ensure payment obligations, rather than a charge<sup>47</sup> created through operation of law.<sup>48</sup>
33. In this case, the charge established in favor of tax authorities under the CGST Act is created through the operation of law and does not involve a transaction, agreement, or arrangement between parties. Therefore, it appears contradictory to classify tax authorities as "secured creditors" because it is not in line with the definition of "security interest" and "secured creditor" in the Code. Upon attachment of a property or any assets, the taxpayer is only debarred from dealing with the attached property except with the permission of the Authority

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<sup>46</sup> The Insolvency and Bankruptcy Code, 2016, § 3(31).

<sup>47</sup> Jalgaon Janta Sahakari v. Joint Commissioner of Sales, MANU/NULL/46114/2022.

<sup>48</sup> Bombay Stock Exchange v. V.S. Kandalganonkar & Ors, AIR 2015 SC 193.

concerned. It does not create a security interest in favor of the tax authorities. Therefore, tax debts cannot be equated with secured creditors' debts.

### 3.1.2. Scheme of IBC

38. The IBC expressly categorizes Government dues as distinct from secured creditors. The BLRC<sup>49</sup> Report, which was the foundation of the IBC, discusses the reasons for placing government dues below those of financial creditors. Banks and financial institutions form the backbone of a robust economy as these institutions are responsible for availability of credit to businesses. The BLRC was of the view that priority for financial/secured creditors will lead to availability of finance, reduction of cost of capital and economic growth in the long run. It was reasoned that with economic growth, the exchequer would also benefit in terms of higher revenue from taxes and thus, the government was placed lower in the waterfall.

### 3.1.3 Non-Obstante Clause

39. In order to ensure its smooth functioning, the IBC, 2016 is accorded primacy over all other laws for the time being in force<sup>50</sup>, as enshrined in Section 238<sup>51</sup>. The insertion of a non-obstante clause in a statute has the effect of rendering any other statute ineffective, or of no consequence, in case of any inconsistency or departure.<sup>52</sup> The clause has been stated to be a 'legislative device' used to preclude the operation and effect of all contrary provisions.<sup>53</sup> The

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<sup>49</sup> Bankruptcy Law Reforms Committee, Report, Volume I: Rationale and Design (2015) <[https://ibbi.gov.in/uploads/resources/BLRCReportVol1\\_04112015.pdf](https://ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf)>

<sup>50</sup> Jyoti Singh & Vishnu Shriram, *Insolvency and Bankruptcy Code, 2016: Concepts and Procedures* 72 (2017).

<sup>51</sup> *Insolvency and Bankruptcy Code, 2016*, §243.

<sup>52</sup> Kafaltiya A.B., *Interpretation of Statutes* 150 (2008).

<sup>53</sup> *Union of India v. G.M. Kokil*, 1984 Supp SCC 196, ¶11.

Apex Court has held that the IBC is “a complete code in itself” that clearly overrides statutes<sup>54</sup> or provisions in statutes that conflict with it,<sup>55</sup> especially with the incorporation of Section 238.<sup>56</sup>

**3.2. THAT DUES OF THE RESPONDENT CANNOT BE AFFORDED PRIORITY OVER SECURED CREDITORS**

42. It is humbly submitted before the Court that the Code provides for the priority of distribution of proceeds in the event of the sale of the assets of a corporate debtor and that secured debts should be given priority over 'Government' dues or crown debts.<sup>57</sup> It is contended that since the GST Department is not a secured creditor and it cannot be afforded priority as taxes are crown debts. In the case of *PR Commissioner of Income Tax v. Monnet Ispat and Energy Limited*<sup>58</sup>, the Apex Court unequivocally ruled that tax dues, being crown debts, do not take precedence over secured creditors.<sup>59</sup>
43. The secured creditors have priority over the unsecured creditors, and the operational creditors rank lower in priority than the secured creditors.<sup>60</sup> Section 53 of the IBC comprises a separate level of priority for government dues. This is sufficient to highlight the legislative intent of treating government dues as distinct from dues of secured creditors. It is a known fact that all

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<sup>54</sup> Sundaresh Bhatt v. Central Board of Indirect Taxes and Customs, (2023) 1 SCC 472.

<sup>55</sup> Embassy Property Development Pvt. Ltd. v. State of Karnataka, 2019 SCC OnLine SC 1542.

<sup>56</sup> Pr. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd., 2018 SCC Online SC 3465.

<sup>57</sup> M/s Edelweiss Asset Reconstruction v. M/s Tax Recovery Officer, MANU/MH/1863/2021.

<sup>58</sup> *Supra* Note 54.

<sup>59</sup> Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., (2000) 5 SCC 694.

<sup>60</sup> Leo Edibles and Fats Limited v. Tax Recovery Officer, (2018) 407 ITR 369.

tax statutes provide for the creation of a charge in favor of tax authorities for unpaid tax dues.<sup>61</sup>

If tax authorities are to be treated as secured creditors owing to the charge created by the operation of law, it begs the question of why they are accorded a separate mention in Section 53(1)(e)(i). Moreover, tax dues being an input to the Consolidated Fund of India and of the States, clearly come within the ambit of Section 53(1)(e) of the Code.

44. The reason for placing taxation authorities lower in the priority order is that if they were given higher priority, they would receive a significant portion or even the entire resolution amount, and other parties like workmen, banks, and financial institutions would not receive anything. The legislature intended for the money to go first to secured creditors because the money belonging to secured creditors came from depositors and taxpayers. Implementing a drastic change to the scheme of the Code requires the intervention of the legislature and should not be left to the courts to overturn the fundamental building blocks of the Code.

### **3.3. THAT THE GST DEPARTMENT IS AT BEST AN OPERATIONAL CREDITOR**

49. It is strongly contended that the GST department's dues are not secured by any collateral or security interest, and are, at best, in the nature of unsecured operational debts. The IBC defines an operational creditor as a person to whom an operational debt is owed. An 'Operational Debt' typically refers to a debt incurred during the functioning of the Corporate Debtor. The 'goods' and 'services,' including employment, are necessary to maintain the Corporate Debtor as an ongoing entity. Only when the Corporate Debtor remains operational and continues as a going concern will statutory obligations, such as Income Tax and GST payments, arise. Because such statutory liabilities stemming from the existing law only arise when the company is

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<sup>61</sup> I.T.O., Hundi Circle I, Madras v. K.A. Govindaswamy & Ors., 1978 113 ITR 593 Mad.

operational, these liabilities have a direct nexus with the company's operation.<sup>62</sup> As a result, all statutory liabilities, including 'Income Tax' and 'Value Added Tax,' fall under the definition of 'Operational Debt.'<sup>63</sup>

50. The case of *National Plywood Industries Limited v. Union of India and Ors*<sup>64</sup> established that GST dues prior to the CIRP are considered operational debts and are governed by the Code. Coercive action cannot be taken against a corporate debtor for dues prior to CIRP, and such dues must be treated as operational debt.<sup>65</sup>
51. In line with the aforementioned reasoning of various Courts, it is contended that GST, being a statutory due similar to Income Tax and Value Added Tax, will also come within the ambit of Operational Debt, in turn making the GST Department an Operational Creditor.<sup>66</sup> Thus, in case of a non-payment or delayed payment of GST, the GST department has a right to recover the tax arrears, interest, and penalties due to it from the defaulting businesses. However, the nature of the dues is that of an operational debt and not a secured debt.<sup>67</sup> Hence, the GST Department cannot be treated as a secured creditor and can, at best, be an operational creditor.

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<sup>62</sup> Pr. Director General of Income Tax (Admin. & TPS) vs. M/s. Synergies Dooray Automotive Ltd. & Others, 2019 SCC OnLine NCLAT 691.

<sup>63</sup> The Insolvency and Bankruptcy Code, 2016, § 5(21).

<sup>64</sup> National Plywood Industries Limited v. Union of India and Ors, 2007 (1) GLT 584.

<sup>65</sup> Circular No. 134/04/2020-GST dated 23rd March 2020; Circular No. 187/19/2022-GST Dated 27th December, 2022

<sup>66</sup> Deputy Commissioner of Income Tax v. Bhuvan Madan RP for Diamond Power Infrastructure Ltd. & Anr., 2019 SCC OnLine NCLT 8411.

<sup>67</sup> Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors., MANU/SC/1661/2019; Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., (2019) 4 SCC 17.

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**PRAYER**

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**WHEREFORE IN THE LIGHT OF ISSUES RAISED, ARGUMENTS ADVANCED AND  
AUTHORITIES CITED, IT IS HUMBLY PRAYED THAT THIS HONOURABLE  
COURT MAY BE PLEASED TO DECLARE THAT:**

- 1) That the writ petitions filed by the Company are maintainable.
- 2) That the Company is not required to pay GST on the entire consideration received by it since all the games operated by it online are only ‘games of skill’ and not ‘games of chance’.
- 3) That the GST Department cannot be treated as ‘secured creditor’ but at best only as an ‘operational creditor.

**And/ or**

**Pass any such order, judgement or direction that the Hon’ble Court may deem fit in the  
interest of equity, justice and good conscience.**

**For this act of kindness, the Counsels for the Petitioner as in duty bound shall forever  
pray.**

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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**Sd/-**

**COUNSELS FOR THE PETITIONER**