

TEAM CODE: 06

**20TH SURANA AND SURANA NATIONAL CORPORATE
LAW MOOT COURT COMPETITION 2022 – 23**

Before

THE HIGH COURT OF KARNATAKA

WP No. 1001-1004 of 2023

IN THE MATTER OF

MIDAS ONLINE GAMES INDIA PVT. LTD. PETITIONER

v.

DIRECTORATE GENERAL OF GST INTELLIGENCE RESPONDENT

MEMORIAL ON BEHALF OF THE RESPONDENT

DRAFTED AND FILED BY THE COUNSELS FOR THE RESPONDENT

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LIST OF ABBREVIATIONS

Sl. No.	ABBREVIATIONS	EXPANSION
1.	&	And
2.	§	Section
3.	¶	Paragraph
4.	AIR	All India Reporter
5.	Anr.	And others
6.	BOM	Bombay
7.	Cal	Calcutta
8.	CGST	Central Goods and Services Tax
9.	COC	Committee of Creditors
10.	Del	Delhi
11.	Ed.	Edition
12.	GST	Goods and Service Tax
13.	Guj	Gujarat
14.	IBC	Insolvency and Bankruptcy Code

15.	ILR	Indian Law Reporter
16.	NCLAT	National Company Law Appellate Tribunal
17.	NCLT	National Company Law Tribunal
18.	Ori	Orissa
19.	Ors.	Others
20.	P&H	Punjab and Haryana
21.	SC	Supreme Court
22.	SCC	Supreme Court Cases
23.	SCN	Show Cause Notice
24.	SCR	Supreme Court Reporter
25.	Sikk.	Sikkim
26.	TN	Tamil Nadu
27.	UP	Uttar Pradesh
28.	v./vs.	Versus

INDEX OF AUTHORITIES

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, 13th 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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- 7) Akaant Kumar Mittal, Insolvency and Bankruptcy Code, 2016, EBC.
- 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 & Practise (2nd Ed.)

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- 1) www.scconline.com
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SL. No.	CASES	CITATION
1.	<i>All India Gaming Federation v. The State of Karnataka & Ors</i>	MANU/KA/0345/2022.
2.	<i>Babasaheb Rahimsaheb v. Rajaram Raghunath Alpe</i>	1930 SCC OnLine Bom 174
3.	<i>Baburam Prakash Chandra Maheshwari v. Antarim Zila Parish Ad Now Zila Parishad</i>	(1969) 1 SCR 518
4.	<i>Bassoon v. Tohersey</i>	S.C. 5 Bom. L. R. 503
5.	<i>Builders Supply Corporation v. Union of India,</i>	AIR 1965 SC 1061
6.	<i>Calcutta Discount Limited Company v. Income Tax Officer, Companies District I, Calcutta & Anr.</i>	(1961) 41 ITR 191 (SC)
7.	<i>Dominance Games Pvt. Ltd v. State of Gujarat</i>	2017 SCC OnLine Guj 1838
8.	<i>Dunlop India Ltd. v. Union of India</i>	(1976) 2 SCC 241

9.	<i>Future Gaming Solution Ltd v. Union of India</i>	2018 SCC OnLine Sikk 136
10.	<i>Ghanashyam Mishra & Sons Private Ltd v. Edelweiss Asset Reconstruction Company</i>	2021 SCC Online SC 313
11.	<i>Innoventive Industries Ltd. v. ICICI Bank,</i>	(2018) 1 SCC 407
12.	<i>Jindal Stainless Ltd v. State of Haryana</i>	(2017) 12 SCC 1
13.	<i>Jindal Stainless Ltd. v. State of Haryana</i>	(2017) 12 SCC 1
14.	<i>Junglee Games India Private Limited v. State of T.N.</i>	2021 SCC OnLine Mad 2762
15.	<i>M/S Gaussian Network Pvt. Ltd v. Ms. Monica Lakhanpal</i>	2012 SCC OnLine Dis Crt (Del) 1
16.	<i>Madras Race Club v. State of T.N.</i>	1975 SCC OnLine Mad 184
17.	<i>Nasir Salim Patel v. State of Maharashtra & Ors.</i>	2018 SCC OnLine BOM 6803
18.	<i>Radha Krishan Industries v. State of H.P.</i>	(2021) 6 SCC 771
19.	<i>Rahke v. United States</i>	180 F. Supp. 576, 578 (Ct. Claims 1960)
20.	<i>Rashid Ahmed v. Municipal Board, Kairana</i>	1950 SCC 221
21.	<i>Shoolbred v. Roberts</i>	[1899] 2 Q. B. 560, 564
22.	<i>Skill Lotto Solutions Pvt. Ltd. v. Union of India</i>	2020 SCC OnLine SC 990
23.	<i>Sri Srinivasa Theatre v. Govt. of T.N.</i>	(1992) 2 SCC 643
24.	<i>State of Bombay v. R.M.D. Chamarbaugwalla</i>	1957 SCR 874
25.	<i>State of H.P. v. Gujarat Ambuja Cements Ltd.</i>	(2017) 9 SCC 601
26.	<i>State of Karnataka v. State of Meghalaya</i>	022 SCC OnLine SC 350,

27.	<i>State of Maharashtra and Others vs. Greatship (India) Limited</i>	2022 SCC OnLine SC 1262
28.	<i>State Tax Officer (1) v. Rainbow Papers Ltd.</i>	2022 SCC OnLine SC 1162
29.	<i>State Trading Corporation of India Ltd. v. Commissioner</i>	ILR 1974 Delhi 58
30.	<i>State Trading Corporation v. Commercial Tax Officer</i>	1964 SCR (4) 89
31.	<i>Swiss Ribbons (P) Ltd. v. Union of India</i>	(2019) 4 SCC 17
32.	<i>Thansingh Nathmal v. Superintendent. of Taxes</i>	(1964) 6 SCR 654
33.	<i>The Assistant Commissioner of State Tax Appellant(s) and Ors. v. M/s Commercial Steel Limited</i>	2021 SCC OnLine SC 884
34.	<i>The Director General of Police v Mahalakshmi Cultural Association</i>	MANU/TN/0741/2012
35.	<i>Titagarh Paper Mills Co. Ltd. v. State of Orissa</i>	1974 SCC OnLine Ori 59
36.	<i>Triveni Shankar Saxena v. State of U.P.</i>	1992 Supp (1) SCC 524
37.	<i>Union of India and Ors. v. Martin Lottery Agencies Limited</i>	2009 12 SCC 209.
38.	<i>United Bank of India v. Satyawati Tondon</i>	(2010) 8 SCC 110

STATEMENT OF JURISDICTION

The Petitioner has approached the Hon'ble High Court of Karnataka under Article 226 of the Indian Constitution, 1949, challenging the orders of the GST Department and proceedings initiated against the Petitioner. The Respondent poses its objection to the said jurisdiction.

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”*

STATEMENT OF FACTS

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 and had dues of 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 stating that the Company in involved in gambling.
4. The company believed it was liable to pay GST at 18% only on the admission fee collected from the participants.
5. The software service provider 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 was constituted and resolved to file writ petitions before the Hon'ble Karnataka High Court challenging the orders passed by the GST Department.

STATEMENT OF ISSUES

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 A
SECURED CREDITOR INSTEAD OF AN OPERATIONAL CREDITOR
UNDER THE INSOLVENCY AND BANKRUPTCY CODE 2016?

SUMMARY OF ARGUMENTS

I. THAT THE WRIT PETITION FILED BY THE COMPANY IS NOT 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 thereby depriving the company its right to natural justice and c) The Demand Orders issued by the Department were unsustainable as it did not give sufficient time to the company to respond to the Department's separate orders.

II. THAT THE COMPANY IS NOT 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 CAN 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.

ARGUMENTS ADVANCED

CONTENTION 1: THAT THE PETITIONS ARE NOT MAINTAINABLE

1. It is humbly submitted before this Hon'ble Court that the writ petitions filed by Midas Online Games India Pvt. Ltd. (hereinafter referred to as the Petitioner) are not maintainable as the latter disturbed the hierarchy that had to be followed by not seeking the alternate remedy available, i.e.; approaching NCLAT before the High Court of Karnataka under Article 226 of the Constitution.
2. The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) is a single unified umbrella code, covering the entire gamut of the law relating to insolvency resolution of corporate persons and others in a time-bound manner. The Code provides a three-tier mechanism namely,
 - (i) the NCLT, which is the adjudicating authority,
 - (ii) the NCLAT, which is the appellate authority,
 - (iii) the Supreme Court, which is the final authority, for dealing with all issues that may arise in relation to the re-organization and insolvency resolution of corporate persons.¹
3. It is contended that a writ petition should not be entertained when an efficacious remedy is provided by law, especially when a right is created by a statute, which itself prescribed the remedy or procedure for enforcing the right or liability, resort must be had to that statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution.² This rule of exhaustion of statutory remedies is a rule of policy convenience³ and discretion.⁴

¹M/s. Innoventive Industries Ltd v. ICICI Bank, AIR 2017 SC 4084.

² Baburam Prakash Chandra v. Antarim Zila Parishad, 1969 SCR (1) 518.

³ Radha Krishan Industries v. State of H.P, (2021) 6 SCC 77.

⁴ Rashid Ahmed v. The Municipal Board, Kairana, 1950 SCR 566.

Herein, the statute in question, the Code, prescribes the remedy to be sought and hence the Petitioner was required to invoke that before approaching this Hon'ble Court.

4. While it is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ, it is urged that the Court declare the petition unmaintainable on the ground of the company not following the authorized procedure.⁵ These procedures were put in place to streamline the process of law and order in the country and also to ease the burden of the higher courts. The Petitioner by circumventing them is undermining their authority. Therefore, the Hon'ble Court should be wary that no interference be made without checking if all alternative remedies have been explored,⁶ which, as has been humbly submitted, has not been done.

1.1 THAT FUNDAMENTAL RIGHTS HAVE NOT BEEN VIOLATED

- 10 It is humbly submitted before the Hon'ble Court that only activities that involve games of skill are protected under Article 19(1)(g) and not those that are games of chance or gambling. These said games organized by the Petitioner also do not fall under the ambit of trade and thus, are not protected by Article 19(1)(g) of the Constitution of India.
5. Moreover, a company is not a citizen of India and is a juristic or artificial person⁷ within this ambit. It cannot claim fundamental rights as most of them have been conferred upon the citizens exclusively.⁸ Thus, it is submitted that the Petitioner, seeking relief under Article 19(1)(g) of

⁵ State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd., AIR 2005 SC 3856. See also Calcutta Discount Limited Company v. Income Tax Officer, Companies District I, Calcutta & Anr. (1961) 41 ITR 191 (SC).

⁶ Thansingh Nathmal And Ors v. A. Mazid, Superintendent of Taxes, 1964 SCR (6) 654; See also Titagarh Paper Mills Co. Ltd. v. State of Orissa And Ors, AIR 1975 Ori 90; Dunlop India Ltd vs Union Of India & Ors, 1976 SCR (2) 98; United Bank of India v. Satyawati Tondon & Ors., (2010) 8 SCC 110; The Assistant Commissioner of State Tax Appellant(s) & Ors. v. M/s Commercial Steel Limited, 2021 SCC OnLine SC 884; State of Maharashtra and Others v. Greatship (India) Limited, 2022 SCC OnLine SC 1262.

⁷ *Supra* Note 3.

⁸ State Trading Corporation v. Commercial Tax Officer, 1964 SCR (4) 89. See also State Trading Corporation of India Ltd. v. Commissioner, ILR 1974 Delhi 58.

the Constitution cannot claim the same. Additionally, on account of the Code being a self-contained one, it is contended that the Hon'ble Court should refrain from interfering with the resolution process.⁹

1.2 THAT THERE HAS BEEN NO VIOLATION OF NATURAL JUSTICE OF THE COMPANY

11. It is humbly submitted before this Hon'ble Court that there was no violation of natural justice on part of the company. The Respondent gave sufficient time to reply and several patient hearings to the company on the SCNs for all the four years.¹⁰ However, the separate orders passed by the department were a result of genuine concern for the nation and fellow taxpayers at large, since if the company failed to pay the whopping amount of INR 11,000 crores, it would be a huge loss for the economy. Section 78 of the CGST Act, 2017 also authorizes the proper officer to expedient the process of recovery of tax if deemed necessary, as is the case in the instant matter.

1.3. THAT ORDER OF PROCEEDINGS WERE HELD WHOLLY WITH JURISDICTION

12. It is also submitted that a writ petition is maintainable before the High Court only if the taxing authorities have acted beyond the scope of their jurisdiction. In the instant case, the demand orders issued by the Respondent are sustainable and the proceedings took place in a fair manner, compliant with the relevant law. This is evident from the fact that the Respondent served the notices on time and gave sufficient time to the company to respond to the department SCN.¹¹

⁹ Swiss Ribbons Pvt Ltd & Anr. v. Union of India & Ors, (2019) 4 SCC 17, Ghanashyam Mishra & Sons Private Ltd v. Edelweiss Asset Reconstruction Company, 2021 SCC Online SC 313.

¹⁰ ¶4, Moot Proposition, 20th Surana and Surana National Corporate Law Moot Court Competition, 2022–23.

¹¹ *Ibid.*

CONTENTION 2: THAT GST IS PAYABLE ON THE ENTIRE CONSIDERATION

13. It is humbly submitted before this Hon’ble Court that the Petitioner is involved in the business of online games involving games of chance such as poker, rummy, lottery, etc., which have been repeatedly established in multiple cases to be gambling, and consequently games of chance.
14. The Court has in a previous judgment assumed that the degree of chance would increase in online gambling; and there was a possibility for manipulation of outcomes by cheating and collusion.¹² The Petitioner, too, is involved in a similar business of online gaming and is susceptible to the same follies.
15. Games based on ‘preponderance of skill’ are protected under Article 19(1)(g) of the Constitution, the restrictions imposed by the State on conducting or playing such games should satisfy the tests of reasonableness and proportionality.¹³ Respectfully, it is contended that first, the Petitioner conducts games of chance and not skill, and thus are not protected under Article 19(1)(g) of the Constitution.
16. “Betting is gambling and gambling includes betting. It follows, therefore, that where the entry is 'betting or gambling', or 'betting and gambling', the effect and scope of the power will be the same.” In real life, games require the competitors to exercise presence of mind.¹⁴ Considering there are a lot of factors such as network, internet connection, etc. that would increase the chance of uncertainty when these games are played online, these remain games of chance. Gambling is clearly prohibited in India, it does not become legitimate solely because it is online.¹⁵

¹² M/s Gaussian Network Pvt. Ltd v. Ms. Monica Lakhanpal, 2012 SCC OnLine Dis Crt (Del) 1.

¹³ Jungle Games India Pvt. v. State of Tamil Nadu, 2021 SCC Online Mad 2762.

¹⁴ Madras Race Club v. State of Tamil Nadu, AIR 1976 Mad 238.

¹⁵ *Ibid.* See also *Rahke v. United States*, 180 F. Supp. 576, 578 (Ct. Claims 1960).

17. Subsequently, betting and gambling are state subjects under Entry 34, list II of the Constitution, giving the State of Karnataka all the rights to frame laws in respect to gambling and lottery. The same are illegal in Karnataka as per the Karnataka Police Act, 1963 and the Karnataka Police (Amendment) Bill, 2021 too declares online gaming and game of chance to be illegal, as defined in Sec 2(7)(i) and Sec 2(7)(ii). With the industry growing manifold over the last decade, the revenue generated from the same is not a meagre amount and will only increase in the near future. It is thus submitted before this Hon'ble Court that GST be levied on the entire consideration. Consequently, in the 47th GST Council Meeting, the Group of Ministers (GoM) recommended that GST be levied on the full value of bets pooled in the totalisators and placed with the bookmakers.¹⁶
18. Moreover, it is necessary that both parties are given a mutual opportunity to win or lose an uncertain event. In the instant case, the model of the game is such that it leads to gain for few and loss for many. In the situation that if the prize money in a game is sponsored by outside persons, it would not be recoverable and that the outcome does not solely depend upon the players. Thus, it is clear that the Petitioner is not conducting is game of chance and not skill.¹⁷

GAMBLING

19. Section 65B (15) of the Finance Act, 1994 defines gambling as *“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”*.¹⁸ Lottery has been held to be an activity of gambling nature, which is res extra commercium, i.e. an activity outside the ambit of trade and commerce.

¹⁶ 47th GST Council Meeting, Minute Book dated 28th & 29th June, 2021.

¹⁷ Babasaheb Rahimsaheb v. Rajaram Raghunath Alpe, (1931) 33 BOMLR 260. See also Bassoon v. Tohersey, S.C. 5 Bom. L. R. 503; Shoolbred v. Roberts, [1899] 2 Q. B. 560, 564.

¹⁸ The Finance Act, 1994, § 65B(15).

20. Lottery and gambling under GST's ambit is valid, which consequently upholds the validity of tax imposition on lottery tickets and the prize money¹⁹. It is respectfully contended that tax should thus be imposed on the games and activities conducted by the Petitioner.
21. Attracting business or enticing players by alluring them with prize money is illegal, which is exactly what is being done by the Petitioners in the instant matter before the Court.²⁰ The participants fall into the false notion of gaining easy money through gambling via these games and suffer heavy losses. These unfair losses that are faced by the common public is what the Petitioner proudly claims to be its income. Hence, the company misleads its players.
22. In the present case, there was an agreement between the Petitioner and participants in which they agreed to the model of the company thus it is a supply of service, following the principle of 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' shall be treated as supply of service.²¹ Thus, the Petitioner must be taxed in full, including the entire consideration being paid by the participants.²²
23. The ambit of betting and gambling is limited to betting on activities based on chance only.²³ It has similarly been observed that the term 'gambling' is confined to games of chance. The games organized by the Petitioner, rummy, poker, lottery, etc are uncertain events the outcome of which does not depend upon skills displayed by the participant and thus have been classified as games of chance.

¹⁹ Skill Lotto Solutions Pvt. Ltd. v. Union of India & Ors, 2020 SCC OnLine SC 990.

²⁰ *Supra* Note 13.

²¹ The Goods and Services Tax Act, 2017, Schedule II, Clause 5(e).

²² State of Bombay v. R.M.D. Chamarbaugwalla & Anr, AIR 1957 SC 699; Union of India and Ors. v. Martin Lottery Agencies Limited, 2009 12 SCC 209.

²³ *Supra* Note 14; See also All India Gaming Federation v. The State of Karnataka & Ors, MANU/KA/0345/2022.

RUMMY & POKER

24. Playing rummy without stakes is legal and if the same is played with stakes, it would amount to gambling.²⁴ Herein, the prize money for the winners can be considered to be the ‘stakes’, making the game of rummy amount to gambling and hence, a game of chance. With respect to Poker, it has been held that Poker does not involve any skill as the outcome is entirely contingent on the cards received by the player.²⁵

LOTTERY

25. In the landmark judgment of *Future Gaming Solution Ltd v. Union of India*²⁶ it had been concluded that lottery is covered under ‘Betting and Gambling’. Entry 62 of List II²⁷ is a specific taxation Entry on ‘luxuries, including taxes on entertainments, amusements, betting and gambling’. Since there is no dispute that lotteries, irrespective of whether it is conducted or it is organised by the Government of India or the State Government or is authorized by the State or is *conducted* by an agency/instrumentality of the State Government or Central Government or any private player, is ‘betting and gambling’, the State Legislatures have the power to tax lotteries under Entry 62 of List II.²⁸

HORSE RACING

26. It is contended that every betting by itself is a gamble and involves an element of uncertainty. Where there is betting there is gambling, where there is gambling by hazarding money on an uncertain event, or winning on a horse, there is betting, therefore, no hesitation

²⁴ The Director General of Police v Mahalakshmi Cultural Association, MANU/TN/0741/2012.

²⁵ Dominance Games Pvt. Ltd v State of Gujarat, 2017 SCC OnLine Guj 1838. See also Nasir Salim Patel v. State of Maharashtra & Ors, 2018 SCC OnLine BOM 6803.

²⁶ Future Gaming Solution Ltd v. Union of India 2018 SCC OnLine Sikk 136.

²⁷ The Goods and Services Tax Act, 2017.

²⁸ State of Karnataka v. State of Meghalaya, 2022 SCC OnLine SC 350.

in holding that horse racing and the activities connected with the same are betting and gambling.²⁹

2.1. THAT THE COMPANY IS LIABLE TO PAY GST ON ENTIRE CONSIDERATION

27. It is humbly submitted before this Hon'ble Court that the Petitioner is involved in the business of online games classified as gambling. With regard to this, the company is liable to pay GST at the rate of 28% on the entire amount comprising the admission and pooling fee received by it from each participant, under SAC 998439 as per Section 9 of CGST Act, 2017, which enjoins that there shall be levied a tax called Central Goods and Services Tax on all intra state supplies of goods or services, or both.

28. Moreover, Schedule III of the said Act lists activities or transactions that shall be treated neither as a supply of Goods nor a supply of services. Entry 6 of this Schedule deals with the exception for the same, i.e actionable claims, other than lottery, betting and gambling are not subject to the imposition of tax. Similarly in the instant case the company is involved in the business of online gaming which does include lottery, betting and gambling and therefore the company is a supplier of services of the same and is liable to pay tax on the entire consideration. By the term entire consideration, emphasis is laid on both, the fees (admission as well as pooling) paid by a participant to these games.

29. *“Services means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.”*³⁰ The business conducted by the Petitioner falls under the ambit of services since it involves the use of money and its conversion from one form to another. The

²⁹ *Supra* Note 15.

³⁰ The Central Goods and Services Tax Act, 1994, § 2(102).

model of the business is such that it involves first transferring money into an account (escrow and the bank's), itself a service and then paying the same money to the winner of the games as prize money is a conversion of money and thus is a service.

30. Show Cause Notices (SCN) were issued against the company on 01.04.2022 for the aforementioned reasons for FY 2017-18, FY 2018-19, FY 2019-20 and FY 2020-21, for organizing game includes gambling which substantially involves game of chance and not skill under:

- A. Rule 31A (3) of GST Rules 2017.
- B. Section 73(2) of CGST ACT, 2017
- C. Section 74(2) of CGST Act, 2017³¹

2.2.THAT COMPANY IS LIABLE UNDER RULE 31A (3) OF GST ACT, 2017

32. It is humbly submitted that the Petitioner is liable to pay tax since the value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator.³²

33. The counsel further submits that Entry 6 of Schedule III deals with the exception wherein actionable claims which include lottery, betting and gambling are subject to be taxed as they are the activities which are included under the ambit of supply of goods or services. Hence, the value of supply of these activities are determined under Rule 31A(3) of CGST act. In the instant case, the pooling fee received from all the participants is transferred to an escrow account, which, according to the Petitioner, becomes the actionable claims of all the participants. Thus, the Petitioner is liable to be taxed on these actionable claims as well, which forms a part of the entire consideration.

³¹ *Supra* Note 10.

³² The Central Goods and Services Act, 2017, Rule 31A(3).

34. In the present case, since the company is involved in the games of chance which includes betting, gambling and lottery therefore the company is liable to pay GST at 28% under the SCN Code 999692³³.
35. The transaction value is the actual price paid for goods or services when the supplier and recipient are unrelated and the price is the only factor in the exchange.³⁴ In the instant case, the price actually paid by the company is the initial amount i.e. the admission fee + pooling fee, paid by the participants which result in gain for few and loss for many³⁵ and therefore tax should be imposed on the entire amount that goes into providing the service. Similarly, 75% of the consideration goes into the escrow account and amounts to the prize money for the players. This model of gaming is also a service since only a fraction of participants benefit alongside the except the company itself and therefore tax should be charged on the entire consideration.

2.3. THAT SECTION 73(9) IS MAINTAINABLE

37. It is humbly submitted before this Hon'ble Court that Show Cause Notice (SCN) and statements were issued against the company for the financial years FY 2017-18 under section 73(2) of GST, ACT 2017. The proper officer has the power to serve a notice on the person chargeable with tax should he notice tax being short paid.³⁶ Here, the Petitioner has clearly been short paying tax by paying GST at 18% on a part of the consideration instead of 28% on the entire consideration. Therefore, the department is legitimate to ask the Petitioner to show cause as to why it should not be taxed at rate of 28% on the entire amount received by it since

³³ Central Board of Indirect Taxes and Customs, Notification No. 48/2012.

³⁴ The Central Goods and Services Tax Act, 2017, § 15.

³⁵ ¶1, Moot Proposition, 20th Surana and Surana National Corporate Law Moot Court Competition, 2022–23.

³⁶ The Central Goods and Services Tax Act, 2017, § 73(2).

it is involved in the business of gambling which involves substantially game of chance rather than game of skill.³⁷

38. Moreover, the department gave sufficient time to reply and several patient hearing to the Petitioner on the SCNs for all the four years. Hence, the demand orders passed by the Respondent are maintainable under Section 73(9) of the CGST Act and it is liable to pay GST of 28% along with penalty and interest i.e., INR 11,000 crores.

2.4. THAT SECTION 74(9) IS MAINTAINABLE

39. It is humbly submitted before this Hon'ble Court that SCN and statements were issued against the company for the financial years FY 2019-20 and FY 2020-21 under section 74(2) of GST, ACT 2017. The proper officer has the power to serve a notice on the person chargeable with tax should he notice tax being evaded on the pretext of wilful-misstatement. The Petitioner, by passing off the games conducted by it as games of skill evaded tax by paying only 18% on part consideration, whereas it conducts games of chance, the taxation of which falls under the tax bracket of 28%. Therefore, the demand orders passed by the Respondent are maintainable under Section 74(9) of the CGST Act.

CONTENTION 3: THAT THE GST DEPARTMENT IS TO BE TREATED AS A SECURED CREDITOR

40. It is humbly submitted before the Hon'ble Court that the GST Department is a secured creditor under the IBC because **(3.1)** The nature of tax incidence affords it a secured status; **(3.2)** There exists a security interest and; **(3.3)** The CoC can't secure their own dues at the cost of statutory dues owed to any Government.

³⁷ *Supra* Note 10.

3.1 NATURE OF TAX INCIDENCE

41. The GST Department, being a regulatory body, is responsible for enforcing the tax laws and ensuring compliance with the same. The Respondent plays a critical role in collecting revenue that is essential for funding government services and social welfare programs, such as healthcare, education, and infrastructure projects. The power to tax is an inherent attribute and an incident of sovereignty.³⁸ This power is unfettered barring the limitation imposed under the Constitution of India. Taxes are collected for the public good and meant for being used by the Government in discharging its constitutional obligation for public welfare and to further the directive principles enshrined under the Constitution.³⁹
42. It is crucial to classify the GST Department as secured creditors as they will have priority in recovering unpaid taxes in insolvency or bankruptcy proceedings, which will help ensure that these revenues are collected more efficiently. By granting them secured creditor status, the government can ensure a more predictable and stable revenue stream, which will in turn help maintain fiscal stability, allowing the government to better plan and execute its budgetary policies. It can act as an incentive for businesses and individuals to comply with their tax obligations, as they would be aware that unpaid taxes will be recovered with priority during insolvency or bankruptcy proceedings and can also help in reducing tax evasion and fraud. Knowing that unpaid taxes will be recovered with priority during insolvency or bankruptcy proceedings will deter businesses and individuals from engaging in such practices.
43. The Respondent being a representative of the public interest, should be given priority over private creditors in insolvency or bankruptcy proceedings as this will ensure that burden of unpaid taxes does not fall disproportionately on taxpayers who have fulfilled their obligations.

³⁸ Jindal Stainless Ltd v. State of Haryana, (2017) 12 SCC 1.

³⁹ Srinivasa Theatre & Ors. v. Government of Tamil Nadu & Ors. 1992(2) SCC 643.

Moreover, the right to collect tax stems from a statute backed by the force of law. This gives it a higher level of protection than unsecured creditors.

44. The common law doctrine that 'Government debts have priority' is recognised within the meaning of Article 372(1) of the Constitution of India.⁴⁰ This doctrine has been consistently recognised by various courts in India and amounts to 'Law in Force' within the meaning of Article 372 (1) of the Constitution of India.⁴¹ The basic justification for the claim of priority of State Debts is the rule of necessity and the wisdom of conceding to the state the right to claim priority in respect of its tax dues.

3.2 THERE EXISTS A SECURITY INTEREST

45. It is humbly submitted that the Respondent is a secured creditor as there exists a security interest. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited and Section 3(31) defines security interest to mean a right, title, interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction, which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.
46. Security interest can be created in two ways, (i) By contract, which means that a lender and debtor enter into a contract for creating a security interest to secure repayment of a debt; and (ii) By operation of law, which means that a security interest is created automatically by virtue of a statute. Secured Creditor, as defined under the IBC is comprehensive and wide enough to cover all types of security interests and such security interest could be created by operation of law. Moreover, this definition does not exclude any Government or Governmental Authority.

⁴⁰ The Constitution of India, 1949, Article 372(1).

⁴¹ Builders Supply Corporation v. Union of India, AIR 1965 SC 1061.

47. It is humbly contended that view of the statutory charge in terms of the CGST Act, the claim of the GST Department of the State, squarely falls within the definition of Security Interest under Section 3(31) of the IBC and the State becomes a Secured Creditor under Section 3(30) of the Code.
48. It is contended that the GST Department has a statutory lien over the assets of the company for the amount of tax due to it, which is similar to a security interest. A lien means “a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims are satisfied.”⁴². Lien is expressly recognized as a form of security interest under the IBC. As IBC makes no distinction between categories of charge holders (in terms of priority), in a scenario where a financial lender, as well as a lien holder, chooses to realise their respective security interests, a financial lender holding a first charge would find himself on the same pedestal as an operational creditor with a lien. Additionally, it is argued that a statutory lien is created by operation of law and hence, verifiable, the Resolution Professional would have to analyze the underlying transaction which led to the creation of the lien and act beyond the mandate given to him for the purposes of verification of security interest.
49. It is contended that the GST department is a secured creditor in the sense that it is entitled to recover the tax arrears, interest, and penalties due to it from the defaulting businesses. Non-classification of the GST Department as a secured creditor creates an unfair disadvantage to the GST department and reduces its chances of recovering the outstanding arrears. Additionally, it is contended that the mere fact that a creditor might be an operational creditor would not result in loss of status of that creditor as a secured creditor.

⁴² Triveni Shankar Saxena v. State of U.P., 1992 Supp (1) SCC 524.

50. It is pertinent to note that the GST Department is responsible for collecting taxes on behalf of the government, and this revenue is crucial for the functioning of the government. Allowing the GST Department to be considered an operational creditor would diminish its ability to recover tax dues, which would have a negative impact on tax revenues for the government. Furthermore, allowing the GST Department to be considered an operational creditor would weaken the tax system and allow defaulting taxpayers to avoid paying their tax dues. This would have a negative impact on the overall economy and financial stability of the country.

3.3 THE COC CANNOT SECURE THEIR OWN DUES AT THE COST OF STATUTORY DUES OWED TO ANY GOVERNMENT.

51. The principle that secured debts cannot be secured at the cost of government dues was enshrined by the Apex Court in *State Tax Officer (1) v. Rainbow Papers Limited*⁴³, wherein it was stated that

“The Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.”

Hence, it is contended that tax dues are public money, which should be treated with priority during the CIRP. It is pertinent to note that excluding the tax claims from this ambit would be detrimental to the public interest, as it could result in a loss of revenue for the government and affect the funding of essential public services.

⁴³ State Tax Officer (1) v. Rainbow Papers Limited, 2022 SCC OnLine SC 1162.

PRAYER

**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 not maintainable.
2. That the Company is required to pay GST on the entire consideration received by it since all the games operated by it online are only ‘games of chance’ and not ‘games of skill’.
3. That the GST Department is to be treated as ‘secured 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 Respondent as in duty bound shall forever
pray.**

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sd/-

COUNSELS FOR THE RESPONDENT