

INDIA: LEGAL UPDATE

Gowree Gokhale, Ranjana Adhikari and Aaron Kamath of Nisith Desai Associates round up the key recent legal developments in India for iGaming Business, which include a further blow for iGaming licensees in the state of Sikkim.

Mahalakshmi Case reaches the chequered flag

The Supreme Court of India (“Supreme Court”) recently delivered two orders in the eagerly followed *Mahalakshmi Case*¹. Until the ruling of the Madras High Court in 2012 (“MHC Order”)², it was fairly settled in that prohibitions under the Indian gaming legislation did not apply in the case of games of skill and therefore one could collect stakes or make profits from games of skill. However, the Madras High Court held that although rummy is a game of skill, it would if played with stakes, amount to gambling. The matter then went on appeal to the Supreme Court.

On August 13, 2015, proceedings took an interesting twist when the Supreme Court observed in its order that the MHC Order had not dealt with online rummy, and therefore any observations made within in the MHC Order did not necessarily apply to this game. The Supreme Court did not however deliver its verdict on the issue of collecting stakes and making profit from rummy played offline.

However, on August 19, 2015 the appellants in the matter stated that a trial court had previously passed an order acquitting them. In light of the acquittal, the appellants sought permission to withdraw the original writ petition filed before the

Madras High Court and this permission was granted by the Supreme Court. The Supreme Court disposed of the matter and observed that the MHC Order and any other orders made by the Supreme Court during the course of the matter become irrelevant and ineffective.

The uncertainty regarding the applicability of State gambling enactments to online gaming sites persists. This also means that the position of the law on collecting stakes from games of skill reverts to the original position asserted by many previous court judgments i.e. games of skill fall outside the scope of the State gambling laws and therefore stakes may be collected or profit generated from such games.

The Supreme Court certainly missed an opportunity to fill the gap in the law and shed light on the accompanying issues. However, operators of online poker websites would be well advised to await the outcome of developments in another case pending

before the Delhi High Court (“DHC”), where the question of whether games of skill can be offered for money on virtual platforms was considered.³ In this case, prior to the revision petition filed before the DHC, a district court in Delhi opined that when skill based games are played for money in the virtual space, this renders them illegal, and also that the degree of skill involved in playing these games in physical form could not be equated with those played online. The next hearing on this matter is scheduled for January 2016.

Sikkim curtails operation of online gaming licences

The Sikkim State Government on August 19, 2015, amended⁴ the Sikkim Online Gaming (Regulation) Act, 2008 (“Sikkim Online Gaming Act”) restricting the offering of “online games and sports games” under the licences issued under the said Act to physical premises of gaming parlours within the geographical boundaries of the state of Sikkim through intranet gaming terminals.

Initially, the Sikkim Online Gaming Act contemplated that the licences would allow the licensee to offer the games⁵ across India

¹ Mahalakshmi Cultural Association v. The Director, Inspector General of Police & Ors. [Special Leave Petition (Civil) 15371 of 2012, Supreme Court of India]

² The Director General of Police v. Mahalakshmi Cultural Association [(2012) 3 Mad LJ 561]

³ Gaussian Networks Private Limited v. Monica Lakhanpal and Anr.

⁴ Sikkim Online Gaming (Regulation) Amendment Act, 2015 notification issued by the Law Department, Government of Sikkim dated August 19, 2015

⁵ Under Rule 3 of the Sikkim Online Gaming (Regulation) Rules, 2009, read with Sikkim Online Gaming (Regulation) Amendment Rules 2009 notification issued by Finance, Revenue and Expenditure Department, Government of Sikkim dated 1st August, 2009, the following games can be conducted online under a license issued under the Sikkim Online Gaming Act: (i) Roulette, (ii) Blackjack, (iii) Pontoon, (iv) Punto Banco, (v) Bingo (vi) Casino Brag, (vii) Poker, (viii) Poker Dice (ix) Baccarat, (x) Chemin-de-for, (xi) Backgammon, (xii) Keno, (xiii) Super Pan 9, (xiv) sports betting on sports games such as football, cricket, lawn tennis, chess, gold, horse-race and such other sport games (which involve prediction of the results of the sporting events and placing a bet on the outcome, in part or in whole, of such sporting event)

“The Sikkim State Government on 19 August amended the Online Gaming Act, restricting the offer of ‘online games and sports games’ to the physical premises of gaming parlours within the geographical boundaries of the state of Sikkim through intranet gaming terminals.”

via their websites, and not be restricted to the State of Sikkim. However, when the go-live licenses were issued a few months ago, the terms carried certain restrictions by virtue of which such online gaming services may be offered only within the state of Sikkim through an intranet connection, thereby restricting the service to people located within the geographical territory of Sikkim. This amendment was brought in to avoid a discrepancy in the terms and conditions of the licenses issued and the wording of the Sikkim Online Gaming Act. This amendment is bound to have a significant impact on the business plans of the licensees given that there were huge investments made in procuring the licenses and setting up the supporting infrastructure based on the expectation that they would be able to offer the games to players across India.

The Sikkim Government also recently clarified⁶ that the “online gaming levy” payable by a licensee company to the Sikkim Government would remain *status quo*, i.e. at the rate of 10% of the gross gaming yield (*the*

total amount of all bets or stakes made, and the price of all chances sold; less the value of all winnings and prizes due, in the course of the online gaming or sports gaming during the period in question) or INR 50,000,000 (approximately USD 767,690), whichever is higher,⁷ until the Sikkim Government deems it necessary to review and revise the online gaming levy.

Delhi District Court declares that cricket betting is not illegal

A district court in New Delhi (“Court”) recently acquitted popular Indian cricketer S. Sreesanth and 35 others in the infamous betting and fixing case pertaining to events during the Indian Premier League cricket tournament in 2013 (“IPL”).

In dealing with the arguments, the Court made an interesting and encouraging observation on the point of whether cricket was a game of skill for the purpose of gambling laws. The Court observed that cricket is purely a game of skill as it requires “extensive training, practice and

expertise and skills in the players.” Taking into consideration factors such as, inter alia, knowledge, study, practice, ability, hand-eye co-ordination, speed, stamina, strength, precision and the mental alertness involved in the various facets of the game, the Court found cricket not to be a game of chance, but a game of skill exempted from the definition of “gambling” under Section 12 of Public Gambling Act, 1867 (“Public Gambling Act”)⁸. The Court made reference to the decision by the Supreme Court in *K. R. Lakshmanan v. State of Tamil Nadu* (“Lakshmanan Case”), wherein betting on horse racing was held to be a game of skill, since factors such as the fitness and skill of the horse and jockey could be objectively assessed by a person placing a bet. Applying the rationale of the *Lakshmanan Case*, the Court stated that betting on the outcome of a game of cricket would not constitute an offence under the Public Gambling Act. The order was delivered by the lower court and therefore may not serve as a binding precedent. However, the order appears to be an encouraging sign for sports betting businesses and indicates a trend of growing judicial acceptance of the legality of sports betting.

CBDT issues clarification on disclosure of offshore winnings routed through e-wallets

The Central Board of Direct Taxes (“CBDT”) recently released a circular with certain “clarifications on tax compliance for undisclosed foreign income and assets”¹⁰ (“Circular”). The Circular clarifies that a person having funds, subject to tax in India but on which tax was not paid, lying in offshore e-wallets / virtual card accounts maintained with online gaming / poker

⁶ Vide Notification No. FIN/DSSL/531/2015-16 issued by the Finance, Revenue and Expenditure Department, Government of Sikkim on June 19, 2015

⁷ Vide Notification No. 337/FIN/DSSL/972 issued by the Finance, Revenue and Expenditure Department, Government of Sikkim on April 1, 2010

⁸ Section 12 of the Public Gambling Act - Act not to apply to certain games: “Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played.”

⁹ AIR 1996 SC 1153

¹⁰ “Clarifications on Tax Compliance for Undisclosed Foreign Income and Assets”, Circular No. 15 of 2015 dated September 3, 2015 issued by Central Board of Direct Taxes (TPL Division), Department of Revenue, Ministry of Finance, Government of India. Available at: http://www.incometaxindia.gov.in/communications/circular/circular15_2015.pdf. Last accessed: October 10, 2015

websites and having made profits therefrom is required to disclose to the Indian tax authorities all the details in relation to these accounts. The Circular states that that an e-wallet / virtual card account is similar to a bank account where inward and outward cash movement takes place. Hence, the same valuation and declaration of such accounts should be made by persons as in the case of a bank account, in order to comply with certain tax compliance requirements under Chapter VI of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ("Black Money Act").

The Black Money Act was recently enacted to tax foreign undisclosed income and assets of tax residents of India and will take effect from April 1, 2016, i.e. from the financial year April 1, 2015 to March 31, 2016. Non-disclosure of foreign income and assets is subject to 30% tax with a penalty of three times the tax due and rigorous enforced imprisonment of between 3-10 years. The Black Money Act provided for a one-time compliance opportunity (or

amnesty) for a limited period for those affected, giving them a chance to bring their tax affairs into order by September 30, 2015, until which time the penalty for failure to make a disclosure in respect of an asset, being one or more bank accounts having an aggregate balance not exceeding the equivalent of INR 500,000 at any time during the previous year,¹¹ did not apply.

It is also relevant to note that remittances out of lottery winnings and remittances for purchase of lottery tickets, banned/proscribed magazines, football pools, sweepstakes etc. are prohibited¹² under the Foreign Exchange Management (Current Account Transactions Rules) Rules, 2000 ("Current Account Rules"). However, although in-letter remittance for the purpose of betting is not explicitly prohibited, it may be construed as such when viewed in light of the spirit and purpose for which the provision was enacted.

¹¹ Proviso to section 42 of the Black Money Act
¹² Schedule I of the Current Account Rules



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