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Articles

Legitimacy of levy of seigniorage fee on consumers

By **Anup Koushik Karavadi**

This article deals with the validity of the levy of seigniorage fee on the consumer/user and the ambiguity in the calculation of the same.

Constitutional validity

Under Entry 54 of List I of Schedule VII of the Constitution of India, the Union is empowered to legislate on matters dealing with mines and minerals. Under this List, flowing from Article 246 of the Constitution, the power to legislate on matters dealing with the *"regulation of mines and mineral development"* has been conferred on the Union. Such power has been exercised by the Parliament through the Mines and Minerals (Development & Regulation) Act, 1957.

Statutory provisions through delegated legislation under Constitutional framework

As per Section 9 of the Mines and Minerals (Development & Regulation) Act 1957, royalty has to be paid by any individual who has received a mining lease from the authorities. Entry 23 of List II read with Section 15 of the Mines and Minerals (Development & Regulation) Act, 1957 confers power on the State legislature to frame the Andhra Pradesh Minor Mineral Concession Rules, 1966 (henceforth referred to as APMCC Rules). Although constitutionally valid as aforementioned, there are multiple issues that arise during implementation.

The said rules require payment of seigniorage fee and obtaining dispatch permits from the Mineral and Geology (henceforth referred to as M&G) department by the lessee prior to the dispatch of minor mineral from the leased area/premises. Reading the above mentioned provisions with Rule 26 of the APMMC Rules, the lessee is required to pay seigniorage fee only on the minerals extracted from the lease area/premises and not on processed material. Further, if the lessee fails to pay the seigniorage fee on the extracted mineral then the lessee could be held liable to pay the penalty of five times the seigniorage fee.

Factors of calculation of Seigniorage Fee

In the matter of *Progressive Constructions Co.* it was stated that calculation of seigniorage fee is to be undertaken as per Schedule I of the APMMC Rules. Schedule I, flowing from Rule 10 of the APMMC Rules states that the segniorage fee payable on the quantity of the certain minerals when extracted is Rs. 50 per cubic metre or Rs. 33 per metric tonne. It can be logically inferred from the same figures that the conversion factor has been set at approximately 1.5 (50/33) by the M&G department on certain minerals. This is the factor of conversion applied at the time of issuance of a transit certificate. Such rate of conversion has led to widespread loss to both consumers and manufacturers. It is pertinent to note that the rules have provided the option

to the lessees to make payment of seigniorage fee either on volume cubic metre basis or weight metric ton basis. However, in practice, the lessees have been making payment of seigniorage fee only on the basis of volume.

Criticism of the conversion factor

The Supreme Court in the case of *Union of India and Others* v. *The Tata Iron and Steel Co.*, observed that the lack of an identifiable standard would lead to arbitrary assessment by authorities. The conversion factor (discussed above) has been criticized on the ground that there is no identifiable test or scientific report reasonably capable of identifying such a ratio for conversion. It has been argued that the conversion factor is to be set at 2.64 as per scientific standards. In response to the same, the High Court of Andhra Pradesh had appointed a Scientific Committee to address the same issue. The Committee report is yet to be submitted. To date, there are several cases pending in the High Court of Andhra Pradesh with regard to the discrepancy in the method of calculation of seigniorage fee at different stages of extraction and transaction. Perhaps, subsequent to the submission of the said report, the High Court would decide the pending cases accordingly.

Problems when burden of payment shifts to users/ consumers

The minor mineral extracted in its original state is less in volume due to the large mass. However, at the time of transportation of the said mineral, it is broken down into smaller boulders for ease of transit. This leads to an increase in the volume of the said mineral due to the air spaces created between the boulders. The problem arises since the original measurements taken are for the weight of the extracted mineral while the transit certificate is issued according to the volume of the said mineral.

Rule 26 of the APMMC Rules refers to imposition of penalty for non-payment of seigniorage fee. It was held in the case of *Mysore Structural Ltd.* that the primary obligation to pay the segniorage fee is *prima facie* on the licensee, however, the consumer is also subject to seigniorage if sufficient proof as to payment is not presented before the authorities. Though this is currently a relatively settled matter through *L. Venkateswara Rao* case, there remains other pertinent issues. The problem arises herein since such penalty may extend to the consumer as well. The same will be discussed below. Further, it has to be seen as to whether Rule 26 of the APMMC Rules is *ultra vires* the Act given that the Act requires the lessee to pay. It has to be seen as to whether the liability can be extended to a user as well within the ambit of the enacted legal provisions.

In practice, liability has been extended to the consumer since the original volume of the mineral at the time of extraction would have been lower (due to fewer air spaces) than the volume on breaking it down into smaller units. Thereby, even the original seigniorage fee paid by the manufacturer would have been lower than the new requirement of seigniorage fee payment post change in the volume of the mineral for transportation. Thus, the original

measure for calculation of seigniorage fee falls short of the new measures based on volume. Since the quantum of consumption would not match the original royalty slips, the consumer would be obliged to pay the seigniorage fee and five times penalty if he is unable to explain the cause of such discrepancy. This tends to land the subsequent consumer in trouble due to lower payment having been made by the manufacturer. As was previously discussed, the question whether this is a levy permitted by the statute, remains.

Conclusion

The seigniorage fee is undoubtedly a valid levy under both the Constitutional paradigm and delegated legislation. However, when it comes to implementation, there is a need to maintain a common measure to avoid the aforementioned confusion and injustice caused to subsequent consumers at times who purchase in bulk. The main focus herein is not on petty consumers but on those who extract and consume in bulk. The loss being caused is far greater due to greater air space leading to added volume as stated above. It would thus be advisable to rely on a common standard of measure based on weight since the risk of double levy by the Government could possibly be avoided unlike in the current practice.

[The author is a Principal Associate, Corporate Practice, Lakshmikumaran & Sridharan, Hyderabad]

Skill versus chance - A saga of online gaming

By **Sreya Bhar**

Introduction

The current trend of selecting national or international players/athletes based on their performance/skill/fitness and creating one's own virtual team to compete on a virtual platform is not a novel concept. In fact, this indulgence dates back to the post World War II era.

In common parlance, trading of players/athletes by individuals on a virtual platform is popularly termed as 'fantasy sports'. Such games began as mere hobby and the frenzy regarding such 'fantasy sports' grew by leaps and bounds. With the spread of internet across the globe, this enthusiasm for virtual 'fantasy sports' grew. The post millennium decade witnessed a boom in internet sites offering the user an opportunity to create his virtual team on a simulated platform with professional athletes/ sportspersons and also indulge in trading and substituting the selected athletes.

The present article attempts to find the legality of such 'fantasy sports' on online platforms wherein money can be made by betting on players/teams, and to draw a bridge between such online games and 'games of mere skill'.

What is 'Online fantasy sports'?

A virtual platform for trading of sportspersons is more commonly known as 'online fantasy sports', wherein participants step into the shoes of owners/managers on a simulated

environment. Such games can be played by the participating individual by way of paid leagues, free entry leagues, knock out tournaments, etc. The participant selects sportspersons based on the statistics of such individual players playing the sports professionally in reality. He has the liberty to trade/substitute players in his team before each round of a real professional match, akin to real sports team management.

Based on the performance of the players in actual tournaments or matches, points are credited virtually to the participant's online user-account and such points continue to accrue over a period of time after which the same may be converted to cash and/or this cash be received *via* account transfer in the name of the participating individual on verification of the identity of the participant by means of proper documentation. This raises questions pertaining to the legality of the same.

Legality of online/virtual sports leagues

It can be well argued that such virtual sports league is a type of betting, which is spelt out as illegal under the Indian Public Gambling Act, 1987. Wagering or gambling, as defined in Black's Law Dictionary (Sixth Edition) 'involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of consideration, an element of chance and a reward'. However, the provisions of the said Act would not apply when such a game involves mere skill, wherever played (according to Section 12, Indian Public Gambling Act, 1987). This was reiterated and reinforced by the Supreme Court in *K.R. Lakshmanan* v. *State of Tamil Nadu,* 1996 SCC (2) 226, that if the game involves a substantial degree or 'preponderance of skill', even though such a game shall have money as its sole consideration, it shall not amount to gambling as the outcome of the same is not left completely to chance. 'Preponderance of skill' in a game can be construed to mean that the outcome of a particular game would depend more on skill of the player/participant rather than just plain luck. Additionally, it shall be pertinent to note that the Supreme Court, in *Pratapchand Nopaji* v. *KotrikeVenkataSetty,* (1975) 2 SCC 208, held that gain of one party arrived at the expense of loss of the other party constitutes the essence of wagering contracts.

It shall be worthwhile to note that unlike placing bets with bookies, such type of simulated online sports requires the participant to have substantial knowledge of the sports as well as speculation and certain degree of logical analysis. Therefore, it can be asserted that these types of games are based on certain skillful permutation, combination and arrangement of the teams of players, which requires certain degree of information of the players' statistics as well as knowledge and ample familiarity with the sports itself. It is not a game which can be left to blind chance or luck to score a win. A display of skill is thus, a prerequisite in case of playing such online sports.

The *K.R. Lakshmanan case* (supra) also elaborated upon 'objective facts capable of assessment by race goers' specifically in relation

to horse races. This can be extrapolated in case of online sports, as elucidated further below.

In case of such online games ('fantasy sports'), where the participant bases his decision of inclusion or exclusion of a player from his team on the player's inherent talent, dexterity, ability, form and fitness, pre-tournament preparation, overall performance in the last few matches, and even on the turf/pitch conditions, and other such conditions; the participant is actually proving his own expertise and knowledge of the game and thus, the dependence on chance and luck is greatly reduced.

These above-discussed factors form the objective criteria for consideration and assessment of sportsperson by the individual, who is participating in an online sports league. He needs to be conversant with these various factors and have ample awareness and understanding of the same about the players and the game itself to form a team of such players to be able to win such points. Hence, it may be safe to opine that such games are games where skill holds a key role. Even if the sole consideration for the participant is the points which can be converted to money, it can be argued that such virtual sports leagues have a keen eye on skill over chance.

The Supreme Court, on 13 August, 2015, in *Mahalakshmi Cultural Association* v. *The Director, Inspector General of Police,* SLP (Civil) 15371/2012, held that the Madras High Court ruling in the *Director General of Police, Chennai* v. *Mahalakshmi Cultural Association,* 2011 SCConline Mad 1997, which observed that playing rummy with stakes amounts to gambling, shall not impact online rummy websites. The Supreme Court, on 18 August, 2015, further observed in the SLP (Civil) 15371/2012(supra) that the observations made by the Madras High Court did not survive as Mahalakshmi Association, which had preferred the Writ petition before the High Court withdrew the said petition as it received acquittal from all charges against its officials in the trial court below.

Also, it may be mentioned that for a few of these fantasy sports games, the participant does not need to pay any amount as processing fee or entry fee. The question of such websites profiteering out of the fees paid by the participants, therefore, does not arise as well. In such case where a registration fee is required to be paid, such amount, on theory, does not in any manner form a basis of calculations for the amount to be paid to the participant on accrual of a specific number of points. As per Section 3 of the Public Gambling Act, owning or keeping, or having charge of a gaming-house is liable to be penalized. By the above decision in *Mahalakshmi Cultural Association* case (supra), the Apex Court has negated the application of such provision to an online gaming website.

All the prizes or awards which are offered to the winners in such cases are published on the websites, with clarification regarding the conversion of such points and often the calculation method. This is in furtherance of the point that such 'fantasy sports' is not in the nature of gambling. The result of these games

do not depend on a solitary event of a player's performance on the field or on the winning or losing of the team in a single match, but depends over a number of matches and on proficiency and awareness of the participant, unlike in the case of betting with bookies.

Concluding remarks

Taking into account the aforementioned judicial precedents, a list of conditions can be prepared to examine the validity of online fantasy sports so as to steer clear from the purview of gambling/wagering, *viz.:*

i) whether the balance tilts in favour skill over chance;

ii) whether there is 'mutuality', i.e. one party enjoys a gain at the loss of the other party with whom the agreement has been made on the basis of occurrence of the uncertain event which is the subject matter of the agreement;

iii) whether the winning is based on a single solitary match or performance of an athlete in a single match or tournament;

iv) whether speculation of the participant depends on his knowledge and objective assessment of the facts and scenario of the athlete, team, tournament, pitch/turf, etc.

These may provide the nudge to push online games in the nature of fantasy sports into the criteria of being considered as a game of skill and thus not be prohibited under the laws of the land. The abovementioned criteria are not the exhaustive conditions that are required to be kept in mind. There is no such pigeon-holed formula to determine whether the balance tilts more in favour of skill in the case of such online games.

With the current trend of online gaming, it is fairly certain that the above criteria and conditions would be explored and distinguished at various levels by the Courts. The laws relating to such online gaming and online reward are evolving at a fast pace. Hence, the time is ripe for such a judicial decision or amendment of the concerned legislation clarifying the stance once and for all.

[The author is an Associate, Corporate Practice, Lakshmikumaran & Sridharan, Kolkata]

Notifications & Circulars

Limited Liability Partnership Rules amended: The Ministry of Corporate Affairs has in exercise of powers conferred by Section 79 of the Limited Liability Partnership Act, 2008, issued a notification dated October 15, 2015 amending the Limited Liability Partnership Rules, 2009. The notification *inter-alia* provides that an intimation of conversion from partnership firm to LLP shall be filed with the concerned Registrar of firms in Form 14 within fifteen days of the date of registration of the LLP, thereby doing away with the filing of Form 14 in case of conversion to LLP from private company and unlisted public company.

SEBI specifies format of Listing Agreement: The Securities Exchange Board of India (SEBI) has, with a view to simplify the listing agreement and make it uniform across all types of securities and listed entities, notified a format for Listing Agreement. It may be noted that according to the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 every listed entity is required to execute a fresh listing agreement with the stock exchange within six months of the date of notification. Circular No. CIR/CFD/CMD/6/2015, dated 13-10-2015 issued in this regard specifies an agreement to give effect to the requirements of the aforesaid regulations. Circular also lists 5 SEBI Regulations where there is a requirement of executing a listing agreement with the Stock Exchange.

SEBI notifies format for compliance report on corporate governance: SEBI has prescribed formats for submission of compliance reports by the listed entities in terms of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. According to Regulation 27(2) of the said Regulation, every listed entity is required to submit quarterly compliance report on corporate governance in the specified format to the recognized Stock Exchange within fifteen days from the close of the quarter. Circular No. CIR/CFD/CMD/5/2015, dated 24-9-2015, which will be effective after 90 days from 2-9-2015, has been issued by SEBI in this regard.

NRIs allowed to subscribe to National Pension System: A Non-Resident Indian (NRI) can subscribe to National Pension System governed and administered by Pension Fund Regulatory and Development Authority (PFRDA), provided such subscriptions are made through normal banking channels and the person is eligible to invest as per the provisions of the PFRDA Act. NRIs have to make payment either by inward remittance through normal banking channels or out of funds held in his NRE/FCNR/NRO account. Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 have been amended by Notification No. FEMA.353/2015 RB, dated 6-10-2015 by the RBI. New provisions further state that annuity/accumulated savings will be repatriable.

Ratio Decidendi

Arbitration when party initiates proceedings to blacklist another: Punjab & Haryana High Court has held that it is open to parties to refer the issue of blacklisting to arbitration. The Court in this regard noted that there is no rule of law that prohibits parties from referring an issue relating to blacklisting to arbitration, and there is no bar to such reference of all other disputes arising under the arbitration agreement merely because one of the parties decides to blacklist the other or initiates a process to consider whether the other party ought to be blacklisted or not. It was held that a view to the contrary would

frustrate not only the arbitration agreement between the parties but the Arbitration and Conciliation Act, 1996, itself.

Observing that the unilateral act of blacklisting cannot deprive the other contracting party of its rights under the contract including the right to invoke the arbitration agreement contained therein, the High Court was of the view that if a blacklisted party can file an action in Court, there is no reason why it cannot refer the dispute to arbitration. It was also held that mere fact that a writ against blacklisting can be issued in a case does not denude the civil court or an arbitrator of the jurisdiction to entertain and try the case. Considering that the arbitration agreement referred to 'all disputes arising out of the purchase order', it was held that the arbitration clause was wide enough to cover the disputes including in relation to the issue of blacklisting. [*KV Fire Chemicals (I) Pvt. Ltd. v. Indian Oil Corporation Limited* - Arbitration Case No. 84 of 2014 (O&M), decided on 24-9-2015, Punjab & Haryana High Court]

Appointment of arbitrator after termination of MoU: The Supreme Court of India has upheld the existence of an arbitration agreement in the Memorandum of Understanding (MoU) between the parties even when there was failure of the parties to reach a full-fledged agreement with respect to the various terms and conditions contained in the MoU for a joint venture. Reversing the High Court decision, the Apex Court rejected the contention that since there can be no arbitration agreement in the absence of a concluded contract, there was no question of an arbitration agreement coming into existence. The Arbitration Clause contained in the MoU was held to be a stand-alone agreement by the Court after it found that irrespective of the question whether the MoU fructified into a full-fledged agreement, specific agreement was entered into by the parties to refer controversies to the sole arbitrator by consensus.

It was held that when consensus was not reached as between the parties for making the reference, it would be open for either of the parties to invoke Section 11 of the Arbitration and Conciliation Act, 1996 and seek for reference of the dispute for arbitration. Referring to various communications between the parties, the Apex Court was of the view that both parties were at variance with reference to the various terms and conditions contained in the MoU and consequently there was every right in either of the parties to seek for an amicable settlement. [*Ashapura Mine-Chem Ltd. v. Gujarat Mineral Development Corporation* – (2015) 8 SCC 193]

SEBI has jurisdiction in respect of CIS offered by Trust: Securities Appellate Tribunal has held that the fact that Section 11AA(2) of the SEBI Act, 1992 refers to any scheme or arrangement made or offered by any 'company' would not mean that the jurisdiction of SEBI to regulate Collective Investment Scheme (CIS) is restricted to any scheme or arrangement made or offered by any company registered under the Companies Act, 1956 only. The Tribunal in this regard observed that Section 11AA(2) merely sets out the conditions applicable to any scheme

or arrangement offered by an entity to which SEBI, under CIS Regulations would grant registration for running a CIS. Reliance in this regard was also placed on provisions of Section 11(1) and Section 11(2)(c) of SEBI Act, which states that SEBI is duty bound to protect the interests of all investors in 'securities' by regulating the securities market including the investors in the collective investment schemes.

While holding that the Art Fund sponsored by the appellant as AMC of the Trust constitutes CIS under Section 11AA of SEBI Act 1992, the Tribunal was of the view that expression 'Collective Investment Scheme' defined under Section 11AA(1) is wide enough to cover any scheme or arrangement. Provisions of Section 11AA(3) carving out some exceptions were also taken note of by the Tribunal in this regard. Finally, since the appellant was running CIS through the arrangement of a private trust without obtaining registration from SEBI, the SAT upheld the decision of the full-time Member of SEBI finding the appellant guilty of operating CIS in violation of the SEBI Act and the CIS Regulations. [*Osian's-Connoisseurs of Art Private Limited* v. *Securities and Exchange Board of India* - Appeal No. 62 of 2013, decided on 13-10-2015]

Competition law - Area allocation when not causes appreciable adverse effect on competition: The Competition Commission of India has held that though the Opposite Party 1 in the case before it had indulged in anti-competitive practices by involving in area allocation in respect of its distributors and stopping supplies to the informant in the case, there was no adverse effect on competition. The Commission thus disagreed with the conclusion of the DG that the vertical restraints imposed by the manufacturer on its distributors caused appreciable adverse effect on competition in the market. Noting that whether an agreement restricts the competitive process is always an analysis of the balance between the positive and the negative factors listed under Section 19(3)(a)-(f), the Commission was of the view that there was no dearth of products of other equally and better brands in the market, and that the DG had left out market study of other players in the sector.

The CCI further in the case held that the FMCG distributor's association, by creating bye-laws by way of which any new dealer before starting any work with a company was required to seek permission (NOC) from the old dealer, and by imposing geographical restrictions, had disturbed free trade and limited competition among the distributors of particular category of products in a specified area. It was further held that the bye-laws of the Association besides limiting/ controlling the supplies also allocated the markets and as such fell within the presumption under Section 3(3)(b) and (c) of the Competition Act. The Commission in this regard relied upon the material collected by the DG in its investigation and noted that the provision that grants territorial protection to a dealer from all competition in the market indicates that the very object of the provision is anti-competitive in nature. [*Ghanshyam Dass Vij* v. *Bajaj Corp. Ltd.* - Case No. 68 of 2013, decided on 12-10-2015]

NEW DELHI
5 Link Road,
Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014

B-6/10, Safdarjung Enclave
New Delhi - 110 029
Phone : +91-11-4129 9811
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park,
Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025.
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden,
2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Ph: +91(80) 49331800
Fax:+91(80) 49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church, Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune – 411 001. Maharashtra
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road, Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59, Sector 26,
Chandigarh - 160026
Phone : +91-172-4921700
E-mail : lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor,
Corporate Office Tower,
AMBIENCE Island, Sector 25-A,
Gurgaon- 122001
Phone: +91- 0124 – 477 1300
Email: lsgurgaon@lakshmisri.com

EUROPE
Lakshmikumaran & Sridharan SARL
35-37, Avenue Giuseppe Motta, 1202 Geneva
Phone : +41-22-919-04-30
Fax: +41-22-919-04-31
E-mail : lsgeneva@lakshmisri.com