

Online Gaming Intermediaries - Are You Game for Another Set of Complexities?

Feb 02, 2023



Pranay Bhatia

Partner, BDO India LLP



Sneha Gohil

Manager, BDO India LLP



Rashi Bohra

Associate, BDO India LLP

All about Online Gaming Industry and related regulations

The online gaming industry in India has witnessed splendid growth in the last decade. The Government is also determined to regulate the said industry and accordingly, it was in the process of seeking consultations on the proposed 'Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021'. While the Government is keen to introduce a novel exhaustive legislation to protect the interest of the players and bring in parity/standardisation, the income-tax laws governing the online gaming sector industry were primitive and obsolete and thus, it was expected to re-evaluate the extant laws. Identifying the need for a separate independent regime with respect to taxability of online games, Budget 2023 proposes to introduce two novel provisions being section 194BA as well as section 115BB of the Income-tax Act, 1961 (the 'IT Act').

Extant tax laws

Section 194B of the IT Act casts a duty on the payer to withhold taxes upon payment of winnings exceeding INR 10,000 to the recipient on account of card games, lottery, puzzles. etc. @ 30% (plus surcharge and cess). Please note, periodicity with respect to withholding of taxes is not detailed in the extant laws.

Section 2(24)(ix) of the IT Act defines 'income' to include any winnings from games of any sort. Further, the income earned from winnings is subject to tax in the hands of the person winning the game under section 115BB of the IT Act @ 30% of the winnings, on a gross basis.

Proposed amendments in Finance Bill 2023

The Finance Bill proposes as follows:

Withholding tax regime - Online gaming intermediary

Amendment in existing section 194B of the IT Act **Introduction of new section 194BA to the IT Act (specific to online games)**

<ul style="list-style-type: none"> Periodicity now defined ('during the financial year') for TDS on winnings on an amount or aggregate of amounts exceeding INR 10,000. Includes gambling or betting of any form or nature whatsoever. Excludes withholding tax on income from winnings from online games with effect from 1 July 2023 (to be governed by section 194BA of the IT Act). 	<ul style="list-style-type: none"> Introduced for withholding of tax on winnings from online games. Effective from 1 July 2023. <u>Provides for withholding of tax at source on net winnings in the user account at the end of financial year.</u> In case of withdrawal from user account during the financial year, the tax shall be withheld at the time of such withdrawal on net winnings comprised in the withdrawal and on remaining amount at the end of fiscal year. Taxes to be withheld/paid in case of net winnings wholly in kind or partly in cash and partly in kind as well.
--	---

Tax in the hands of Players/users

Amendment in existing section 115BB of the IT Act **Introduction of new section 115BBJ to IT Act (specific to online games)**

<ul style="list-style-type: none"> Excludes taxability on income by way of winnings from online games from 1 April 2023 (to be governed by section 115BBJ of the IT Act). 	<ul style="list-style-type: none"> Effective from 1 April 2023. Effective tax rate of 30% on net winnings from online games during the fiscal year. No exemption of basic slab limit.
--	--

Key observations as well as challenges ahead

- Meaning of net winnings** -The proposed section 194BA as well as section 115BBJ of the IT Act states that a computation mechanism shall be prescribed to arrive at 'net winnings'. It is pertinent to note that the term 'net winnings', as and when prescribed, should clearly outline winnings as net of entry fee and platform fee (as charged by the gaming company).
- Recovery of withholding taxes:** As stated above, proposed section 194BA of the IT Act provides for withholding on net winnings in the user account at the end of the financial year (unless the same is preceded by part/full withdrawal). In that case, only the balance withdrawal standing at the end of the year shall be subjected to tax, if the same comprises of winnings.

Let us assume a scenario wherein:

Particulars	Reference	Amount (in INR)
Introduction of monies by a player in his wallet		INR 5,000
Amount utilised for Playing GameA 1 (entire amount in wallet)		INR 5,000
Amount won in Game 1 (inB addition to the amount utilised)		INR 4,000
Balance in wallet	C = A + B	INR 9,000 (comprises of INR 4,000 of winnings)
Amount utilised for Playing GameD 2		INR 9,000

Amount lost in Game 2 (out of the INR 9,000 utilised in Game 2)	INR 8,000
Net amount in wallet eligible for withdrawal and withdrawn	INR 1,000
Withholding tax on winningsG = B*30% (assuming 'net winnings' will follow the existing mechanism of not allowing set-off of losses with the winnings)	INR 1,200
Amount short for the purpose of recovery of withholding tax	INR 200

In the above scenario, it would be interesting to determine as to how shall the taxes to the extent of INR 200 be collected from the player given that the wallet withdrawable balance is only INR 1,000 (withholding tax liability being INR 1,200). The situation should not lead to online gaming intermediaries not left with adequate amount left in user account.

3. Winnings not liable for taxes earlier may be liable at the time of withdrawal: Consider a scenario where a player has earned winnings of INR 5,000 during April 2023 to June 2023. As per the proposed amendment in section 194B of the IT Act, the online gaming intermediary shall not be required to withhold taxes under section 194B of the IT Act during the period April 2023 to June 2023 given that winnings do not exceed INR 10,000 during the year (assumed that the player will not earn any winnings during the entire year). However, the player withdraws the said sum of INR 5,000 only in August 2023. In that case, shall the earlier winnings which was otherwise not liable for withholding of taxes now shall be liable to withholding of taxes at the time of withdrawal (given that from July 1, 2023 onwards, any amount of winnings at the time of withdrawal shall be liable to be examined for withholding of taxes).
4. 'Net' winnings not stated in sections 194B and 115BB of the IT Act - It may also be pertinent to note that section 194B as well as section 115BB of the IT Act does not use the terminology 'net winnings' vis-à-vis proposed section 194BA and section 115BBJ of the IT Act. It would be interesting to see if the language in section 194B as well as section 115BB of the IT Act is amended once the bill receives assent of the Hon'ble President to ensure parity.

Impact of the amendment

Scraping the withholding tax threshold from the existing INR 10,000 so as to bring within its ambit large base of players may negatively impact the industry and lead to compliance burden on the gaming platforms. Algorithms shall have to be tweaked and reporting compliances shall increase drastically. Online gaming companies shall now have to keep a watch on the winnings of each player during three timeframe; during the year (for the purpose of section 194B), at the year end, and at the time of every withdrawal.

While the Government aims to collect due taxes from the players, implementing the new regime shall definitely result in surge in compliances for gaming companies as well as higher taxes for the players. Having said so, outlining an independent mechanism for online gaming and related taxability/withholding should bring in clarity for the gaming industry and pave way for standardisation in approach.