

The Finance Bill 2023 introduces new taxation laws for Online Games



THE FINANCE BILL 2023 INTRODUCES NEW TAXATION LAWS FOR ONLINE GAMES

Authored by:

Ashutosh Mohan Rastogi, Managing Partner

Tanya Nair, Associate

During Covid, online gaming as an industry experienced meteoric growth, gaining popularity among the new-age GenZ and millennials. Online games were easily accessible through smartphones, play stations, Nintendo, and Xbox and were nothing short of a best friend in disguise to eradicate the boredom and isolation brought upon by the pandemic.

While the pandemic may have spelled doom for many industries, online gaming boomed exceptionally on the back of easy access and multifarious optionality for end-users. Acknowledging the same, the explanatory memorandum to the Finance Bill 2023 has stated the reason for the introduction of separate provisions for governing online gaming:

"It is also seen that in recent times, there has been a rise in the users of online games. There is a need to bring in specific provisions regarding TDS and tax ability of online games due to its different nature, being easily accessible vide the Internet and computer resources with a variety of playing options and payment options".

The Finance Bill, 2023 ("Bill") introduced significant amendments to the tax provisions governing online gaming in India owing to its emergence as one of the most popular activities during the pandemic. This article discusses these new provisions as introduced under the Bill, and since codified under the Income Tax Act, 1961.

Old Provisions under the Income Tax Act, 1961

Under the erstwhile provisions, the Income Tax Act, 1961 regulated online games under the purview of 'card games and other games of any sort' under section 194B along with lottery, crossword puzzle, racing including horse racing as well as gambling and betting of any nature. It is to be noted that 'card games and other games of any sort' was defined as: "any game show, an entertainment programme on television or electronic mode, in which people compete to win prizes or any other similar game". Furthermore, section 115BB provided that the income tax would be calculated at the rate of 30% (thirty per cent) on income by **winnings** from the aforementioned class of games. Additionally, section 194B obligated the person responsible for payment of income by way of winnings, to deduct a tax (at the rate of 30%) on **an amount exceeding Rs 10,000 (rupees ten thousand)**, at the time of payment of income.

New Provisions introduced under the Finance Bill, 2023

The Central Government vide the Finance Bill introduced new provisions that award online gaming an independent status. With respect to income tax, the Bill has introduced section 115BBJ titled 'Tax on winnings from online games' which shall come into effect from 1st April 2024. The aforementioned provision has retained the tax slab at 30% (thirty per cent) however, the calculation of income tax, pursuant to the new provision shall be applicable on the '**net winnings**' from online games.

Further, section 194BA titled '*Winnings from Online Games*' has been introduced with respect to TDS (effective from 1 July 2023) wherein instead of deducting income tax on winnings from games (pursuant to section 194B), the deduction of income tax shall be applicable on 'net winnings' available in the user account. '*User account*' has been defined under the Bill as '*account of a user registered with an online gaming intermediary*'; and a '*User*' has been defined as '*any person who accessed or avails any computer resource of an online gaming intermediary*'.

It is noteworthy, that the Central Government has done away with the threshold of Rs 10,000 (Rupees ten thousand) under the new provision. The rationale behind this decision was an observation that gaming platforms are deducting tax by applying a threshold of Rs 10,000 per transaction, thereby avoiding TDS by splitting winning into multiple transactions, each below the above limit. Such actions by gaming platforms circumvented the legislative intent and necessitated the introduction of new provisions which could effectively tax the fast-growing industry.

Furthermore, it is pertinent to note that section 194BA provides for the tax to be deducted at two points: (a) in the event the user decides to withdraw their income at any time during the financial year, the operator of the online gaming intermediary is required to deduct a tax at that point; and (b) at the end of the financial year, a tax is required to be deducted on the net winnings present in the user account of the user.

Pursuant to the new provisions, Section 194B (as mentioned above) would now only regulate winnings made from lottery, crossword puzzles, card games, or from gambling and betting of any form thereby making an explicit delineation between online games and other games.

What constitutes net winnings?

One of the notable amendments is the substitution of 'winnings' with 'net winnings' in the context of online gaming. On reading the relevant clauses, it is interpreted that 'net winnings' would amount to total income made by a user through winnings from online games. In case this is the intention of the government, such substitution could be considered beneficial for gamers. However, the Central Government has not provided the definition or manner of calculation of net winnings thereby leading to uncertainty around whether net winnings would be calculated on winnings made by a user through one gaming platform or through all the gaming platforms the user is registered with. Furthermore, there is no clarification on whether the computation of such net winnings would include the consideration/deposit made by the user on the gaming platform for the purpose of participation. One hopes that the government would soon provide the necessary clarifications on this issue.

What is an 'online game'?

An 'online game' has been defined under the amended provision as a '*game that is offered on the internet and is accessible by a user through a computer resource including any telecommunication device*'. Prior to the introduction of this definition vide the Bill, online games were defined under the category of '*card games and other games of any sort*'.

The definition of 'online game' as presented under the Bill, does not distinguish between 'games of skill' and 'games of chance'. At present, games of skill attract a GST rate of 18% whereas games of chance attract a rate of 28%. The classification of 'game of skill' versus 'game of chance' is a bone of contention insofar as differential GST rates are being applied to the two.

It is also noteworthy that the Ministry of Electronics and Information Technology (MeitY) recently introduced the draft amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Intermediary Rules) in order to broaden the scope of the IT Intermediary Rules to regulate online games and online gaming platforms. In particular, the IT Intermediary Guidelines define an 'online game' to mean "a game that is offered on the Internet and is accessible by a user through a computer resource if he makes a deposit with the expectation of earning winnings". It is interesting to note that the definition provided in the IT Intermediary Guidelines adopts a narrower approach insofar as it only confines to games that require a monetary consideration and reward system. On the contrary, the definition of online games under the Finance Act, aims to cover all games, regardless of a monetary consideration attached to the game. The definition of online games under the Act does not necessitate any payment of a deposit to qualify as such.

Provided below is a summary of the differences between the old and new provisions as introduced under the Finance Act, 2023.

S.no.	Old Provision	New Provision
1.	While there was no standalone definition of an 'Online game' prior to the Bill, 'online games' were included under the purview of ' card game and other game of any sort ' which was defined to include ' <i>any game show, an entertainment programme on television or electronic mode, in which people complete to win prizes or any other similar game</i> '.	'Online Game' has now been awarded a separate definition under section 115BBJ of the Bill. It has been defined to mean ' <i>a game that is offered on the internet and is accessible by a user through a computer resource including any telecommunication device.</i> '
2.	Income Tax for 'card and other games of any sort' was charged at the rate of 30% on 'winnings' from 'such lottery or crossword puzzle or race including horse race or card game and other games of any sort or from gambling and betting of any form or nature whatsoever' under section 115BB.	Pursuant to the Bill, a separate clause for income tax on online games has been incorporated to the Income Tax Act wherein tax shall be calculated at the rate of 30%. However, such calculation shall be done on 'net winnings' from such online games

S.no.	Old Provision	New Provision
3.	Under section 194B of the Income Tax Act, the person responsible for paying income by way of winnings was required to deduct income tax on winnings exceeding Rs 10,000 from such card game or other game of any sort.	A new provision namely section 194BA has been introduced under the Bill wherein a person responsible for paying income to any person by way of winnings is to deduct income tax on 'net winnings' in such user's account. However, as opposed to the old provision, the threshold of Rs 10,000 has been done away with. Further, TDS is to be deducted at two points i.e, i. At the time of withdrawal, or ii. At the end of the financial year when there is unwithdrawn amount in user account

Conclusion

While the developments made under the Income Tax Act with respect to online gaming are essential, there are certain issues that still require clarification.

- To begin with, there is no clarity on whether a user would be permitted to set off any losses (in one online game) against winnings made in other online games.
- Furthermore, as mentioned above, there is ambiguity with regards to the phrase 'net winnings'—whether the computation of winnings at the end of the financial year would consider all winnings/income made on multiple online gaming platforms by the user or would it mean individual winnings made by the user on individual platforms.

It is assumed that the foregoing issues would be clarified by the government in the imminent future. Nevertheless, the introduction of the new provisions under the Bill represents the growth of the online gaming sector in India and satiates the popular requirement of regulating the gaming sector.

Authored by :

Ashutosh Mohan Rastogi, Managing Partner
ashutosh@amicusservices.in

Tanya Nair, Associate