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exceeding expectations  
SINCE 1985

REPORT



# IMPACT OF THE PROPOSED TAXATION

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WITHHOLDING TAX PROVISIONS ON  
THE ONLINE GAMING INDUSTRY

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# 1. Overview: Online Skill Gaming Industry

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1.1 India has become a pioneer in the “online” gaming industry and has shown great potential to empower the “Create in India” and “Brand India” vision. The industry is enabling unprecedented innovation and has shown the promise to catapult India to being a global gaming superpower and a hub for global game developers, sharing the vision of the Hon’ble Prime Minister of India, Shri Narendra Modi, to make India a global hub for game developers and gaming services. To further enable this vision, the Finance Minister announced the launch of an **Animation, Visual Effects, Gaming and Comics (AVGC)** task force in the Union Budget 2022. It also formed an Inter-Ministerial Task Force (IMTF) to create a regulatory framework for the online gaming industry.

1.2 The Online Skill Gaming industry (**‘OSG’**) in India, has emerged as a key enabler of the AVGC sector. Factors such as internet penetration, 5G infrastructure, and an increase in the use of smartphones have provided a strong impetus to the online gaming industry. The gaming industry in India has charted an impressive growth grown with \$1.8 billion in revenue in 2020, projecting a CAGR at 38%<sup>1</sup>. The industry has already contributed more than INR 22,000 crore<sup>2</sup> as revenue to the Exchequer and number is expected to further go up in the coming years.

1.3 On December 23, 2022, the Government of India (Allocation of Business) (Three Hundred and Seventieth Amendment) Rule, 2022 was notified allocating matters relating to online gaming to the Ministry of Electronics and Information Technology (**“MeitY”**). In furtherance to this, MeitY on January 2, 2023 issued Draft Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules (**“Draft Rules”**) to provide a responsible and accountable regulatory framework for Online Gaming Intermediaries (**“OGI”**). The draft IT Rules clearly define online gaming and online gaming intermediaries.

1.4 The Union Budget, 2023-24 and the Finance Bill, 2023 have recognized the online gaming industry as a new age industry and have provided clarity to the industry by distinguishing online gaming from gambling/betting and making separate provisions for taxation of winnings from online gaming.



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1. <https://www.bcg.com/mobile-gaming-market-opportunity-in-india>

2. <https://www.assochem.org/uploads/files/Online%20gaming%20-Impact%20on%20the%20industry.pdf>

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## 2. Overview of Income-tax w.r.t. Gaming Income

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2.1. The collection of taxes and fees is a fundamental way for countries to generate public revenues that enables them to finance investments in human capital, infrastructure, and the provision of services to citizens and businesses.<sup>3</sup> At the same time, the countries are expected to ensure that their tax system is “fair and equitable”.

2.2. The canons of taxation guide the formulation of tax policies of a country. These include “Neutrality” (levy of tax raises revenue while minimising discrimination in favour of, or against, any economic choice), “Certainty” and “Simplicity of Tax Policies”, “Effectiveness and Fairness” (practical enforceability of tax rules is an important consideration) and “Equity” (ability-to-pay principle), amongst others.<sup>4</sup>

2.3. The scheme of income-tax laid out by the Legislature in India is also primarily guided by these canons of taxation. In India, the income-tax is charged in accordance with and subject to the provisions of the Income-tax Act, 1961 (**the Act**).

2.4. Section 4 of the Act provides for levy of income-tax on total income of a person for an assessment year, in accordance with the provisions of the Act. Every person is liable to pay tax on the previous year’s total income. The payment of tax can be either by way of self-assessment including advance tax or at the time of filing of return of income or by way of deduction of taxes out of income earned by a person.

2.5. To ensure collection of tax in advance, the Act provides for payment in advance i.e., either by way of “Advance Tax” or “Deduction of Tax at Source” (**“TDS”**). In this regard, Section 4(2) read with Section 190 of the Act *inter-alia* provides for payment of tax on income by way of TDS.

2.6. Chapter XVII-B of the Act contains provisions relating to TDS. The general scheme of TDS provision is as follows:

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3. The World Bank, Taxes & Government Revenue, Accessible at <https://www.worldbank.org/en/topic/taxes-and-government-revenue#:~:text=Collecting%20taxes%20and%20fees%20is,services%20for%20citizens%20and%20businesses>.

4. OECD Library, Chapter 2: Fundamental principles of taxation, Accessible at <https://www.oecd-ilibrary.org/docserver/9789264218789-5-en.pdf?expires=1675764318&id=id&accname=guest&checksum=1F0A1A406126FFB1430F50994FAF1006>

- Specific nature of income is made subject to TDS.
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- Charge of TDS is attracted upon occurring of the specified event, i.e., the payment or credit of any specified sum whichever is earlier.
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- Person responsible for payment / credit of income is required to deduct TDS at the prescribed rate and deposit it with the Central Government within the specified time.
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- The recipient from whose income, tax is deducted at source, gets the credit of such TDS in his personal assessment.
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2.7. The deduction and payment of TDS on behalf of recipient are only one of the modes of recovery. The recipient is otherwise liable to make payment of tax if the final amount of tax liability is more than TDS. However, no deduction is required to be made if the payment does not exceed the prescribed threshold limit under the respective TDS provisions.

2.8. The non-compliance of TDS provisions viz., non-deduction / non-payment / short deduction / short payment, has penal consequences leading to the levy of penalty and / or prosecution under the Act.



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## 3. Taxability of Online Gaming Income (Prior to the Finance Bill, 2023) Income

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### Provisions relating to User Taxation

3.1. The year 1972 saw a paradigm shift in the approach of the Legislature in taxing casual and non-recurring receipts which were earlier exempt from tax under section 10(3) of the IT Act. The objective behind bringing an income of such nature within taxable limit was two-fold: *firstly*, to bring it in line with the principle of taxing equal people with equal capacity, and *secondly*, to curb tax evasion indulged in by conversion of black money into white.

3.2. Section 2(24) of the Act defines ‘income’ in an inclusive manner. By the Finance Act, 1972, clause (ix) was inserted in Section 2(24) to expand the definition of income to include ‘winnings from lotteries, crossword puzzles, card game and other game of any sort’, etc.<sup>6</sup>

3.3. The phrase ‘card game and other game of any sort’ is defined in Explanation (ii) to Section 2(24)(ix) to include “*any game show, an entertainment programme on television or electronic mode, in which people compete to win prizes or any other similar game.*”<sup>7</sup> The definition is inclusive in nature and therefore, the words ‘other games of any sort’ are of wide amplitude and their meaning would include an online game. Thus, the winnings from games are covered under the purview of ‘income’. The definition does not make distinction between offline gaming and online gaming. Thus, income earned from online gaming shall also be covered under the definition of income in Section 2(24)(ix) of the Act.

3.4. Section 14 of the Act classifies the income into five different heads viz., Salaries, Income from House Property, Profits or Gains from business or profession, Capital Gains, and Income from other sources. The winnings from lottery, horse race, card games and other games of any sort etc. are classifiable under the head “Income from Other Sources”. This is covered under clause (ib) to Section 56(2) of the Act.<sup>8</sup>

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5. Memorandum to Finance Bill, 1972 and para 6 of Circular No. 108 dated 20 March 1973.

6. Section 2(24)(ix): “*any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever.*”

7. Inserted vide Finance Act, 2001 (w.e.f. 01.04.2002)

8. Section 56(2)(ib): “*(ib) income referred to in sub-clause (ix) of clause (24) of section 2.*”

3.5. The income from gaming is taxable at a special rate as specified in section 115BB of the Act. The relevant part of Section 115BB reads as under:

*“115BB. Where the total income of an assessee includes any income by way of winnings from any lottery or crossword puzzle or race including horse race (not being income from the activity of owning and maintaining race horses) or card game and other game of any sort or from gambling or betting of any form or nature whatsoever, the income-tax payable shall be the aggregate of-*

*(i) the amount of income-tax calculated on income by way of winnings from such lottery or crossword puzzle or race including horse race or card game and other game of any sort or from gambling or betting of any form or nature whatsoever, at the rate of thirty per cent; and...*”

3.6. The section provides for a flat rate of taxation at the rate of 30%, unlike income in the case of individual assesseees or certain other assesseees which are chargeable at slab rates. Thus, if an individual's total income is INR 20,000/- which has solely been earned by way of winnings from games, etc., then such income would be chargeable to tax at the rate of 30%, irrespective of the income-tax slabs. That is, he would be liable to pay INR 6,000/- as tax on the income earned.

### **Relevant TDS Provisions (Prior to the Finance Bill 2023) – History and Current**

3.7. Vide the Finance Act, 1972, the Legislature also introduced TDS provisions with respect to winnings from lottery and crossword puzzle by introducing Section 194B. Section 194B as introduced in 1972 read as under:

***“Winnings from lottery or crossword puzzle.***

*194B. The person responsible for paying to any person any income by way of winnings from any lottery or crossword puzzle in an amount exceeding one thousand rupees shall, at the time of payment thereof, deduct income-tax thereon at the rates in force:*

*Provided that no deduction shall be made under this section from any payment made before the 1st day of June, 1972.”*

3.8. The rationale behind the introduction of taxing provision on winnings from lotteries and crossword puzzles is explained in the under noted circular<sup>9</sup>:

.....  
9. Circular No. 108 dated 20th March 1973

### ***“Taxation of casual and non-recurring incomes***

6. Under the provisions of the Income-tax Act, receipts, which are of a casual and non-recurring nature, are exempt from tax except where the receipts constitute capital gains or arise from a business or the exercise of profession, vocation or occupation or are by way of additions to the remuneration of an employee. In view of this exemption, **no tax is currently chargeable in respect of winnings from lotteries, crossword puzzles, races, card games or from gambling or betting. The exemption from tax of such receipts is not in keeping with the principle of taxing equally persons with equal capacity to pay. The exemption also provides scope for tax evasion and conversion of black money into white by ascribing income, which would normally be taxable, to winnings from lotteries, races, card games, etc. The Finance Act, 1972 has made the following amendments to the Income-tax Act with a view to withdrawing the exemption currently available in respect of casual and non-recurring receipts:**

1. **The definition of income in section 2(24) has been amended to specifically provide that winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever will be regarded as income for purposes of the Income-tax Act. [Section 3(b) (ii) of the Finance Act]**

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### ***Deduction of income-tax from payments in respect of lottery and crossword puzzle prizes***

10. As explained in Paragraph 6 of this circular, the Finance Act, 1972 has made several modifications in the scheme of tax exemption of casual and non-recurring receipts. The effect of these modifications, inter alia, is that winnings from lotteries and crossword puzzles will become chargeable to income-tax from the assessment year 1973-74 onwards. Under a provision made in the new section 194B, every person responsible for paying any income by way of winnings from any lottery or crossword puzzle in an amount exceeding Rs. 1,000 is required to deduct income-tax thereon at the rates prescribed in this behalf in the Finance Act of the relevant year. Consequential changes have also been made in sections 197, 198, 199, 200, 202, 203, 204 and 205 with a view to placing the tax deducted at source from lottery and crossword puzzle prizes on par with the tax deducted from other categories of income in certain respects. These provisions apply in the case of resident as well as non-resident taxpayers. The main features of these provisions are

*explained below:*

1. *No tax will be deducted at source where the prize is Rs. 1,000 or less or where the payment is made before 1-6-1972.*
2. *Where the prize is given partly in cash and partly in kind, income-tax will be deductible from the cash prize with reference to the aggregate amount of the cash prize and the value of the prize in kind. Where, however, the prize is given only in kind, no income-tax will be required to be deducted.*
3. *Income-tax will be deductible from prizes given after 31-5-1972 even if the relevant draw in respect of a lottery or, as the case may be, the competition in respect of a crossword puzzle may have been held on or before that date.*
4. *Where the lottery or crossword puzzle prize is paid in instalments, the deduction will be made at the time of actual payment of each instalment.*
- 5..."

***[Emphasis added]***

3.9. ***By the Finance Act, 1986, the threshold for deduction of tax u/s. 194B was increased to Rs. 5,000 from Rs. 1,000.***

3.10. By the ***Finance Act, 1997, the then Second Proviso was inserted into Section 194B to provide for deduction of tax even if winnings are distributed in kind.*** This proviso provided that where the winnings are wholly in kind or where they are partly in cash and partly in kind but the part in cash is not sufficient to meet the liability for tax deduction in respect of the whole of the winnings, the person responsible for paying shall, before releasing the winnings wither in cash or in kind, ensure that tax has been paid in respect of the winnings. The rationale for insertion of this proviso is explained in the undernoted circular<sup>10</sup>:

***“TDS from winnings from lottery, etc., in kind***

*51.1 According to the provisions of section 194B, any person responsible for paying any income by way of winnings from any lottery or crossword puzzle exceeding Rs. 5,000 is required to deduct tax at the rates in force. The tax is required to be deducted irrespective of whether the winnings are in cash or in kind. However, in cases where the winnings are either wholly in kind or where they are partly in cash and partly in kind but the part in cash is not sufficient to meet the liability for tax deduction in respect of the whole of the winnings, difficulties arise in complying with these provisions. **By a beneficial***

10. Circular No. 763 dated 18th February 1998



*circular, it was hitherto provided that tax need not be deducted in cases where the winnings are wholly in kind. However, instances have come to the notice of the Government where the lottery winnings in kind have escaped taxation.*

*51.2 Therefore, to safeguard the interest of revenue, the Act amends section 194B to provide that in cases where the winnings are wholly in kind or where they are partly in cash and partly in kind but the part in cash is not sufficient to meet the liability for tax deduction in respect of the whole of the winnings, the person responsible for paying the winnings shall, before releasing such winnings either in cash or in kind, ensure that tax has been paid in respect of the aggregate winnings.* He can do so, for example, by collecting from the winner a sum equal to the tax deductible at source on the winnings in kind and, thus, meeting the liability for TDS, before releasing the winnings. For this purpose, the value of the winnings in kind shall be taken as the cost incurred by the payer in acquiring the said winnings in kind.

51.3 Amendments have also been made in section 271C and section 276B to provide for penalty and prosecution for failure to comply with the amended provisions of section 194B.

51.4 These amendments will take effect from 1st day of June, 1997.”

***[Emphasis Added]***

3.11. Prior to the Finance Act, 2001, the deduction of tax u/s. 194B was limited to the payment of winnings from lottery or crossword puzzle only. However, ***by the Finance Act, 2001, the applicability of Section 194B was also extended to winnings from card game and other game of any sort.*** The rationale for the insertion of this proviso is explained in the under noted circular<sup>11</sup>:

***“TDS on winnings from card game and other game of any sort***

*72.1 Under the existing provisions of section 194B of the Income-tax Act, tax is required to be deducted at source at the rates in force in respect of income by way of winnings from any lottery or crossword puzzle.*

*72.2 With a view to widen its scope the Act has amended the section so as to make it applicable to any income by way of winnings from card game and other game of any sort.*

*72.3 The amendment will take effect from 1st June, 2001.”*

11. Circular No. 14 of 2001 dated 09th November 2001

3.12. By the *Finance Act, 2010, with a view to adjust for inflation and to reduce the compliance burden of deductors and taxpayers, the de minimis threshold for deduction of TDS u/s. 194B was increased from Rs. 5,000 to Rs. 10,000.*

3.13. Section 194B, as it stands today, reads as under:

***“Winnings from lottery or crossword puzzle.***

*194B. The person responsible for paying to any person any income by way of winnings from any lottery or crossword puzzle or card game and other game of any sort in an amount exceeding ten thousand rupees shall, at the time of payment thereof, deduct income-tax thereon at the rates in force:*

*Provided that in a case where the winnings are wholly in kind or partly in cash and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of the winnings, the person responsible for paying shall, before releasing the winnings, ensure that tax has been paid in respect of the winnings.”*

3.14. The terms relevant from the perspective of TDS being deducted under section 194B are as follows:

- **Person responsible for paying:** As defined in section 204(iii), the payer would be the person responsible for paying and thus deducting the TDS under section 194B. In the context of online gaming, the person who is organising the game in an online format and is distributing the winnings, could be treated as person responsible for paying.

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- **Any person:** The provision would be applicable irrespective of whether winnings are paid to a resident and a non-resident.

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- **Income by way of winnings from game:** The deduction of TDS is on the payment of income by way of winnings from a game as is referred to in the Section.

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- **Amount exceeding ten thousand rupees:** If the winnings paid are less than ten thousand rupees, then there shall not be any requirement to deduct tax at source.

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- **Payment:** The liability to deduct TDS arises only at the time of payment of winnings.

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- **Rates in force:** The term has been defined in section 2(37A) of the Act. For the purposes of TDS under, inter alia, section 194B, sub-clause (ii) of the section provides that the rate or rates of income-tax specified in this behalf in the Finance Act of the relevant year. Part II of Schedule I

of the Act provides for the TDS rates, which is 30% for the purposes of section 194B.

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3.15. It is also necessary to draw attention to the proviso which requires the payer to ensure the payment of tax on the winnings, if the same is paid in kind.



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## 4. Taxability of Online Gaming Income (Proposals by the Finance Bill, 2023)

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### a. User Taxation

4.1. The Finance Bill, 2023 has proposed a new provision for the taxation of income by way of winnings from “online games” under Section 115BBJ (w.e.f. AY 2024-25). Section 115BBJ as proposed in the Finance Bill, 2023 reads as under:

*“115BBJ. Notwithstanding anything contained in any other provisions of this Act, where the total income of an assessee includes any income by way of winnings from any online game, the income-tax payable shall be the aggregate of—*

*(i) the amount of income-tax calculated on net winnings from such online games during the previous year, computed in the manner as may be prescribed, at the rate of thirty per cent.; and*

*(ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the net winnings referred to in clause (i).*

*Explanation.—For the purposes of this section,—*

*(i) “computer resource” shall have the same meaning as assigned to it in clause (e) of the Explanation to section 144B;*

*(ii) “internet” means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that transmits information based on a protocol for controlling such transmission;*

*(iii) “online game” means a game that is offered on the internet and is accessible by a user through a computer resource including any telecommunication device.”*

4.2. Section 115BBJ seeks to tax the income from online games on ‘net winnings’ during a previous year, at a flat rate of 30%. The computation of ‘net winnings’ shall however be prescribed separately and would have to be followed by the taxpayer while computing net winnings.

## b. TDS on Winnings from Online Gaming

4.3. The Finance Bill, 2023 also proposed to introduce new TDS provision with effect from 01st July 2023 i.e., Section 194BA, for withholding tax on winnings from online games. The new section reads as under:

*“194BA. (1) Notwithstanding anything contained in any other provisions of this Act, any person responsible for paying to any person any income by way of winnings from any online game during the financial year shall deduct income-tax on the net winnings in his user account, computed in the manner as may be prescribed, at the end of the financial year at the rates in force:*

*Provided that in a case where there is a withdrawal from user account during the financial year, the income-tax shall be deducted at the time of such withdrawal on the net winnings comprised in such withdrawal, as well as on the remaining amount of net winnings in the user account, computed in the manner as may be prescribed, at the end of the financial year.*

*(2) In a case where the net winnings are wholly in kind or partly in cash, and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of the net winnings, the person responsible for paying shall, before releasing the winnings, ensure that tax has been paid in respect of the net winnings.*

*(3) If any difficulty arises in giving effect to the provisions of this section, the Board may, with the previous approval of the Central Government, issue guidelines for the purposes of removing the difficulty.*

*(4) Every guideline issued by the Board under sub-section (3) shall, as soon as may be after it is issued, be laid before each House of Parliament, and shall be binding on the income tax authorities and on the person liable to deduct income-tax.*

*Explanation.— For the purposes of this section—*

*(a) “computer resource”, “internet” and “online game” shall have the meanings respectively assigned to them in section 115BB7;*

*(b) “online gaming intermediary” means an intermediary that offers one or more online games;*

*(c) “user” means any person who accesses or avails any computer resource of an online gaming intermediary;*

*(d) “user account” means account of a user registered with an online gaming intermediary.”*

4.4. From the perusal of the aforesaid, the broad features of the new provision can be deduced as under:

- Deduction of TDS on ‘net winnings’ from online games in the ‘user account’ at the end of the concerned financial year. The computation of ‘net winnings’ shall however be prescribed separately and would have to be followed by the payer while deducting tax on such payment.

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- If a withdrawal takes place from the user’s account before the end of the concerned financial year, then the event of deduction of tax shall be the time of withdrawal to the extent of winnings included in the amount being withdrawn. For the balance sum in the user’s account, the payer shall deduct the tax at the end of the financial year.

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- In case of winnings in kind (partly or fully), the payer is required to ensure that tax has been paid on such winnings.

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- Section 194BA shall be effective from 01st July 2023. Thus, in respect of winnings from online games during the period April 2023 to June 2023, it is presumed that the status quo shall be maintained and that the tax shall have to be deducted in accordance with section 194B of the Act.

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4.5. Section 194B of the Act is proposed to be amended with effect from 01st July 2023 to exclude the operation of the said provision in relation to winnings from online gaming. Thus, the newly introduced section 194BA of the IT Act alone will apply in relation to tax deduction on winnings from online gaming. Further, another amendment is proposed in section 194B with effect from 01st April 2023 to apply the threshold of Rs. 10,000/- in aggregate relating to tax deduction qua the financial year. Prior to the Finance Bill, 2023, the de minimis threshold in Section 194B was not linked with the financial year and the word aggregate was also not present. The rationale behind this amendment was explained in the Memorandum to the Finance Bill 2023 reads as under:

*“4. It is seen that deductors are deducting tax under section 194B and 194BB of the Act by applying the threshold of Rs 10,000/- per transaction and avoiding tax deduction by splitting a winning into multiple transactions each below Rs 10,000/-. This is against the intention of legislature.*

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6. Accordingly, it is proposed to:—

*(i) amend section 194B and 194BB of the Act to provide that deduction of tax under these sections shall be on the amount or aggregate of the amounts exceeding ten thousand rupees during the financial year;”*

### c. Issues

4.6. The proposals of the Finance Bill 2023 to provide a specific tax regime for online gaming industry is very welcoming step. However, on an interpretation of the proposed amendment, certain issues have cropped up which requires clarification from the legislature either in the form of amendment or circular or notification. These issues are elaborated in the following paras.

#### Issue 1

##### ***Provisions of section 194B to apply for the period of 01st April 2023 to 30th June 2023 with amended threshold for tax deduction***

The amendments proposed for section 194B and section 194BB of the Act will take effect from 1st April, 2023. The proposed section 194BA of the Act will take effect from 1st July 2023. The amendment proposed for section 115BB of the Act and the proposed section 115BBJ in the Act will take effect from 1st April, 2024 and will accordingly be applicable for the assessment year 2024-25 and subsequent assessment years.

The conjoint reading of these sections presupposes that the amended Section 194B, limited only to the machinery provisions providing for levying and collection of tax, shall apply to 'online game' from 1st April 2023 to 30th June 2023. In effect, the proposed amended threshold of Rs. 10,000/- in aggregate for tax deduction as provided in section 194B will be applicable for online gaming for the period between 1st April 2023 to 30th June 2023. Thus, the timeline of application of provisions relating to tax deduction on winnings from online gaming will be as under:

- **Till 31st March 2023:** Existing provisions of section 194B to apply. Tax to be deducted only if winnings from the game exceed Rs. 10,000/-
- **From 01st April 2023 to 30th June 2023:** Provisions of section 194B to apply with amendment to the threshold for tax deduction. Tax to be deducted if the aggregate winnings during the period exceed Rs. 10,000/-
- **From 01st July 2023:** Provisions of section 194BA will come into effect and tax to be deducted on net winnings in accordance with the newly introduced provision.

The mismatch of the date of implementation and the lack of clarity of timelines will lead to the following issues:

- a. The online gaming industry will have to incur additional costs to introduce technological changes to comply with the change in applicable tax regime twice within a period of three months.
- b. Further, the application of two different tax deduction provisions within the same financial year may also result in a mismatch between the winnings reporting by OGI and actual taxable winnings of the users..
- c. There could be potential TDS liability on platforms that will arise due to the implementation of 194B from 1st April to 30th June, 2023:
  - i. On 5th May, 2023 if the user (assessee) has winnings of Rs 7,500 and places a request for withdrawal. Since the amount of aggregate winnings is under Rs 10,000, there is no tax liability for the deduction of TDS. The platform can allow the withdrawal of the entire amount requested by the user.
  - ii. On 6th May, 2023, the user plays and wins Rs. 3,000. At this juncture, the aggregate winnings have crossed the threshold of Rs 10,000 and the tax liability of the user is therefore Rs. 3150. However, the user account would only have a balance of Rs 3000, which is in the deficit of the tax liability.
  - iii. The user cannot withdraw any amount, moreover, the platform will incur an additional liability of Rs 150 in this instance. Further, section 271C imposes penalty on platforms for non-deduction of TDS under Section 194B. This imposes an undue burden and liability on the platforms in implementation of the amended section 194B effective from 1st April, 2023.

Similar scenarios would arise wherein the platforms may not be able to recover the said amounts from the users.

## Issue 2

***Whether tax has to be deducted at the rate of 60% where the user is a 'specified person' under section 206AB?***



Section 206AB of the Act provides for a higher rate of tax deduction where payee is non-filer of income-tax returns. The said provision was introduced vide Finance Act, 2021 with effect from 01st July 2021 and provides that the payer should deduct tax at higher of twice the rates provided in IT Act/Finance Act or 5%. Since inception, the provisions of section 194B of the Act were kept outside the purview of section 206AB. Seemingly, the exclusion was made on account of 30% tax rate provided in section 194B. Accordingly, the tax is already deducted under section 194B at highest slab rate and application of section 206AB in cases involving section 194B would have resulted in exorbitant tax deduction at 60%. The exclusion of section 194B from purview of section 206AB also ensured that OGI's do not have to verify the return filing compliance in respect of millions of users registered on their platform.

Though, the Finance Bill, 2023 proposes to insert section 194BA to the IT Act with same 30% rate of tax as provided in section 194B of the Act, the provisions of section 194BA have not been excluded from the purview of section 206AB of the Act. Further, in the absence of any monetary threshold, OGI's will have to deduct tax in respect of millions of users. The effect of application of section 206AB of the Act on winnings from online games will increase compliance of OGI's and will also result in 60% tax deduction where the user is a non-filer of return of income as envisaged in section 206AB of the Act.



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## 5. Impact of changes in TDS

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### a. Online Gaming Players

5.1. The introduction of new tax provisions under the Finance Bill, 2023, specifically section 194BA which enables OGIs to deduct tax at the end of the financial year on the net winnings lying in a user account or on every withdrawal, would need significant education on new rules by the platforms to about 20+ crore online gaming players. The return filing process for users at the end of the financial year needs to be made seamless.

5.2. The impact of new TDS changes is contingent on the definitions and rules to be prescribed on net winnings and whether the rules would be aligned with the online gaming users. Additionally, the lack of clarity and differing taxing provisions for the period between 1st April 2023 to 30th June is against the canons of taxation that will adversely impact the simplicity and convenience of the users.

### b. Gaming Industry

5.3. The introduction of new tax liabilities on OGIs to deduct TDS on net winnings at the withdrawal by the user or at end of the financial year, whichever is earlier, would lead to a higher compliance burden and costs since the nature of income is casual and non-recurring, the instances of withdrawals are also non-uniform. Additionally, OGIs usually have a high rate of withdrawals of very low value like Rs 50 or Rs 100, adversely impacting the OGIs.

5.4. The platforms are required to implement multiple tax regimes in a short period of time i.e current TDS regime until 31st March 2023, an interim TDS tax regime for 1st April, 2023 to 30th June 2023 and the new TDS regime from the 1st of July 2023. Given the large number of userbase for various online gaming platforms which is estimated to be over 20 crores, the technology changes required to be implemented by the platforms between April to June is expected to create significant compliance issues along with exponential increase in tax related grievances.

5.5. In today' era, any change to a transactional tax requires massive system overhauling to ensure completeness and compliance. Thus, introduction of

new TDS provisions requires the payer to make suitable changes to the ERP systems to ensure deduction of tax at source. Considering the aforesaid, it has been a convention to implement provisions relating to tax deduction at source (introduced vide Finance Bill in February) from end of at least first quarter of financial year to give sufficient time to the industry to implement the provisions. The convention was followed while introducing various provisions, a few of which have been illustrated as under:

Provision	Introduced vide	With effect from
Section 194-O TDS by e-Commerce Operator	Finance Act, 2020	1 <sup>st</sup> October 2020
Section 206C(1H) TCS on sale of goods	Finance Act, 2020	1 <sup>st</sup> October 2020
Section 194Q TDS on purchase of goods	Finance Act, 2021	1 <sup>st</sup> July 2021
Section 194R TDS on benefits or perquisites	Finance Act, 2022	1 <sup>st</sup> July 2022
Section 194S TDS on purchase of Virtual Digital Assets	Finance Act, 2022	1 <sup>st</sup> July 2022

5.6. The winnings from online gaming are being subject to tax deduction under section 194B of the IT Act. The mechanism of tax deduction under the said provision is different as compared to tax deduction proposed under section 194BA. As per the existing position in Finance Bill, the provisions of section 194BA will come into effect from 01st July 2023. Thus, to that extent the convention of allowing three-month period for implementing the procedure has been followed. However, one should not lose sight of the fact that unlike other recently introduced TDS provisions, winnings from online games are already suffering tax deduction and will continue to do so till 30th June 2023. Thus, the sector will not be left with any breather period to ensure compliance with the newly introduced provisions. On the contrary, the sector will be burdened with changing mechanics of tax deduction twice within a period of three months. Considering the said hardship, a deferral of amendment of threshold proposed in section 194B to 01st July 2023 will provide a relief to the sector.

5.7. Thus, application of different mechanics of tax deduction within a short period may cause hardship the sector. Following are a few scenarios that showcase the confusion, undue burden, and possibility of non-recovery TDS amounts from the users on the gaming platforms due to the multiplicity of

regime and complexity:-

### Scenario 1

***Where winnings during the period April 2023 to June 2023 are less than Rs. 10,000/-, then no tax shall be deductible u/s. 194B. If such winnings are withdrawn after June 2023, whether tax shall be deductible u/s. 194BA?***

Section 194B of the Act read with amendments proposed by the Finance Bill 2023, provides that if the winning amounts or aggregate amounts during a financial year exceeds Rs. 10,000, then the payer shall be required to deduct TDS. In respect of winnings from online gaming for the period April 2023 to June 2023, TDS shall be deducted u/s. 194B as amended under the Finance Bill, 2023 and from 01st July 2023 onwards, TDS on net winnings from online games shall be deductible u/s. 194BA.

In a case, where the tax is not deducted u/s. 194B on account of winnings not exceeding Rs. 10,000 from 1st April to 30th June 2023, but such winnings are withdrawn post 01st July 2023, then in such a case it is not clear as to whether Section 194BA would be attracted in respect of winnings from 01st April to 30th June 2023 either during withdrawal or end of the financial year.

### Scenario 2

***The de minimis threshold for deduction u/s. 194B of the Act is proposed to be changed to Rs. 10,000 in a financial year. Whether the TDS would be deducted on the amount in excess of this threshold limit or on the entire amount once the threshold is crossed?***

Section 194B of the Act read with the amendment proposed by the Finance Bill 2023 would read as: "The person responsible for paying to any person any income by way of winnings from any lottery or crossword puzzle or card game and other game of any sort or from gambling or betting of any form or nature whatsoever, being the amount or the aggregate of amounts exceeding ten thousand rupees during the financial year shall, at the time of payment thereof, deduct income-tax thereon at the rates in force". Thus, going forward, where either a single winning or aggregate of winnings exceeds Rs. 10,000 during the financial year, then the payer shall be liable to deduct tax at source u/s. 194B.

In this regard, it is not clear as to whether tax would be deducted on the amount which is in excess of Rs. 10,000 or tax would be deducted on the entire winning amount once the aggregate of winnings crosses the threshold of Rs. 10,000. The latter interpretation may involve practical difficulties as in certain cases, the user account balance may not be sufficient to ensure tax deduction at source. E.g.,

Game Opening	User Account Balance	Entry Fee Paid	Net Winnings	Closing User Account Balance
Game 1	1,000	1,000	9,000	10,000
Game 2	10,000	9,000	0	1,000
Game 3	1,000	1,000	2,000	3,000

In the aforesaid example, winnings from 3rd game has breached the threshold of Rs. 10,000 as provided u/s. 194B. In such circumstances, it is ambiguous if tax is required to be deducted on entire net winnings i.e., 11,000 (9,000 + 2,000) or on 1,000 (being difference between the net winnings of Rs. 11,000 and threshold of Rs. 10,000)?

If the former position is intended to be applied, the operator will be required to deduct tax amounting to Rs. 3,300/- on conclusion of Game 3. However, as can be witnessed, the user account balance may not be sufficient to deduct the requisite tax at source. Such an interpretation may pose practical difficulties to ensure deduction of tax at source.



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## 6. Recommendations *vis-à-vis* Online Gaming

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### a. Computation of Net Winnings

6.1. Section 115BBJ as well as Section 194BA requires payment / deduction of tax on “net winnings during the previous year”. Hence, the formula of ‘net winnings’ is central to computation of tax liability u/s. 115BBJ as well as for deduction of tax u/s. 194BA. It is essential for user growth as well as for the growth of the industry that the computation of net winnings be prescribed on a rational basis, keeping the business realities in mind.

6.2. The intention of the legislature in levying tax on “net winnings during a previous year” suggests that the net amount from the activity of playing online game is sought to be taxed and not the gross prize money. The purpose and scheme of income-tax are to tax the real income of a person. Therefore, the following recommendation should be construed for the purpose of determining “net winnings during a previous year”:

6.2.1. As suggested by the Revenue Secretary in the post-budget press conference on users participating in multiple gaming sessions across a period of time in online gaming, the computation of TDS should be on net winnings across multiple gaming sessions in a financial year. Therefore, the computation mechanism for net winnings should allow offsetting of entry fee across all contests in a Financial Year. Therefore, the entry fee paid by a user to participate in the game should also be considered as deduction in arriving at the net winnings. The word “winning” in its ordinary, natural and grammatical sense, means prize money arrived at after reducing the contribution amount.

6.2.2. It is the “net winnings during the financial year” which is sought to be measured of taxation u/s. 115BBJ as well as u/s. 194B of the Act. In the computation under the head “profits and gains of business or profession”, the net result of business activity is sought to be taxed, ignoring the individual business transaction. Similarly, for the purpose of Section 115BBJ and 194BA, the net result of online gaming activity should be considered for taxation. Therefore, entry fees across multiple withdrawal sessions in a Financial Year should be off-set and carried forward by the platform.

### **b. Retention of threshold for TDS u/s. 194BA**

6.3. At the time of its introduction vide Finance Act, 1972, the threshold in section 194B was fixed at Rs. 1,000/-. However, subsequently, the threshold for tax deduction was increased from Rs. 1,000/- to Rs. 5,000/- vide Finance Act, 1986 and from Rs. 5,000/- to Rs. 10,000/- vide Finance Act, 2010. At the time of increase of threshold from Rs. 5,000/- to Rs. 10,000/-, it was explained in CBDT Circular No. 1/2011 dated 06th April 2011 that the threshold limits in various provision were increased to adjust for inflation and to reduce compliance burden of deductors.

6.4. While section 194B and Section 194BB of the Act has a de minimis threshold of Rs. 10,000, the proposed section 194BA of the Act has no such lower limit prescribed. A look at all the other TDS provision also reveals that upto certain monetary threshold, no tax is required to be deducted. This reduces the compliance burden and increases the ease of doing business. This also ensures that small value transactions are not made subject to greater compliance burden.

6.5. A similar monetary threshold should also be prescribed for Section 194BA so that small value withdrawals does not increase the compliance burden of the online gaming intermediaries.

### **c. Amendment to section 194B should made effective from 01st July 2023**

6.6. Subjecting online gaming platforms to section 194B with amended threshold only for the period April 2023 to June 2023 will create significant compliance issues. Ensuring technological changes to comply with tax provisions at three different intervals will adversely reduce the ease of doing business. Thus, the amendment of threshold to section 194B should be deferred till 01st July 2023 to avoid the issue of multiple transitions within same financial year.

### **d. Exclusion of winnings which have suffered withholding u/s. 194B from withholding under Section 194BA**

6.7. In respect of winnings from online games during the period April 2023 to June 2023, tax shall be deductible under Section 194B. From 01st July 2023 onwards, tax would be deductible under Section 194BA. The event of taxation under Section 194B is on payment of winnings whereas under Section 194BA, it is on net winnings lying in user account at the end of the financial year as well as at the time of withdrawal if made before the end of the financial year.

6.8. In certain cases, it may so happen that tax on payment of winnings during April 2023 to June 2023 has been deducted but such winnings are not withdrawn during the period. A user either exercises an option to withdraw such winnings

post June 2023 or does not withdraw at the end of the financial year. In such a case, it is not clear as to whether such winnings have already suffered deduction of tax u/s. 194B prior to Finance bill, 2023 would again be subject to withholding of tax u/s. 194BA.

6.9. In this regard, it may be provided that if winnings from online games for the period 01st April 2023 to 30th June 2023 have been subject to withholding of tax u/s. 194B prior to Finance bill, 2023 and such winnings are not withdrawn prior to 01st July 2023, then in respect of such winnings, no tax would be deductible u/s. 194BA. Further, if no tax has been deducted u/s. 194B prior to Finance bill, 2023 in respect of such winnings, then at the time of withdrawal or at the end of the financial year, tax would be deductible u/s. 194BA.

#### **c. Exclusion from the ambit of section 206AB**

6.10. Section 206AB of the Act is a special provision providing for higher rate for TDS for the non-filers of income-tax return. The TDS rate provided under this section is higher of the following:

- twice the rate specified in the relevant provision of the Act; or

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- twice the rate or rates in force; or

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- the rate of five per cent.

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6.11. Section 206AB was introduced as a special provision, providing for higher rate for TDS for the non-filers of income-tax return, to ensure filing of return of income by those persons who have suffered a reasonable amount of TDS/TCS. It also excluded those TDS provisions from its purview where higher TDS, either in terms of rate of TDS or amount of TDS, is deducted by the payer e.g., Section 192 – TDS deductible at slab rates on salaries; Section 194B – TDS at 30% on winnings from lottery or crossword puzzle or card games etc.; Section 194LBC – TDS at 25 / 30% on income from investment in securitisation trust; Section 194N – TDS at 2% on payment of certain amounts in cash.

6.12. The Finance Bill 2023 has introduced Section 194BA for tax deduction in respect of winnings from online gaming and thus, carving online gaming out from the scope of Section 194B. Under Section 194BA, tax shall be deductible at the rates in force which would be 30% on winnings from online games. Thus, a reasonable portion of winnings shall be deducted as tax on behalf of the winner before balance winnings are distributed to him. However, no amendments have been made in Section 206AB for non-applicability to Section 194BA. Therefore, it is only equitable that online gaming also receives the same benefit.



6.13. It is to be noted here that Section 206AB is not applicable to Section 194B and Section 194BB. Both of these sections deal with withholding of tax in respect of winnings from game. The only difference is former (i.e., Section 194B and Section 194BB) deals with lottery and crossword puzzles and horse races etc. whereas Section 194BA is specifically introduced to cover online games. Further, TDS u/s. 194BA would be deductible at higher rate.

6.14. Therefore, Section 206AB may be suitably amended to exclude its applicability to Section 194BA.



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## 7. Conclusion

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7.1. The introduction of new provisions dealing specifically with the online gaming industry has brought much relief to the entire industry as well as to the large user base. The Finance Bill 2023 has sought to put to rest a host of issues which were prevailing under the old regime. Yet, the new provision has certain ambiguities which if cleared, would bolster the growth of the online gaming industry, leading to increased revenues and tax collection. Therefore, it is essential that the open issues are addressed by introducing suitable amendments to the Finance Bill 2023 or by issuing a circular/notification later.





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