

Rationalised Tax Regime to Unleash Gaming Industry's Potential

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Overview of Online Gaming Industry:

Last decade has witnessed stupendous growth of the online gaming industry in India, quickly propelling India into one of the biggest global markets for gaming. India has around half a billion online gamers with a current industry valuation of \$2.6 billion in FY 2022 and the Indian gaming market is expected to grow to \$8.65 billion by FY 2027. At present, there is no comprehensive legislation with respect to its legality and the existing laws around it are obscure. The Government has kickstarted the process of regulating online gaming companies by seeking consultations on the proposed 'Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021'. While a framework is under discussion to regulate the online gaming industry, the income-tax laws governing the industry are archaic and thus, there is a compelling need to revisit the governing tax laws.

Extant Income-tax laws

Section 2(24)(ix) of the Income-tax Act, 1961 (the 'Act') defines income to include any winnings from games of any sort. The income earned from winnings is subject to tax in the hands of the person winning the game under Section 115BB of the Act at a tax rate of 30% of the winnings on gross basis. Further, income is to be computed on gross basis without aggregating losses from other games in accordance with Section 58(4) of the Act.

In order to mitigate the leakage of tax, Section 194B of the Act casts a duty on the payer to discharge the tax liability on such income by deduction of tax before paying the winnings to the recipient (ultimate tax liability is on the winner). As per Section 194B of the Act, tax is required to be deducted on fulfilment of following conditions:

1. Any person is responsible for paying to any person;
2. any income by way of winnings from lottery or crossword puzzle (or card game and other game of any sort);
3. Obligation to withhold taxes under the said Section is at the time of payment;
4. Amount payable exceeds INR 10,000.

Pre-budget expectations (Income-tax perspective)

As per some of the recent news reports, it appears that the Government believes that certain winners playing online games have not reported appropriate income in their income-tax returns and thereby not paid taxes. Accordingly, revenue authorities have initiated an action to send notices to such winners. In order to prevent leakage of taxes and ensure trail, the Government is said to be considering tweaking TDS provisions by lowering the thresholding for withholding of taxes from the existing INR 10,000. However, a reduction in the withholding tax threshold could retard the growth of the industry by increasing the administrative cost and making it less lucrative for the players. Setting the context, below are the key expectations by the online gaming industry in Budget 2023 on the existing tax regime:

1. **De-minimis threshold of INR 10,000 to be kept intact:** As stated above, this will help to reduce administrative burden on the gaming platforms. Else, if the de-minimis threshold is lowered, algorithms shall have to be tweaked and reporting compliances shall increase drastically and prove to be counter-productive.
2. **Clarity on point of taxation:** At present, the liability to withhold taxes arises on winnings exceeding INR 10,000. In this regard, reference has been placed on CBDT Circular 240 dated May 17, 1978 regarding tax deduction under Section 194BB of the Act with respect to winnings from horse races which states that withholding has to be undertaken at the time of each race. Placing similar reference to Section 194B of the Act, it could be interpreted that taxes have to be withheld at end of each game. Further, analysis of other sections like 194C and 194J of the Act mandates to withhold taxes upon payment of aggregate amount exceeding certain threshold during the year. If any periodicity is mentioned in the existing provisions, the issue of set-off of losses may also needs to be clarified.

Since no periodicity is mentioned, similar to provisions of Section 194C/194J, online gaming intermediaries are deducting taxes on per game per player basis. However, clarity around this is also expected in the Budget 2023 so as to put to rest any anxieties around this aspect. Withholding of taxes on per game basis would also ensure that losses are not set-off against the profits earned by the players as envisaged in Section 58(4) of the Act.

3. **Set-off of losses to be made permissible:** Some developed nations like US permits set-off of losses realised in a game against winnings from another game, while in United Kingdom, winnings are not subjected to tax. While Section 58(4) of the Act do not permit set-off of losses against winnings earned from other games, players generally have to go out of pocket to pay for taxes. There may possibly be a scenario where the player has lost more monies overall than winnings during the year, additionally casting responsibility of payment of taxes on gross winnings. The said treatment is deterring the growth of the industry and hence, the law in this regard requires a revisit.

It would not be a surprise if the Government prescribes a completely new tax regime to tax online winnings, wherein a withholding tax at a certain percentage would be imposed on the total pool of money collected from the players and correspondingly, the winner could claim credit of such taxes. Taxes could be withheld by the online gaming intermediary upon conclusion of each game once a particular threshold of the total pool money is exceeded (say INR 10,000). This would address issues pertaining to aggregation of losses, withholding of taxes on a per game / per day / per annum basis, etc. However, it would be pertinent to also provide for a framework wherein there are more than one winner in a particular game. In such a case, mechanism for withholding of taxes and corresponding credit in case of each of the winners is to be provided.

Concluding remarks:

While the gaming industry has evolved rapidly and contributed to the growth of the economy, the industry is still grappling with the complicated and ambiguous regulatory and the tax laws. Having said so, the online gaming platforms only act as a withholding tax agent while paying winnings to the players. Accordingly, introducing a rationalised tax regime taking into consideration stakeholder's sentiment is need of the hour. Prompt action on this account will promote standardisation and boost confidence amongst the industry players, thereby channelising the efforts towards growth of business and industry at large. Further, it would be interesting to see how the industry further grapples with the issue of using cryptocurrency for the purpose of wallets, trading of NFT, hosting a game on metaverse and the related tax issues around it. Log in to your system, the game is about to begin.

** Views expressed above are personal & may not reflect that of the organisation.*