

Tax inequalities in the treatment of poker games in the EU

Tax regimes applicable to poker winnings vary from country to country in the EU, despite prospects of harmonised legislation. Frans M.M. Duynstee and Roos Jongeneel, of VMW Taxand, examine some of these differences and analyse their impact.

There are many Dutch poker players in Belgium, Germany and abroad, and many foreign poker players also participate in live tournaments in the Netherlands organised by the Dutch State monopoly Holland Casino. Online poker is not yet legal in the Netherlands¹. Nevertheless, the Netherlands provide for so-called 'neutral' tax legislation which makes no distinction between legal and illegal activities. For this reason, earnings resulting from poker games - be they legal or illegal - are taxed at a rate of 29%. The scope of the Betting and Gaming Act is far-reaching given that the earnings of a Dutch poker player during a live tournament abroad or via the internet are also taxed. With a view to avoiding double taxation, the Dutch Tax Act provides for an exemption of such foreign earnings if these earnings are taxed in the same manner abroad. This provision requires an examination of the tax on poker abroad.

The Dutch District Court has recently ruled that poker cannot be deemed a game of chance and is thus to be considered a game of skill². This qualification means that poker falls outside the scope of the Betting and Gaming Act and the Betting and Gaming Tax Act. However, an appeal has been lodged in this case and the Supreme Court will eventually rule on whether or not poker is a game of chance. Current legislation and the current tax treatment of poker

will remain in place until that time.

The Netherlands

The Dutch Betting and Gaming Tax Act implements a tax on games of chance³. The poker host established in the Netherlands is a taxpayer under gaming tax legislation. This domestic host is liable for a 29% gaming tax on the difference between the bets placed by the players and the total paid out in prizes. Gaming tax is calculated on the sums received by the host for organising the poker tournament if the host fails to provide the prize itself. The Dutch or foreign player participating in live poker tournaments in the Netherlands is not liable for gaming tax on the positive result achieved from participation in the poker tournament. This differs if the poker player, resident in the Netherlands, participates in a live tournament abroad or plays online.

The Dutch resident is then liable to a 29% gaming tax on the gross earnings pertaining to the positive result achieved from participation in a live poker tournament abroad. The poker player's stake may not be deducted from the taxable amount. If a Dutch poker player plays online, the positive result is likewise taxed in the Netherlands, even if the taxable result is calculated in some manner other than as regards participation in a live tournament. The Dutch poker player is liable for a 29% gaming tax on the net result for participation in online poker - in other words, the prizes received minus the stake. This result is calculated on a monthly basis and possible losses may not be set-off against each other between the months.

As the results achieved abroad fall under the Dutch gaming tax, there is a risk that the Dutch participant may have to pay tax on his result in

two countries. For this reason, the Netherlands exempts the foreign results from Dutch gaming tax if the prize received abroad is subject to the same type of tax.

Germany

In Germany, the tax on casino games is regulated at state-level. We have used the legislation of the State of Nordrhein-Westfalen as an example⁴. The German gaming tax is made up of a casino fee to be paid by the casino when it organises games of chance achieving a result of more than €1 million. With respect to the tax base, a distinction is made between games of chance in which the casino itself participates - and thus also runs a risk - and games of chance merely organised by the casino. If the casino itself does not play, then the taxable amount is made up of the sum ultimately due to the casino for the provision of poker. Should the casino itself participate in the game, then the casino may offset the loss that it incurred the previous day. The taxable amount is the amount that the stake exceeds the winnings paid out to the players minus the loss incurred by the casino the previous day.

The basic tax rate is 50%. Germany additionally distinguishes between big and small games to apply an additional tax rate. Poker qualifies as a big game - this means that the casino is obliged to pay an extra tax of 15%. Should the taxable amount exceed €5 million, this rate will increase up to 20%. A person participating in a poker tournament in Germany is not liable for tax on earnings received from poker.

Belgium

Poker is subject to a tax on bets and games in Belgium. This tax and income tax are treated equally⁵. This Act includes a broad

provision for those deemed to be taxpayers for this tax. Each person receiving any wager or stake, whether for their own account or as intermediary, is liable to paying the tax. With respect to poker, the casino that organises the poker games is considered to be the taxpayer.

Like in Germany, Belgian legislation distinguishes between casino games in which the casino itself participates and those in which it does not. On organisation of a poker tournament, the casino will usually not participate in the game. The tax base on which the tax owing may be calculated is the gross revenue earned by the casino. Gross revenue must be understood as the sum that the casino takes from the players at the end of the game. This sum is made up of the total stake of the players minus the winnings taken by the players. The stake of the players is very broadly determined. It includes not only the stake but also previous or later participation entitlements and bets. The casino is liable for a 33% tax on these gross earnings insofar as such earnings do not exceed € 1.36 million. Anything above this sum is taxed at a rate of 44%.

In Belgium, like in Germany, a poker player is not liable for tax on the positive result achieved following participation in a poker game.

Exemption of prizes under Dutch tax legislation

Dutch tax authorities hold the view that the tax regime applicable to a Dutch poker player in Germany and Belgium does not concur with the Dutch system. For this reason, they provide no exemption. Belgium and Germany do not provide a gaming tax for which the individual taxpayer is liable. However, as is the case in the Netherlands, casinos are liable for tax in these countries on the results

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achieved from the poker games provided. The view held by the tax authorities is contrary to the information published by the Dutch Ministry of Finance and that provided by the tax authorities regarding a possible exemption of prizes ensuing from foreign games of chance. For example, the explanatory note to the gaming tax return, which return must state the equivalent foreign tax that the prize is subject to, states that the exemption always applies to prizes won in Germany and Belgium. In practice, no exemption is granted to poker players resident in the Netherlands on prizes won in Belgium and Germany.

We advocate a uniform tax treatment of poker, and clarification of the ambiguities and objections currently existing concerning the Dutch gaming tax. In addition to the exemption issue, there is also an EU law issue regarding the tax treatment of games of chance in the Netherlands.

Contrary to Belgium and Germany, the Netherlands provide for tax legislation where a participant must pay tax on the result achieved on poker played abroad. Dutch legislation implements a policy of 'discouraging' poker players through the levying of taxation. The legislator, by also taxing the results of foreign poker tournaments, wishes to make plain that it is not advantageous to play poker abroad. However, it is clear that the tax base for the Dutch gaming tax for a domestic game of chance (the difference between the stake and that which is paid out in prizes) is a great deal smaller than the tax base for a foreign game of chance. For online poker, this is the prize minus the stake and for a live tournament played abroad, the whole prize, without deduction of the stake, is taxable. A

characteristic of poker is that it is a game of redistribution. The part paid out to players is much larger than the part remaining as compensation for the casino.

This unequal tax treatment - whereby foreign games of chance are not treated in the same way as domestic games by the Dutch legislator - could possibly conflict with European law. This issue will shortly be clarified because a Dutch court will rule on the compatibility of Dutch gaming tax with European law. A ruling will also be handed down on whether it is justifiable that the Netherlands deem that the taxation in Germany and Belgium does not concur with the taxation levied in the Netherlands.

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1. See the Betting and Gaming Act.
2. The Hague District Court, 09/867520-08, LJN BN0013
3. See the Betting and Gaming Tax Act.
4. *Spielbankgesetz NRW-SpielbG NRW*.
5. Articles 43 to 74 of the Code of the income tax equivalent (*Wetboek van de met de inkomstenbelastingen (WGB)*).