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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 882

NEW LEGISLATION

MATTERS CONCERNING THE IMPLEMENTATION OF RECENTLY ADOPTED EU VAT PROVISIONS

ORIGIN:	**Commission**
REFERENCES:	**Article 73 of the VAT Directive** **Article 7 of the VAT Implementing Regulation**
SUBJECT:	**VAT 2015: VAT treatment of online gambling services (follow-up)**

1. INTRODUCTION

At the 102nd VAT Committee, based on a Working paper prepared by the Commission services[1], the treatment that should be conferred to several aspects of online gambling services was discussed in the light of the rulings of the Court of Justice of the European Union (CJEU). At the same meeting the scope of the notion of electronically supplied services was also discussed[2].

As a result of those discussions, an attempt was made to reach conclusions. Doubts were however raised by some Member States, in particular on whether some types of online gambling services could be considered to be electronically supplied services and on the way the taxable amount should be determined for certain types of games. The same concerns have been addressed to the Commission services from other stakeholders.

For that reason, the Commission services have considered it would be convenient to provide a further analysis on those questions.

2. SUBJECT MATTER

Electronically supplied services are defined in Article 7(1) of the VAT Implementing Regulation[3] as "*services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology*".

The implications of that definition were last analysed in Working paper No 843. There it was concluded that the definition of electronically supplied services encompassed four elements, which had to be taken into account on an equal basis when assessing the classification of a service. Therefore, to qualify as an electronically supplied service, the service had to:

– Be delivered over the Internet or an electronic network.

– Its nature is that it is essentially automated.

– Its nature is that it involves minimal human intervention.

– Its nature is that it is impossible to ensure in the absence of information technology.

Annex II of the VAT Directive[4] includes an indicative list of electronically supplied services, a list that was further developed in Annex I of the VAT Implementing Regulation. According to that list, games of chance and gambling games are electronically supplied services where games are downloaded on to computers and mobile phones or

1 Working paper No 844 REV.
2 Working paper No 843.
3 Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).
4 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

where automated online games are accessed which are dependent on the Internet, or other similar electronic networks, where players are geographically remote from one another[5].

The development of the online gambling industry has led to an expansion of the types of games that could be supplied online, some of which might require a certain degree of human intervention to be supplied.

Therefore, it is necessary to determine whether there are cases where the human intervention should be considered as being more than minimal so that those games could be seen as falling out of the definition of electronically supplied services.

The requirement of minimal human intervention is going to be examined in the present Working paper only in relation to activities that qualify as gambling. In that regard, we will first analyse whether some activities usually considered as gambling should remain regarded as such or whether, as argued by some, they could be seen as something different from gambling and so not captured by Annex I of the VAT Implementing Regulation.

A second aspect that needs further clarification is the determination of the taxable amount.

In Working paper No 844 REV no mention was made of games where the players play against other players, and the operator receives a fee or commission linked to such games which is calculated based on the amounts played. We will present our views on how the taxable amount should be determined in these cases.

In addition, it was concluded in the said Working paper, after an analysis based on the rulings of the CJEU, that when the gambling company was obliged to return to the players a certain amount of the sums received from them due to legal or statutory obligations, then the sums that have to be returned to the players as winnings had to be deducted from the total sum received in order to determine the consideration obtained by the gambling company from the players which then constituted the taxable amount of the gambling services. On the other hand, when the company was not under an obligation to return to the players a certain amount of the consideration received from them, it was concluded that the taxable amount would include the full amount received from the players, without any deduction.

The CJEU has not ruled on cases where the gambling operator had an obligation to return to players a certain amount of the consideration received from them, but that obligation was not due to a legal or statutory obligation. In Working paper No 844 REV they were subsumed under the cases where the taxable amount was constituted by the full amount of the sums received, without deductions.

Upon further reflection, we have considered that this concrete case that was not covered by the rulings of the CJEU should be further analysed and submitted for discussion in the VAT Committee asking for the view of Member States on the rules that should be applied in these circumstances before concluding on the point of taxable amount.

[5] See points 4(d) and (e) of Annex I of the VAT Implementing Regulation.

3. THE COMMISSION SERVICES' OPINION

3.1. Scope of gambling services

In the case of games where players compete against each other for a prize fund, such as poker, the operator puts players in contact with each other, obtaining a fee or commission (called "rake") from the stakes played. The nature of the services provided could be put into question, as it could be assimilated more to that of a commission agent instead of a gambling operator.

However, the activity of the operator goes beyond putting in contact the players. The players have to be registered customers of the operator or of other operators that use the same platform, who establishes the rules of the game and controls their fulfilment and also assures that the payments are made. The operator also provides the software that generates the cards that the players receive and the platform for the players to perform the game. Thus, he does not simply put in contact the players. He organises the gambling activity.

In that regard, it is of no importance whether the operator produces these services in-house or outsources them. The relevant element is that he is responsible to the player for the proper operation of the game.

The fact that the operator does not bear any risk linked to these games is of no importance in that regard. That is also the case with other games such as bingo or slot machines, where the amount received by the operator is a percentage of the stakes played, without bearing any risks. The one that bears the risk inherent to gambling in all these games is the player.

Therefore, as organiser of a gambling activity, the services supplied by the operator of this kind of games, where players compete against each other, should be considered to be gambling. If that were not the case, and given that the activity of the operator cannot be qualified, by any means, as a financial service, the activity of such operator would have to be taxed and not exempted.

3.2. Scope of electronically supplied services

Electronically supplied services usually involve, to some extent, human intervention. This is the reason why Article 7 of the VAT Implementing Regulation allows that a certain level of human intervention, referred to as minimal, can be involved in the supply of an electronically supplied service.

Therefore, it is of utmost importance to delimit when the level of human intervention exceeds the limit that could be qualified as minimal, as in these cases the service could no longer be qualified as an electronically supplied service.

In the case of betting activities, they usually refer to a sport event that can be performed by humans or animals (football games, tennis, horse races, greyhound races …). However, the fact that these events imply the activity of humans cannot lead to the conclusion that the betting activity is not an electronically supplied service.

The requirement of minimal human intervention refers to the relationship between the gambler and the betting operator. The sport event is outside that relationship, even though the winners or losers on the betting activity are determined by the outcome of that event.

It is the activity of the supplier of the service that has to be assessed with a view to determine whether or not it involves human activity that exceeds the limit of minimal. As the performance of the sport event does not fall under the sphere of the activity of the supplier, the fact that a sport event is performed with human intervention has no relevance for the possible qualification of the betting activity as an electronically supplied service.

Fully comparable to the case of betting activities described above, is the situation where an operator retransmits games taking place in a land-based casino, for instance the roulette. The online players can bet on numbers as if they were in the casino, but they have no interaction with the dealer, neither with the players who are in the land-based casino. The online game is played in parallel to the game in the land-based casino, without any interaction between online players and the activities taking place in the said casino, as if online players were not there. The online players win or lose depending on the outcome of the game that is played in the land-based casino, but that again does not imply that the supply of the gambling activity involves more than minimal human intervention. The activity of the supplier in supplying that service of online gambling is completely automated, and the fact that the outcome of the game is determined by a live event that is being broadcast does not change that conclusion.

The case just mentioned differs to a certain extent from an online gambling activity where a human dealer is spinning the wheel of the roulette or drawing physical cards to play blackjack or baccarat, and, as an employee, he is doing that activity specifically for the online operator, not for a land-based casino. That activity is performed at certain intervals, every X minutes. During that interval, the players can place their bets or demand their cards.

In our view, the qualification of these games as electronically supplied services would depend on the interaction between the dealer and the players.

The activity of a dealer could be completely disconnected from the activity of the players. The dealer would in that case continue spinning the wheel or drawing cards at scheduled intervals even if there were no player playing at all during a certain interval. In such a setup the actions of the players have no influence on the dealer, who would continue doing the same activity whether there are thousands of players or no players at all. The only aim of using a human dealer is to give the appearance of playing in a real casino, but the game takes place without any interaction between dealer and players. The activity of the dealer serves to determine the outcome of the game, as it happens with betting on sports events, but the relation between the player and the operator regarding the provision of the service is completely automated and does not involve human intervention. Therefore, in these cases the gambling activity should be qualified as an electronically supplied service.

However, a dealer could indeed interact with the players through the internet, so that the activity of the dealer would vary depending on the input received from the individual players. In this case, the internet would be used as a simple tool for communication between dealer and players. Thus, we could use the same reasoning as the one applied to

cases such as webinars and exclude these activities from the scope of electronically supplied services, as they involve more than minimal human intervention.

The decisive element for these games to be qualified or not as an electronically supplied service is therefore not whether there is a human dealer working for the gambling operator, but the level of interaction between that dealer and the players influencing individual supplies of services.

We would also like to bring up that in running the betting activity odds are updated during the course of an event by a bookmaker, depending on the bets placed. That implies that the supplier has at his disposal trading, pricing and risk management teams. They determine the rules that should be applied to the bets placed by the players, it being even possible to not accept a particular bet, monitor the bets that are being placed and update the odds. What they do, however, focuses on the whole environment of the game and not on individual bets made by players.

Once again, it is necessary to stress that the requirement of minimal human intervention is referring to the way in which each individual service is supplied to the customer, and not to the preparatory internal activity or modifications to the game as such while it is being played, carried out by the supplier.

If we look at other activities that clearly fall under the scope of electronically supplied services, such as downloading of music, we can easily identify several activities that require human intervention.

First of all, the song has to be created, obviously. In addition, the supplier classifies the songs in different styles, creates playlists, highlights new songs … All those activities require human intervention. However, when the client purchases a song, the song arrives to him without any need of human intervention, and the activity is qualified as an electronically supplied service.

In the case of betting, the activity of these trading, pricing and risk management teams serves to determine the criteria that would be used when the players place their bets, and how the odds would evolve depending on such bets. But once these criteria have been implemented by those teams, if the acceptance of a bet and the evolution of the odds is made by software that the operator has at his disposal, then the relation between the players and the operator becomes completely automated.

Therefore, the existence of these teams working for the operator does not present an obstacle, subject to the circumstances under which each service is supplied, to consider betting activities as electronically supplied services.

The requirement of minimal human intervention is referring to the activity deployed by the supplier to provide each individual service when such a service is required by the customer. In the cases we have just presented, even though some degree of human intervention exists, it should be seen as not being more than minimal in the sense of Article 7(1) of the VAT Implementing Regulation, so the services are susceptible to be qualified as electronically supplied services.

Only in cases where the action of the player leads to a reaction by the supplier in relation to an individual supply, the level of that human intervention should be analysed in order to determine whether or not the service can qualify as an electronically supplied service.

3.3. Determination of the taxable amount

3.3.1. Games where players compete against each other for a prize fund

The particular features of games where players compete against each other for a prize fund have been described in section 3.1. In these cases, the operator receives a fee or commission from the amount of the stakes played, the rest being distributed to the winner of the game.

These cases were not dealt with in Working paper No 844 REV but have subsequently given rise to questions, so the Commission services have considered it useful to include a reference in this Working paper.

As Article 73 of the VAT Directive states, the taxable amount is the consideration obtained or to be obtained by the supplier. The terms and conditions written by the operator and accepted by the players determine the amount of the commission or fee that the operator will receive for organising the game.

The consideration could not be taken to be the total amounts of the stakes that are received from the players, as these stakes remain "on the table" until the end of the game, where they are given to the winner of the game, leaving the operator with a commission or fee calculated based on the sum played or the winnings obtained by the winner.

Therefore, we are of the view that in these cases the consideration received by the operator is formed by the total amount of commission or fees only, to which the terms and conditions of the game accepted by the players refers.

As the CJEU stated in *Glawe*[6], *"the consideration actually received by the operator for making the machines available consists only of the proportion of the stakes which he can actually take for himself"*. In the case we are considering, the gambling operator can only take for himself, when organising the gambling activity, the commission or fee agreed with the players in the terms and conditions.

It should be noted that the operator cannot dispose of the stakes placed by the players. Thus, the total amount of stakes placed should not be considered as consideration obtained by the supplier, as he cannot use these to cover the costs of his activity. Only the part of the stakes or the winnings that he receives as commission or fees from the players can be used by him to cover these costs, constituting the consideration obtained by him.

In this regard, the CJEU sustained in *Metropol*[7] that *"the taxable amount is determined by what the taxable person actually receives as consideration, and not by what one particular service user pays in a specific case"*.

[6] CJEU, judgment of 5 May 1994 in case C-38/93, *Glawe*.
[7] CJEU, judgment of 24 October 2013 in case C-440/12, *Metropol*.

Therefore, in the case of games where players compete against each other for a prize fund, where the gambling operator only receives a commission or fee from the total stakes placed by the players, the taxable amount should be the total amount of the commission or fees received and it should not refer to the total amount of stakes placed.

3.3.2. Obligation to pay to the winners not resulting from legal or statutory provisions

As previously said, in Working paper No 844 REV it was concluded that when a gambling company was obliged to return to the players a certain amount of the sums received from them due to legal or statutory obligations, then the sums that have to be returned to the players as winnings had to be deducted from the total sum received in order to determine the consideration obtained by the gambling company from the players which then constituted the taxable amount of the gambling services.

That was inferred from several rulings of the CJEU on the subject. In the said Working paper it was stated that "*from those rulings we can infer that the decisive element in determining the taxable amount is whether the operator supplying the gambling service can freely dispose of the amounts received. In that regard, it is not important whether he can physically access to the full amount paid by the players*".

When the gambling company is not obliged by legal or statutory obligations to return to players as winnings a certain amount of the sums received from them, the conclusion was that the taxable amount would include the full amount received from the players, without any deduction.

However, it should be borne in mind that there are cases where there is an obligation for the gambling company to return to the players as winnings a certain amount of the sums received from them although that obligation does not result from a legal or statutory provision.

That is the case when a gambling company publishes the terms and conditions of the game, that have to be accepted by the player in order to be able to take part in the game, and in those terms and conditions the percentage of the stakes received that has to be returned to players as winnings is established. It would also cover games such as roulette or betting activities, where the player at the moment he places his bet knows the amount of the prize he will get in the case of a winning.

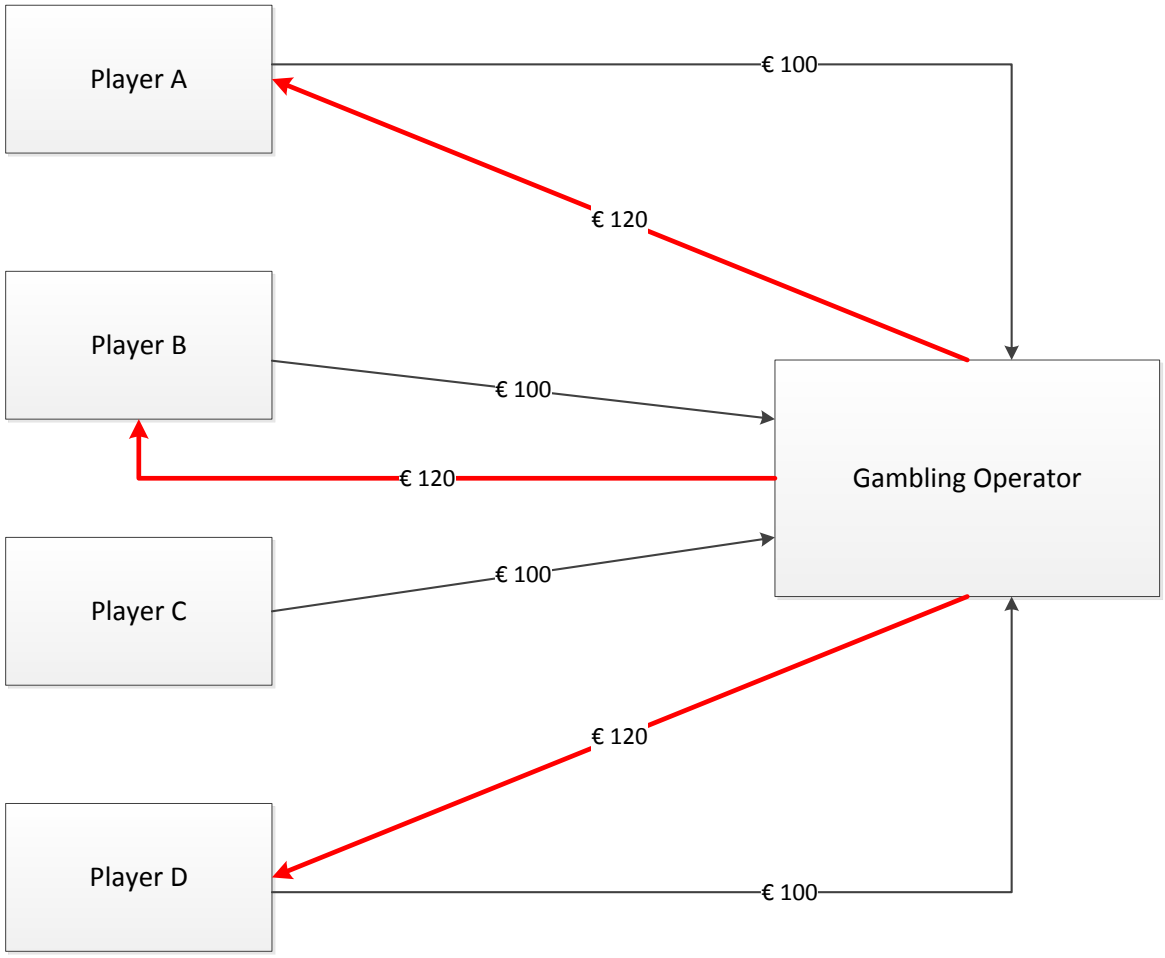
In these cases, if the gambling company does not fulfil that condition, the players can take legal action to enforce that obligation in the same way as if that obligation had resulted from a legal or statutory provision. Therefore, in these cases the gambling operator cannot freely dispose of the total amounts received, which was considered the decisive element in determining the consideration obtained by the supplier which constitutes the taxable amount.

That is in line with the reasoning of the Advocate General Jacobs in *Glawe*[8], where he stated that "*the operator's turnover consists in the amounts he is able to remove from the machine, and not in the total amounts inserted by players. Otherwise one would arrive at the surprising result that the machine operator refunds the larger part of his turnover to his customers*".

[8] *Glawe*, opinion of Mr Advocate General Jacobs delivered on 3 March 1994, point 18.

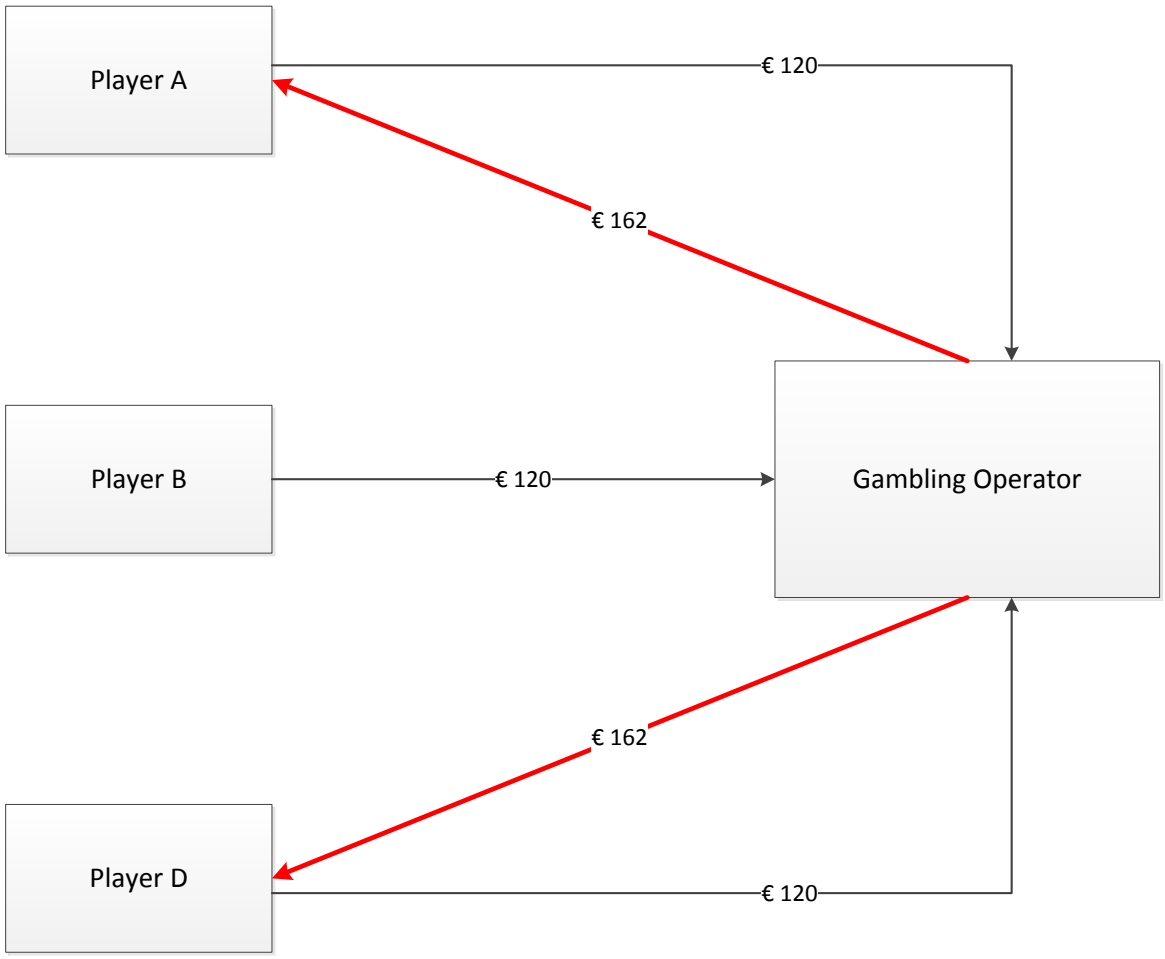
We could use an example to illustrate this statement. We will refer to a game where there are four players who each gamble €100. The gambling operator commits himself to return to the winners of the game 90 per cent of the amounts played. After the first hand of the game, the players continue playing with the winnings received, without any additional amounts being employed and with no new players entering the game.

First hand



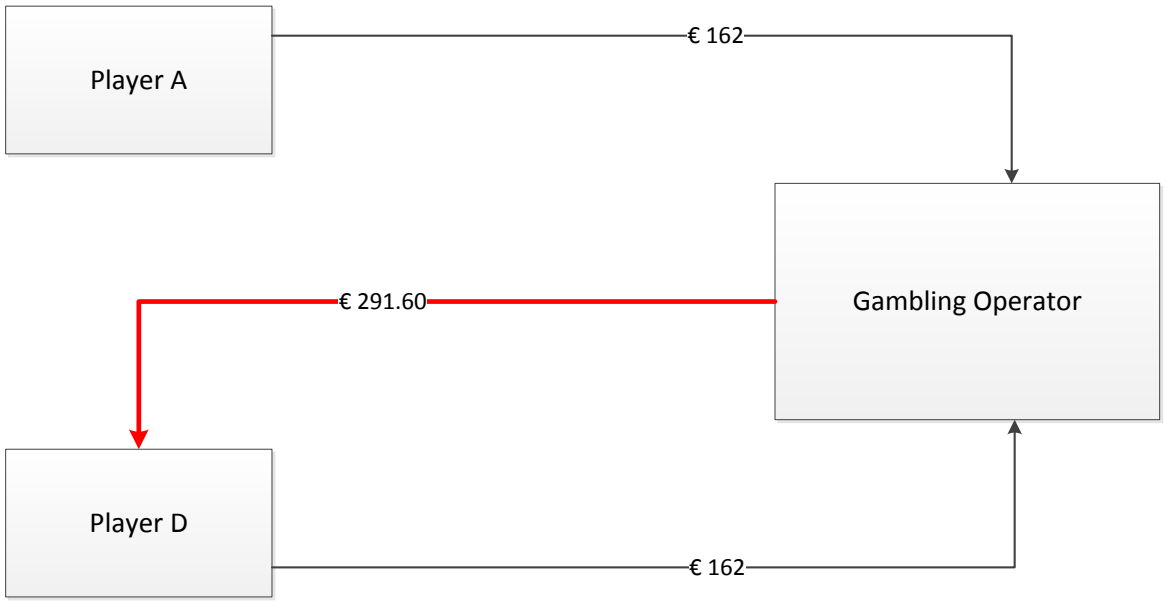
Bets placed = €400

Second hand



Bets placed = €360

Third hand



Bets placed = €324

From this example we observe that the players have continued playing with the original €400 placed by them. Still, they have in their possession (in the hands of player D) €291.60 of that amount. Therefore, the gambling operator has obtained from the game €108.40. However, if we consider that the taxable amount is the total amount placed by the players, without deduction of the amounts returned to players as winnings, the taxable amount for the gambling operator after the three hands played would sum up to €1 084.

If we understand VAT as a general tax on consumption, it seems difficult to associate that amount of €1 084 with what is the consumption made by the players. In the same way, that sum does not seem to be the consideration obtained by the gambling operator in return for the supply, which is the taxable amount of the tax according to Article 73 of the VAT Directive.

For those reasons, we would like to ask Member States to consider how to determine the taxable amount when a gambling company has committed through the terms and conditions of the game that have been accepted by the players, or by any other means, to return to the players as winnings a certain amount of the sums received from them, and that obligation can be enforced in the same way as if it had been imposed by a legal or statutory obligation. It is a situation that seems clearly detached from the one in *Towns & County Factors*[9], where there was no enforceable obligation on the side of the supplier and where the obligations on the organiser of the competition were binding in honour only, inasmuch as neither the rules of the competition nor national legislation obliged the organiser of the competition to pay the cash prizes or to pay for the non-cash prizes out of the entry fees. It could therefore either be so that those amounts that have to be returned to the players as winnings should be deducted from the total sum received to determine the taxable amount of the gambling service or, conversely, the taxable amount should be

[9] CJEU, judgment of 17 September 2002 in case C-498/99, *Town & County Factors*, paragraphs 9 and 10.

determined in this case by the sum of the total amount of the stakes received without any deduction.

Finally, we would also like to point out that in some games such as roulette or betting, as a result of one of the hands of the game, the gambling operator could register a loss. That could be the case where the amounts that have to be handed over to the winners exceed the amounts that are obtained from the losers. In that case, if we were to consider that the sums returned to players as winnings should be deducted from the taxable amount, the taxable amount of that concrete hand would be negative, and should be compensated with positive taxable amounts obtained in other hands of that concrete game.

In these cases, and according to the CJEU in *Metropol*, as the taxable amount is determined by what the taxable person actually receives as consideration from all players and not by what one particular service user pays in a specific case, it does not have to be determined transaction by transaction. It can be determined using cash receipts referring to a concrete period of time.

That same reasoning was applied in *First National Bank of Chicago*[10] where the CJEU, after saying that "*any technical difficulties which exist in determining the amount of consideration cannot by themselves justify the conclusion that no consideration exists*", ruled that "*the taxable amount is the overall result of the transactions of the supplier of the services over a given period of time*". In the view of the CJEU, "*nor is it necessary for either the taxable person supplying the goods or performing the service or the other party to the transaction to know the exact amount of the consideration serving as the taxable amount in order for it to be possible to tax a particular type of transaction*".

3.4. Conclusions

The services supplied by the operator of games where players compete against each other for a prize fund, should be considered to be gambling, as the activity of the operator goes beyond simply contacting the players and implies the organisation of a gambling activity.

Gambling activities are included in Annex II of the VAT Directive and should therefore be considered to be an electronically supplied service, unless the level of human intervention involved in the supply of the service is more than minimal, insofar as all of the conditions required by Article 7(1) of the VAT Implementing Regulation are fulfilled. This level of human intervention should be determined in relation to the activity deployed by the supplier to provide the service when such a service is required by the individual customer, and not to preparatory activities or adjustments of the game environment carried out by the supplier even if such activities may be necessary for services to be supplied. Neither is the level of human intervention impacted by the activities carried out by persons different from the supplier, as is the case of sports events.

In cases where the operator only receives a commission or fee from the players, the taxable amount should be determined by the total amount of commission or fees received by the operator and not by the total amount of the stakes placed by the players.

When a gambling company is obliged to return to the players as winnings a certain amount of the sums received from them, and that obligation does not result from legal or

[10] CJEU, judgment of 14 July 1998 in case C-172/96, *First National Bank of Chicago*.

statutory provisions but it could be enforced as if it derived from such provisions, it is necessary to agree on whether the consideration obtained by the supplier and therefore the taxable amount is determined by the total amount of the stakes received without any deduction or if the amounts that have to be returned to players as winnings could be deducted in order to determine the taxable amount.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on this matter raised by the Commission services, and provide their opinion on the question asked by them.

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