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By PwC Deutschland | 21. Oktober 2022

Supreme Tax Court confirms different VAT treatment of online gambling and physical (offline) gambling

In a resolution regarding the request for suspension of payment the Supreme Tax Court endorsed the different VAT treatment of terrestrial (physical) gambling versus VAT exempt online gambling. Furthermore, the court held that this unequal treatment is not contrary to the EU principles of fiscal neutrality.

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Background

During proceedings for suspension of payment, the appellant enterprise – which operates gambling halls in which slot machines are installed (terrestrial gambling machines) - took the view that it suffered disadvantages compared to virtual online games due to changes allowed by law since 1 July 2021: Virtual slot machine gambling is subject to the German Race Betting and Lottery Act (RBLA) and as such exempt from VAT as provided in Sec. 4 No. 9 (b) VAT Act. The appellant claimed that its gambling services were exempt from VAT pursuant to Art. 135 of the VAT Directive. Article 135(1)(i) of the VAT Directive states that the organization or operation of betting, lotteries and other forms of gambling and gambling machines is in principle exempt from VAT, although Member States remain responsible for determining the conditions and scope of this exemption. The tax office, on the other hand, believed the German lawmakers, at the time of the amendment of the statutes, had dealt with this issue in detail in its official memorandum on the reasons for the amendment of the statutes and concluded that there were significant distinctions between online gambling and physical gambling machines which would justify the difference in VAT treatment.

The Tax Court of Muenster had doubts with respect to the EU principles of fiscal neutrality on the VAT liability arising in connection with revenues from terrestrial (physical) gambling machines as opposed to the existing VAT exemption available for online gambling and granted suspension of enforcement. In the opinion of the court there is a competitive situation here and in case of virtual gambling the player is given the feeling that he is playing in a traditional casino venue rather than in a virtual environment. For the so-called average consumer, who is interested in the gaming experience and the achievable gain, it made no difference at first and thus it should not really matter to him whether he plays virtually or terrestrially.

Decision

After a summary examination, the Supreme Tax Court granted the complaint brought by the tax office and rejected the request of the appellant for relief in the form of a suspension from execution (i.e., a delayed tax payment). The Münster tax court had wrongly assumed that turnovers from virtual slot machine gaming (as of 1 July 2021 exempt from VAT as falling under the German RBLA) and turnovers from terrestrial operation of slot machines (continue to be subject to VAT) are similar and comparable services.

According to the principle of neutrality it is not allowed to treat similar and therefore competing services differently with regard to VAT. For that purpose, the Supreme Tax Court took a closer look at both types of gaming and at the memorandum of the German legislator on the reasons for amending the racing betting and lottery tax at the time. There were indeed significant differences to be found in the legal framework regarding these two types of transactions in terms of stakes, winnings and losses, payout ratios, and availability of play, as well as other differences in terms of player-slot machine interaction, the winning experience, and the gaming experience.

The court notes that there are other and further differences between the two types of games: "Differences in the minimum and maximum stakes and winnings, the chances of winning, the available formats and the possibility of interaction between the player and the slot machine" are circumstances that have a significant

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influence on the decision of the average consumer and therefore - as in the case of dispute – are not services of similar type.

For the sake of similarity, it is not important whether the virtual online game is intended to simulate or replicate the terrestrial slot machine game, but whether this objective has been achieved in such a way that similarity can be affirmed. This is explained in more detail in the explanatory memorandum of the legislators: “In addition, these online services are already fundamentally different in nature from terrestrial services, despite a superficial similarity in appearance, among other things. Online services are regularly less expensive to operate and enable more efficient economic calculations because, among other things, there is no need to maintain physical equipment or premises.” Moreover, in the case of terrestrial slot machines the player is paid in cash, while in the case of virtual slot machines the player receives a credit to his gaming account.

The arguments for the different treatment by the legislator do not indicate an infringement of EU law. The legislator has taken as its starting point the applicable standards of Union law and has explained the differences which, in his view, do not make the services appear similar from the perspective of an average consumer. Hence, these considerations for an unequal treatment of both types of gaming do not, in the opinion of the Supreme Tax Court, suggest an infringement of Union law. Even if it were to be found in the main proceedings that there was a similarity in services, these could still be treated differently, if the unequal treatment is objectively justified, as is the case here.

Finally, the Supreme Tax Court went on to point out that EU law also provides that electronic gambling and terrestrial gambling are in some ways treated differently for VAT: For online gambling, the place of supply of services is in the country where the recipient is resident rather than in the country of origin, therefore the place of performance differs if the service providers are not domiciled in Germany. Also, there could be restrictions both in the right for input VAT deduction and - depending on the recipient of the service - with respect to the tax exemption or the tax rate applicable in the Member State in which the respective recipient of the respective transaction is domiciled. By establishing the alternative place of performance, the EU wished to ensure that such services would be taxed in the EU if they were consumed there. This justifies the different taxation of terrestrial sales and online sales.

Source:

Supreme Tax Court decision of 26 September 2022 case ref. XI B 9/22 (AdV), published on 20 September 2022.

Schlagwörter

VAT Exemption, online game