



VAT NEWSLETTER

Doubts concerning legality of taxation of (online) slot games

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1 Background

Virtual and terrestrial slot games, where the players are physically present in the gambling halls, have been taxed differently since 1 July 2021. Due to the German State Treaty on Gaming 2021, virtual slot games are now subject to the Betting Racing and Lotteries Act. The stakes form the taxable amount and are subject to the virtual slot games tax of 5.3%. Accordingly, virtual slot games are, in accordance with sec. 4 no. 9 lit b of the German VAT Act, exempt from VAT.

On the other hand, terrestrial slot games are still subject to VAT charged at 19%. The taxable amount is the gross gaming revenue, i.e. the stakes less the winnings paid out (see Federal Ministry of Finance's letter of 5 November 2021).

2 Decision on suspension of execution by the Fiscal Court of Münster

In its decision published today (ref. 5 V 2705/21 U), the Fiscal Court of Münster grants a suspension of execution concerning VAT for terrestrial slot games. The Court considers the different tax treatment of virtual and terrestrial slot games to be a violation of the principle of VAT neutrality and raises doubts as to whether the legislator was entitled, for VAT purposes, to treat virtual slot games differently from terrestrial slot games. This different treatment arose due to there being a competitive situation between the two types of slot games. In the Fiscal Court's view, the unequal treatment cannot be justified by the different regulatory framework conditions discussed in the legislative procedure.



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3 Consequences for the practice

The Fiscal Court of Münster's explanations are convincing. In recent years, enhanced by the coronavirus pandemic, it has become apparent that terrestrial and virtual slot games are comparable and are in direct competition with each other. This is because virtual slot games simulate the conventional casino experience for the player. This leads to a competitive situation between the two types of slot games. In addition, the ECJ held in the legal case *The Rank Group* (C-259/10), that comparability cannot simply be ruled out if only one type of game is subject to an unharmonised tax – here: virtual slot game tax (rec. 48).

Despite the comparability of the two types of slot games, there is unequal treatment due to the different tax treatment. To justify the unequal treatment, it was referred to the different regulatory framework conditions during the legislative procedure. We are, however, of the opinion that these cannot justify the unequal treatment in the present context. As the Fiscal Court of Münster has correctly stated, with reference to the ECJ in *The Rank Group* case, the different legal regulations regarding supervision and regulation cannot justify the unequal treatment under VAT law. Moreover, an unequal treatment also results from the different taxable amounts. The VAT on terrestrial offers is assessed according to the gross gaming revenues and the virtual slot tax is assessed according to the gaming stakes. This favours terrestrial offers economically, compared to virtual offers, due to the high payout ratios (regularly exceeding 90%). This consideration and the different tax rates are, however, all irrelevant from an EU law perspective regarding the VAT taxation of terrestrial offers. This is because the ECJ held in the legal case *Fischer* (C-283/95) that unharmonised taxes (here: virtual slot game tax) are not to be considered within the framework of the principle of neutrality (rec. 29 ff.). On the other hand, against this background, the economic disadvantage of virtual offers raises concerns regarding the principle of equality.

Operators of terrestrial slot games should consider filing an appeal against their VAT assessments and, with reference to the proceedings of the Fiscal Court of Münster, apply for a suspension of execution in accordance with sec. 361 of the German Fiscal Code. Operators of virtual slot games can benefit in a similar way. They can file an appeal against the assessment of the virtual slot game tax and also apply for a suspension of execution in accordance with sec. 361 of the German Fiscal Code, with reference to the proceedings of the Fiscal Court of Münster.

It should be noted that the present case merely concerns legal proceedings regarding a suspension of execution, i.e. the Fiscal Court has provisionally assessed the legal situation in summary proceedings for interim relief. However, it is only a matter of time before a fiscal court will review the legal situation in main proceedings.