



Federal Ministry of Finance comments on the VAT treatment of prize money

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1 Background

In its judgements of 30.08.2017 - XI R 37/14 and 02.08.2018 - V R 21/16, the Federal Fiscal Court confirmed that a supply subject to VAT requires a direct link between the supply and the remuneration. If a payment is uncertain and/or dependent on uncertainties, this direct link may be missing. The Federal Fiscal Court has found this to be so in two cases, one involving a poker player and the other, a horse race. The Federal Fiscal Court decisions are therefore in conformity with the ECJ's decision in the *Baštová* case (ECJ, judgment of 10.11.2016, C-432/15), which reached the same conclusion in regard to horseback riding tournaments.

Against this backdrop, in particular the gambling and lottery industry (e.g. horse racing and poker tournaments) had legitimate hopes of benefiting from this jurisprudence. However, in its letter of 27.05.2019, the Federal Ministry of Finance restricted the scope of the application of the principles established by the ECJ in the *Baštová* case.

2 Non-taxability of placement-dependent prize money

In the Federal Ministry of Finance's opinion, the principles of the Federal Fiscal Court and the ECJ case law only apply to placement-dependent prize money awarded by organisers of horse races and poker tournaments, sporting competitions, beauty contests, elimination games, games of chance and the like. Thus, placement-dependent prize money is not taxable.



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3 Taxability of placement-independent prize money

On the other hand, the principles of the Federal Fiscal Court and the ECJ case law are not to apply to placement-independent prize money (e.g. appearance fees). In these cases, each participant in a contest ultimately receives a payment from the organiser, the amount of which is uncertain at the outset of the contest. In the opinion of the Federal Ministry of Finance, the payment made by the organiser is the actual consideration for participation in the competition and not for achieving a certain position. The participation constitutes the consumable advantage which is necessary for taxability.

4 Taxable supplies of a slot machine operator or casino operator

The Federal Ministry of Finance confirms that the supplies of a slot machine operator or casino operator are taxable. The supply of other services consists of admission to the game with a chance of winning. The stake the participant pays is the valuable consideration.

5 Non-objection rule

The principles of the Federal Ministry of Finance letter are to be applied to all open cases. However, there is no objection - even for the purposes of input VAT deduction - if the participants are in agreement that the remuneration is taxable when paying placement-dependent prize money for participation in a competition taking place before 1 July 2019.

6 Consequences for the practice

In the view of the tax authorities, in practice, it is necessary to make a clear distinction between placement-dependent and placement-independent prize money. Participants in such competitions are required to precisely differentiate each individual case, according to whether the payment is made for (uncertain) success or on the basis of an actually provided supply. This should present them with considerable challenges. In practice, it is not uncommon for organisers to pay prize money containing both placement-dependent and placement-independent components. In these cases, it is necessary to allocate the prize money. Depending on the individual case, the taxable amount would then, generally formulated, correspond to the prize money less the placement-dependent components.

It is unclear whether German tax courts will draw the same conclusions as the Federal Ministry of Finance and restrict the scope of application of the principles established by the ECJ in the *Baštová* case accordingly. In the past, the ECJ based taxability on the fact of there being a direct relation between the supply and a determined or determinable amount of remuneration. The ECJ pointed out this direct relation in the context of a street musician receiving voluntary payments (see case *Tolsma*). In this case, the ECJ was of the opinion that there was no taxable supply, since the street musician received sums of money which were neither determinable in advance nor based on a remuneration agreement. According to these principles, and contrary to the Federal Ministry of Finance's view, taxability of placement-independent prize money could be denied if the amount of the payment is uncertain, i.e. not determined or determinable.