



KMLZ VAT NEWSLETTER

Uncertain Remuneration – No Taxable Supply

1. Facts

During the years 2006 and 2007, the Plaintiff participated in and won poker tournaments, so called “cash games” and “internet poker events”. The question then was, were these winnings to be considered as remuneration, for taxable supplies by the Plaintiff, rendered within the domestic territory. The Plaintiff did not file any corresponding VAT returns. The tax office assumed that the Plaintiff was a professional poker player, in terms of sec 2 of the German VAT Act, and assessed VAT on the Plaintiff’s winnings.

The tax court in Münster rejected the Plaintiff’s appeal. In the tax court’s opinion, the Plaintiff rendered a supply of services by playing for prizes. Obeying the predefined rules and accepting the risk of playing against other players, he participated in poker tournaments etc. for which prizes were offered to the winner.

Federal Fiscal Court denies taxable transaction in case of uncertain payment

With its decision of 30.08.2017 – XI R 37/14, concerning a poker player, the Federal Fiscal Court confirmed that a taxable supply requires a direct link between the supply and the remuneration. Where the provision of a payment is uncertain, the direct link might be found to be lacking. This Federal Fiscal Court decision follows the ECJ, which previously similarly decided a case concerning horse racing. In addition to many forms of racing and gaming, other sectors might also benefit from this case law.

2. Grounds

The Federal Fiscal Court did not follow the tax court’s opinion. According to the Federal Fiscal Court, no direct link existed between the Plaintiff’s participation in poker tournaments etc. and the related payments (prizes and winnings).

Firstly, the Federal Fiscal Court found that the scope of VAT is very wide. Any granting of an advantage, which might lead to consumption, would be sufficient. With a view to the organizer, the court stated that the organization of gambling (legal or illegal) is also basically subject to VAT. The supply rendered by the organizer to the player was to accept the player’s request to participate in a game of chance.

The Federal Fiscal Court also refers to the treatment of participants. The participation in a competition might be a supply of service against remuneration where an appearance fee or another direct remuneration is paid for the participation.



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If only the successful participant – depending on his placing – obtains a prize, which was possibly fixed in advance, the prize is not considered to be remuneration. The Federal Fiscal Court justifies this as follows: It is consistently held that a “supply of services for remuneration” requires the existence of a direct link between the supply of service and a payment the taxable person receives. This requires a legal relationship between the supplier and the recipient, within the framework of which a supply for consideration was carried out. In this case, the remuneration received by the supplier must correspond to the actual equivalent value of the service rendered to the recipient.

In the Federal Fiscal Court's view, the fact, that it was uncertain whether the taxable person would receive a payment, is sufficient to annul the direct link between the supply of services rendered to the recipient and the possible payment he might receive. The awarding of a prize is thus subject to a specific performance and also to a degree of uncertainty, resulting in the exclusion of a direct link.

The Federal Fiscal Court's grounds are based on the ECJ decision in the case *Baštová* (ECJ, decision of 10.11.2016 – C-432/15), where the ECJ denied the taxability of a prize won in a horse race.

Finally, the Federal Fiscal Court pointed out that both the fiscal jurisdiction and the tax offices are obliged to observe ECJ case law.

3. Consequences for the practice

The Federal Fiscal Court's decision is certainly important for many forms of racing and gaming, including online gambling.

If one takes the criterion of uncertainty seriously, one could even consider applying this case law to other cases where the remuneration is success-dependent. Taxable persons operating e. g. in the financial service sector, which to date have applied VAT exemptions to such remuneration, would enjoy a positive effect as regards input VAT deduction if the services were treated as non-taxable. It is currently unclear in what other types of cases this issue of the uncertainty of a payment may impact upon. It may be that this criterion needs to be considered with regard to the degree of certainty in terms of the content of the service provided and the point in time the service is rendered. If it is unclear, at the point in time the service is rendered, if there will be any remuneration, a direct link might have to be denied. However, if the content of the service is the act of achieving the success and the payment is made as a result of this success, then a direct link might exist. It will be for the courts to provide clarification in the course of future decisions.

It is nothing new to say that all national authorities, including the tax authorities, must observe Union law and ECJ case law. In practice, this legal requirement, however, has not always been taken into account by the tax offices. If national authorities fail to apply Union law, the respective member state will possibly be held liable for damages.