Betting in Kenya: Can Caesar collect on winnings?

By Toddy Thairu

The second reading of the Betting, Lotteries and Gaming (Amendment) Bill, 2016 has once again elicited debate as to how the gambling industry should be taxed in Kenya. Hon. Jakoyo Midiwo, who has sponsored the Bill, is on record accusing the industry's bookmakers of tax evasion and avoidance. The industry and its regulator have responded to these accusations, compounding the confusion surrounding the taxation of the gambling industry in Kenya. In particular, punters (players) have been left wondering whether they are required by law to account for tax on their winnings. Some of my friends and acquaintances have been caught up in the sports betting craze and one of the questions that always pops up during some of our conversations is, whether they would be required to pay any tax were they to win one of the many multi-million jackpots up for grabs in Kenya.

In order to answer this question, it is important to understand how the tax regime on the gambling industry has evolved in Kenya.

The Government first attempted to tax betting and gaming winnings in mid-2012 through the Finance Act, 2012 by introducing a 20% withholding tax on winnings from betting and gaming. However, even before the provisions could come into effect, they were deleted via a second Finance Act, 2012 published in January of 2013. The Government however re-introduced the 20% withholding tax on winnings through the Finance Act, 2013. The 20% withholding tax was introduced as a final tax and took effect on 1st January 2014.

Following this re-introduction of withholding tax on betting and gaming, the Association of Gaming Operators filed a petition at the High Court contesting that the new Income Tax Act amendments enacted by the Finance Act, 2013 were unconstitutional as they were introduced without any public participation. The Association also claimed that the implementation of the tax was impractical. The petition was dismissed by Justice Majanja, perhaps cementing the long held Kenya Revenue Authority (KRA) view that tax is due irrespective of implementation difficulties.

Outside the corridors of justice, other industry players claimed that the law was not clear as to who was supposed to account for the withholding tax. However, like any other withholding tax mechanism, withholding tax is always accounted for by the person making the payment. Thus, the betting and gaming companies were required to deduct 20% tax from the winnings of the punters and remit this to the KRA. However, ambiguity still remained as to whether the tax was applicable on the gross amount of winnings or the net winnings. In gambling, net winnings would be arrived at after taking a deduction of the amounts that a player has lost to a betting or gaming company.

Nevertheless, in an attempt to address the implementation challenges, the Government introduced further amendments to the Income Tax Act in 2015. Through the Finance Act, 2015, withholding tax was now applicable to the gross winnings payable by bookmakers to punters. The withholding tax was also reduced from 20% to 7.5%. This change took effect on 1st January 2016.

Despite these clarifications and changes, some of the industry stakeholders still held the view that the application of the law was still impractical at least from an administrative viewpoint. Others claimed that the law was unfair and departed from the international best practice.

Internationally, different countries have adopted various modes of taxing the gambling industry. For example, for bookmakers, some countries tax them as any other trading company while others ascribe different taxes depending on the various gambling activities, that is, betting, lottery, casinos and prize competitions. For winnings of the punters, some countries tax them as any other ordinary income, others attach a final withholding tax on the payments while others do not tax these winnings.

In the US for example, gambling winnings are fully taxable and a winner must disclose these winnings in their tax return. One may deduct gambling losses but only if they are itemized and supported. However, the amount of losses one may deduct cannot be more than the amount of gambling income reported in the return. In the United Kingdom, gambling winnings are not taxable on the punters. The bookmakers are however liable to a 15% tax on their gross profits. In Europe, outside of the UK, tax on punters' winnings is rare.

Through the Finance Act, 2016, and in a bid to further streamline taxation of the industry and encourage compliance, the Government removed the taxation of the industry from the provisions of the Income Tax Act to the ambit of the Betting, Lotteries and Gaming Act. With effect from 1st January 2017, Kenya adopted the UK model of taxing the gambling industry. This model lays the tax burden on the bookmakers and not the punters.

The Finance Act, 2016 introduced a monthly betting tax of 7.5% on the bookmakers' gaming revenue. Gaming revenue is defined as the bookmakers' gross turnover less the winnings paid out to the punters. Also, there will be a monthly lottery tax of 5% chargeable on the lottery turnover. Casinos will now be liable to a monthly gaming tax of 12% of their gaming revenue. For prize competitions and promotions, these will now be chargeable to a monthly prize competition tax of 15% on the total gross turnover.

The Government's effort to ensure compliance and collection of taxes across the gambling industry is laudable. However, these new changes are still bound to face challenges when it comes to their practical implementation. For example, it remains to be seen whether a betting company's net profit will still be liable to the 30% corporation tax, now that a betting company is liable to the 7.5% tax on its monthly gross profit. If so, will the company be allowed to take the 7.5% monthly tax as a credit against its annual corporation tax liability? For prize competitions, what happens where there is no particular cost of entering the competition, but rather, all one has to do is buy a certain product or just make use of a particular service?

There is no doubt that taxation of the gaming industry is one of the government's initiatives to broaden its tax base. However, it will be interesting to see how the Government reacts to these practical challenges, including how to license and net into the tax bracket the slot machine operators that are now sprouting in the slums. What is clear is that the taxation of the gambling industry is yet to be streamlined and with gambling (especially online sports betting) looking like it will be around for the long term, the Government has to get over these teething problems as soon as possible to minimize loss of revenue from this booming industry. For now, the punters can rest easy knowing that the current laws do not oblige them to account for tax on their winnings. However, all this could change should Hon. Midiwo's Bill see the light of day.

Toddy Thairu is a Tax Manager with KPMG Advisory Services Limited (tthairu@kpmg.co.ke). The views and opinions are those of the authors and do not necessarily represent the views and opinions of KPMG.