



VAT Alert – Guidelines published on the Gambling VAT Exemption

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In summary

On 21st November 2017, two sets of Guidelines were published in the Government gazette in relation to the gambling VAT exemption, entitled '*Guidelines on Item 9 of Part Two of the Fifth Schedule to the VAT Act*' and '*Guidelines for the determination of the taxable value of gambling and betting services*'.

The first set of Guidelines establishes which gambling supplies qualify for the VAT exemption provided in the VAT Act. This is in line with the EU VAT Directive which requires Member States to exempt without a right of deduction of input VAT '*betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State*'. In essence, whereas most forms of gambling will remain VAT-exempt, certain online supplies of skill games and casino-type games, whether peer-to-peer or not, will become VAT-taxable as from 1st January 2018. Land-based table games, slot machines, lotto, lottery and lottery-type games, sports and horse betting, betting on the outcome of events, bookmaking and betting exchanges will remain exempt from VAT. The VAT exemption covering supplies which are strictly required, related and essential to, and which form part of an underlying gambling or betting transaction ('intrinsic services'), will be limited to those that are related to exempt gambling/betting transactions as aforesaid.

Given the particular nature of gambling supplies, the second set of Guidelines seeks to establish the specific rules applicable for the computation of the value of gambling services on which VAT should be charged or otherwise.

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The changes will mainly effect providers of online casino games such as blackjack, baccarat, roulette and poker, which to date have exempted their supplies and which, as from 1st January 2018 will have output supplies bearing a VAT-taxable status.

To the extent that most gambling operators established in Malta provide such VAT-taxable services to players not established in Malta, the main implication for them is on their right to recover input VAT and possibly on the need to change their type of VAT registration.

Following the 2015 VAT changes, gambling operators engaged in the provision of electronically supplied services (or 'ESS') already have the right to recover input VAT in respect of gambling supplies subject to VAT in other jurisdictions where their players are located. With effect from 1st January 2018, the right to recover input VAT will be extended to those gambling operators engaged in supplies which will become VAT-taxable in nature, irrespective of the place where the gambling supplies are made.

In turn, gambling operators engaged in the provision of VAT-taxable services to players established in Malta, will generally have an obligation to shift to an Article 10 VAT Registration and charge VAT on the taxable value as determined by the Guidelines. This applies unless such i-gaming operators are established outside Malta and opt for the Mini One Stop Shop in some other EU Member State.

An Article 10 VAT registration brings with it different VAT compliance obligations, namely the submission of VAT returns on a quarterly basis and where relevant, the determination of the extent of input VAT recovery on the basis of a partial attribution in the case of i-gaming operators engaged in both VAT-taxable supplies and supplies which are not subject to VAT.

Furthermore, a switch in VAT registration may trigger an 18% VAT charge on any office premises leased by the gaming operators if the lessee was previously not so registered under Article 10.

Having said this, for gambling operators who are exclusively (i) engaged in the provision of gambling ESS to players established outside Malta when such services are VAT-taxable in nature in Malta, and/or (ii) engaged in supplies that are VAT-taxable in the Member State of consumption, the shift to an Article 10 registration is optional but necessary for their entitlement to a right to input VAT recovery. This means that, before switching to an Article 10 VAT registration, gaming operators would need to weigh the benefits of VAT recovery against any sunk VAT cost on any office lease, bearing in mind that the exemption on intrinsic services procured by operators (i.e. which are required, related and essential to, and which form part of an underlying gambling or betting transaction) will, as from 1st January 2018, be restricted to those supplies incurred in the provision of VAT exempt gambling services.

In turn, it could prove challenging to those providing 'intrinsic services' to gambling operators, who, as from 1st January 2018, would need to determine their VAT charging obligations based on the VAT treatment of the output supplies of their clients i.e. the gaming operators. In the circumstances, it would be advisable that:

- (a) such providers of 'intrinsic services' reassess their VAT obligations based on their clientele (which clientele may be engaged in both VAT-taxable and exempt gambling supplies) and establish a *modus operandi* that is both practical and VAT compliant; and
- (b) gambling operators engaged in a mix of VAT-taxable and exempt supplies evaluate their position *vis-à-vis* the procurement of 'intrinsic services', potentially considering some restructuring, also taking into account the announcement made by the Minister of Finance, in his 2018 Budget Speech, that VAT Grouping will be introduced for the gaming sector.

Another point worth considering in the analysis is the interaction of the VAT Guidelines with the proposed overhaul to Malta's gaming licenses regime. Whereas the proposal is to replace the multi-licence system (i.e. Classes 1 to 4) with just two forms of licences (i.e. B2C and B2B), thereby allowing suppliers of B2C gambling services to consolidate their activities under one licence, such consolidation may make it more difficult to comply with the VAT obligations. This would notably be the case when the operator would be engaged in a mix of supplies that are VAT-taxable and exempt in nature.

The Guidelines in respect of the determination of the taxable value of gambling and betting services, clarify the manner in which the taxable value should be calculated in a sector where the remuneration is not the traditional VAT consideration. In addition the Guidelines, which follow EU jurisprudence, contribute to having consistency across the industry and seek to minimise the implications of the change-over on gambling operators.



The Guidelines

A. 'Guidelines on Item 9 of Part Two of the Fifth Schedule to the VAT Act'

Item 9 of Part 2 of the 5th Schedule to the VAT Act exempts without credit *Government lotto and lotteries, the supply of agency services related thereto and such other supplies related to gambling as may be approved by the Minister*. The first set of Guidelines clarify the scope of the said exemption by providing that with effect from 1st January 2018, the Gambling VAT exemption in Malta will be limited to the provision of the following supplies:

- i. The provision of facilities for the placing of bets and wagers, including the services of book makers, betting exchanges and any equivalent facilities.

The term *placing of bets and wagers*:

- **Refers to** gambling on the outcome of an event, which outcome is unknown at the time of the placing of the bet or wager, while the term *event* includes, but is not limited to a sporting event (real life and virtual), a competition, a lottery, the performance of an index, and a natural phenomenon.

- **Excludes** gambling on the outcome of (a) casino-type games such as blackjack, poker and roulette; and (b) any games of chance, the outcome of which is determined by a random generator.

- ii. The granting of the right to participate in a lotto or lottery, including Grand Lottery, Super 5, scratch cards, keno and any other lottery-type games;

- iii. The granting of the right to participate in bingo games;

- iv. The provision to players of devices or equipment for the playing of casino-type games of chance, the outcome of which is determined by a random generator, including tables for playing of roulette, blackjack, baccarat, poker when played against the house, and slot machines.

The Guidelines clarify that the terms *devices or equipment*:

- **Refer to** game tables, machines and other similar objects which are physically located in premises or locations which are licensed or otherwise recognised by the Malta Gaming Authority ('MGA'), whether accessed by the player physically or remotely.

- **Exclude** "amusement machines" and "remote gaming equipment" as defined in the Lotteries and Other Games Act and in the Remote Gaming Regulations.

- v. Supplies which are strictly required, related and essential to, and which form part of an underlying gambling or betting transaction falling within paragraphs (i) to (iv) above, as shall from time to time be determined by the MGA.

B. 'Guidelines for the determination of the taxable value of gambling and betting services'

The second set of Guidelines deal with the calculation of the taxable value of gambling and betting services. Specifically the Guidelines establish that:

- a. Where the supplier receives a commission or participation fee ('rake'), the said commission or fee shall be regarded as consideration for the service provided; and
- b. In all other cases, the consideration received by the operator shall be equal to the revenue of the supplier (i.e. the total stakes/bets placed by the player) less the winnings and other amounts paid out to players in connection with that bet.

The consideration is deemed to be inclusive of VAT chargeable under the VAT Act.

In arriving at the taxable value there shall be deducted any amount of commission or fee received by a supplier, or of stakes/bets placed by the player which is immediately allocated by the supplier to a jackpot pool as well as bonuses and other incentives provided by a supplier and which had been included within the consideration.

The Guidelines also establish that the taxable value should be determined on the last day of a given tax period, by reference to the aggregate taxable value of the transactions during the respective tax period, and exempt suppliers of gambling services from the obligation to issue fiscal receipts.

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