

# VAT and Remote Gaming

Some years back, as Malta was ahead on its path to becoming a European hub for the gaming industry, discussions were underway on the legislative amendments to the VAT Directive aimed at shifting taxing rights of certain services to the jurisdiction where the services are actually consumed. The result of this effort was manifest in the changes to the place of supply rules of Electronically Supplied Services (ESS) which, as from 1st January 2015, shifted the place of supply of e-services provided to non-business clients (B2C) to the country of consumption or residence of the consumer.

Such development and other issues relevant to the iGaming industry are discussed hereunder.



## VAT on electronically supplied services across the EU

ESS are defined as services 'delivered over the Internet or an electronic network, the nature of which renders their supply essentially automated and involving minimal human intervention'. What is 'essentially automated' and what constitutes 'minimal human intervention' could be debatable, potentially giving rise to double or non-taxation if a place of supply conflict arises. Yet, it is certain that some online gambling services qualify as ESS; indeed the non-exhaustive list laid down in the EU VAT Directive mentions games of chance and gambling games as e-services, potentially leaving out other forms of games. The VAT Department itself has issued guidance with a list of services that are not classified as ESS – such list includes the offering of a facility for the placing of bets on the internet or via an electronic network in connection with live horse races and other live sporting events and the offering of a facility for internet gambling pursuant to the streaming of a live casino event.

As from the start of 2015, identifying the location of the remote gaming players became imperative for a proper analysis of the VAT treatment. Yet, with the IT systems and IT functionalities in place and with other sources of information such as KYC (Know Your Client) details, the identification process might not be the toughest of hurdles for remote gaming operators.

In contrast to the general Business-to-Business (B2B) place of supply rule (where clients receiving services from other EU Member States self-charge VAT), in B2C supplies of e-services the responsibility to charge and levy VAT rests with the supplier. In

theory, the EU VAT Directive exempts from VAT betting transactions and other forms of gambling, however, given that this exemption is subject to the conditions and limitations laid down by each individual Member State, diverse VAT treatment prevails across the EU. Indeed, in Malta gambling services are exempt from VAT (without credit) subject to the approval of the Minister, some Member States have implemented a blanket VAT exemption while others opted to restrict the exemption. As a result, this lack of harmonisation gives rise to technical challenges, since iGaming operators need to identify the applicable VAT treatment of a supply on a Member State by Member State basis.

From an administrative perspective, suppliers of e-services need to consider their tax reporting requirements. Specifically, they can either opt to register for VAT in the jurisdictions in which they offer taxable services or take up the Mini-One Stop Shop (MOSS) option, which permits VAT compliance requirements to be handled through one VAT authority.

## VAT on e-services extra-EU

Akin to the VAT amendments on EU ESS rules, the OECD has identified the collection of VAT on sales of digitized services to private consumers as a challenge and, in 2014, recommended that taxing rights should be allocated to the jurisdiction in which the digitized services are consumed and that customer residence should be used as proxy for consumption. Various non-EU countries, ranging from Australia and New Zealand to Korea and Japan have implemented

or intend to implement the 'destination principle' for e-services, which the OECD considers to be 'the most effective and efficient approach to ensure appropriate VAT collection.' Consequently, monitoring such developments is key to Maltese iGaming operators looking to extend their outreach beyond the EU.

## VAT Recovery rights of Maltese iGaming operators

Following the introduction of the new place of supply rules, Maltese iGaming operators may be required to charge VAT if their players are located in countries where iGaming is subject to VAT. In this context, the VAT Act was amended

to allow VAT recovery by taxable persons such as iGaming operators to the extent that the input VAT is attributable to output supplies which are taxed outside Malta, even though in Malta, such output supplies would have been exempt from VAT without credit. To this end, the Commissioner for Revenue has been granted the discretion to prescribe a partial attribution method to taxable persons when a turnover-based partial attribution ratio would not give a fair and reasonable VAT recovery results.

VAT recovery rights can only be exercised if Maltese iGaming operators get registered under Article 10 of the VAT Act or switch thereunder from an Article 12 registration. The VAT recovery benefit has to be weighed against the compliance obligations of an Article 10 registration and the potential 18% VAT outflow on the leasing of office space from companies.

Common misconception in the iGaming industry

Misconception	Proper understanding
✗ VAT does not apply to transfers of intangibles such as IP.	✓ Transfer of IP is a <b>supply of a service</b> falling within the scope of VAT.
✗ There are no implications on transfers of business.	✓ Transfers of business could qualify for VAT relief <b>only if the conditions set in the VAT Act are met</b> . In some circumstances, authorisation is required for a transfer of a going concern to fall outside scope of VAT.
✗ A Class 4 licensee has to be an Article 12 VAT-registrant.	✓ Not necessarily, for instance Class 4 licensees providing services to EU VAT-registered customers are likely to need an Article 10 registration.
✗ iGaming services are automatically exempt from VAT in Malta.	✓ The exemption is subject to the approval of the Minister of Finance.
✗ There is no VAT on intra-group transactions.	✓ In the absence of VAT grouping provisions in Malta, intra-group transactions are treated in the same way as transactions with third parties.
✗ Substance is only required for income/corporate tax purposes.	✓ The absence or lack of substance in a jurisdiction could have VAT risks on the place of establishment/fixed establishment of an entity and the place of services.

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