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GAME TAXATION IN SPAIN: FROM THE GAME RATE TO THE NEW GAME ACTIVITIES TAX.

A SHORT HISTORY

di Natividad Araque Hontangas¹ and Rita Mascolo²

Abstract

This article deals with the legislative changes regarding the taxation of gambling in Spain from its liberalisation using Real Decreto-Ley 16/1977 to the new concept of online gambling, which has produced new regulations through Ley 13/2011. Stated the importance of collecting taxes on Gambling, this article focuses his attention on the different kinds of Gambling not only from an administrative perspective, but also and mainly from a tax viewpoint.

Keywords: taxation, legislation, casinos, bingo, gambling, raffles, lottery, online gambling

1. Introduction

The traditional conception of gambling suffered a deep transformation due, fundamentally, to the development of new technologies, for which it has been necessary to adopt a new legal regime. To comply with the new needs, Ley 13/2011, of 27 May, known as the Gambling Law, was enacted; previously, gambling was regulated by Real Decreto-Ley 16/1977, which still regulates the criminal, administrative and fiscal aspects of games of chance, gambling and betting (Araque, 2013).

In this document, an analysis is made of the taxes imposed on the gambling sector, as well as the taxation of the profits or prizes obtained by individuals in the exercise of gambling. The analysis conducted in this document aims to understand the new legal reality that regulates the Gaming sector since it deals with both publicly and privately managed games and online gaming. The online gambling, its regulation and control, is of special interest, since most of the main operators reside in tax havens.

¹ University of Castilla-La Mancha. E-mail: Natividad.Araque@uclm.es

² Adjunct Professor at LUISS University in Rome and Research Fellow at the University of Sannio: E-mail: emascolo@luiss.it

The study of the gaming sector, both public and private, grouping together publicly managed games such as the State Lotteries and Bets and the gaming organizers of the Spanish National Gaming Organization (ONCE) and privately managed games: Casinos, Bingos, Raffles, Gaming Machines and Gambling. These games are subject to different taxes.

As far as gaming organizers are concerned, this is regulated by the Gaming Activities Tax and, secondly and in a supplementary manner, when they are not subject to the tax, by two rates: the rate on Lucky, Avoided or Gambling Games, and the rate on Raffles, Betting and Random Combinations.

2. Regulations of gambling

The Law 13/2011, of 27 May, with Real Decreto-Ley 16/1977, regulates all gaming activity in person or through electronic channels. This law distinguishes between reserved and non-reserved activities, the former comprising non-sporadic state lottery games, and the latter being linked to all other games different from the lottery games (art. 3). Moreover, only the operators designated by the law carry out reserved activities, while non-reserved activities comprise all games that can be carried out by a plurality of operators.

The Law establishes that to carry out non-reserved activities it is necessary to obtain an enabling title, also called a licence (art. 9), which can be of two types: general licence (art. 10) and individual licence (art. 11). Consequently, any activity carried out without a licence will be considered prohibited (art. 9). Based on the nature of the Games, they can be divided into publicly managed games and privately managed games. Publicly managed games include state-run lotteries and betting games, while privately managed games include other ones like Casinos, Bingos and Gaming Machines.

Spanish Constitution regulates competence over gambling matters (articles 148 and 149), which establishes that matters not attributed to the State may correspond to the Autonomous Communities, as well as those matters that have not been assumed by the Autonomous Communities shall correspond to the State (Araque, 2013). In this regard, reiterated case law has attributed exclusive competence to the Autonomous Communities, to organise and authorise the holding of Games in their territories, as is the case with Ruling 164/1994 of the Constitutional Court, of 26 May, in its fourth legal basis, which states that the distribution of competence is attributed to the Autonomous Communities under the

title of "Casinos, Games, and Sports Betting with the exclusion of Mutual Sports-Benefit Betting".

According to Article 157.1 of the Constitution, it seems that there is unconstitutionality since it only allows the assignment of state taxes and not of fees. However, Law 22/2009 establishes the transfer to the Autonomous Communities of the yield of taxes on gambling performed in their territory and, if the Autonomous Community does not make use of its powers, the State regulations would be applied in a supplementary manner (Art. 26.1). The transfer of gambling taxes to the Autonomous Communities includes the total yield produced by the latter in their territory, in addition to the possible regulatory powers on the exemption from the tax base, tax rates, fixed quotas, allowances and accruals.

3. The taxation of the game

The Gambling tax was created by Royal Decree-Law 16/1977, of 25th February, which establishes its taxable event in the organisation, celebration and authorisation of the carrying out of games of chance, consignment or chance, intending to tax the economic capacity generated by gambling. All of that leads to the conclusion that it is a tax figure different from the fee which seeks to provide proportional consideration for the cost of a service. Consequently, the gaming tax is a tax enforced on the income obtained by the activities of private entrepreneurs in the same way as a tax on the acquisition of income from activities related to economic capacity, since it is not a consideration but a business or an act which demonstrates the economic capacity of the taxpayer, as set out in the judgment of the Constitutional Court in Case 296/1994, November 10th.

The General Tax Law 58/2003, of 17 December, defines taxes as "public income consisting of monetary benefits required by public administration as a consequence of the realization of the factual situation to which the law has linked the duty to contribute, to obtain income necessary to sustain public expenditure". This law classifies taxes into rates, special contributions, and taxes. In this respect, it may be stated that gambling is subject to three taxes: the tax on gambling activities, both principal and subsidiary; the tax on games of chance, consignment, or chance; and the tax on raffles, bets and random combinations.

The tax on gambling activities is levied on the authorisation, holding or organisation of Games, Raffles, Competitions, Betting, and activities at the state level. This tax will be applied to competitions, betting, and raffles in which the Autonomous Community has not

legislated under its powers. If it has exercised its powers, this tax will not be applied, but the tax on Games of chance, gambling, and raffles, and the tax on raffles, raffles, and random combinations.

Los contribuyentes son las personas físicas, jurídicas o entidades sin personalidad jurídica que operen, organicen o desarrollen las actividades gravadas por el tributo. Asimismo, se dispone que serán responsables solidarios del pago del impuesto aquellas personas que permitan el Juego a otras con residencia fiscal en España, aunque no tengas las licencias correspondientes. La base imponible está constituida por los ingresos brutos, es decir, el importe total de las cantidades destinadas al Juego. Asimismo, dicha base puede estar formada por los ingresos netos o aquellas cantidades que se dediquen a la participación en el Juego, deduciendo los premios satisfechos por el operador a los participantes. La Ley del Juego de 2011 establece los gravámenes aplicables a la base imponible (art. 48.7). Estos tipos varían desde un 25 por ciento, en el caso de Apuestas deportivas cruzadas, hasta un 10 por ciento en el caso de las combinaciones aleatorias publicitarias. Además, las Comunidades Autónomas pueden incrementar dicho gravamen hasta un 20 por ciento, correspondiente a la participación de los residentes fiscales en las Comunidades Autónomas en los juegos regulados por el impuesto. La cuantificación y gestión tributaria del impuesto del Juego se realiza aplicando los mencionados tipos de gravamen proporcionales sobre la base imponible, dando lugar a la cuota tributaria que han de pagar los contribuyentes. Por último, cabe decir que el impuesto se liquida mediante la presentación de una autoliquidación trimestral, cuando se trate de actividades anuales o plurianuales.

Taxpayers are individuals, legal entities or entities without legal personality that operate, organise or develop the activities taxed by the tax. Likewise, it is stipulated that persons who allow others with tax residence in Spain to gamble, even if they do not have the corresponding licenses, will be jointly and severally liable for the payment of the tax. The taxable base is constituted by the gross income, that is to say, the total amount destined to the Game. Similarly, this base can be made up of the net income or those amounts dedicated to participation in the Game, deducting the prizes paid by the operator to the participants. The 2011 Gambling Law establishes the taxes applicable to the taxable base (art. 48.7). These rates vary from 25 per cent in the case of crossover sports betting to 10 per cent in the case of random combinations of advertising. Additionally, the Autonomous Communities may increase this tax to 20%, corresponding to the participation of tax

residents in the Autonomous Communities in games regulated by the tax. The quantification and tax management of the gaming tax is carried out by applying the aforementioned proportional tax rates to the taxable base, resulting in the tax liability to be paid by the taxpayers. Finally, note that the tax is settled through the submission of a quarterly self-assessment, in the case of annual or multi-annual activities.

Concerning the tax on Juegos de Suerte, envite o azar, as mentioned above, its nature is essentially taxable despite its name on the fact that the taxable event is constituted by the authorisation, organisation or holding of Casinos, BINGOES and Recreational and Gaming Machines, as can be seen from the Judgement of the Constitutional Court 126/1987, July. In general, the tax will be applied to the taxable base and the tax liability will depend on the type of gambling carried out. When the Autonomous Communities have legislated on the tax on Games of Luck, Shipping or Chance, the rate established in these regulations will be applied. Otherwise, it will be the State which will apply a rate at a fixed rate of 20 per cent. The tax rate will be established with different parameters depending on the activity carried out.

4. The Public Management Games

These games are regulated through the public business collective and are based on two types of games: the State Lottery and Bets "Sociedad Estatal de Loterías y Apuestas del Estado, S.A." and those organized by the ONCE (Spanish National Organization for the Blind). The draws related to the State Lottery and Bets are the National Lottery, Euromillions, Bonoloto and Primitiva, together with those organised by the Autonomous Communities, those of the ONCE and the Red Cross. The Gaming Law defines Lotteries as gambling activities in which prizes are awarded in cases where the number or combination of numbers or signs, expressed on the ticket or ballot, coincide in whole or in part with that determined by drawing lots (art. 3). According to the Gaming Act, statewide lotteries are reserved for operators designated by the Act, and the Ministry of Economy and Finance is responsible for authorising the marketing of statewide lotteries, consisting of the maximum and minimum percentage allocated to prizes (Art. 4).

Within publicly managed games there are several types of taxes, some of which have already been addressed previously such as the Gaming Activities Tax, which does not tax State Lotteries and Gambling; rates and Personal Income Tax and Non-Resident Income Tax.

In the case of State Lotteries and Bets, as the State is a public entity it is not subject to the payment of any tax and, in turn, this Game is exempt from Value Added Tax, as established by Law 37/1992, of 28 December, on Value Added Tax (art. 20).

ONCE (Organización Nacional de Ciegos Españoles), by its nature as a public law corporation of a social nature, and as a gaming operator of recognised prestige, is subject to strict public control, as established by the Gaming Law in its second additional provision. ONCE is a charitable organisation (Rodríguez Rodríguez, 2006: 320), as its birth was due to the merger of several institutions for the protection and guardianship of the Spanish blind, which was reflected in the founding Decree of 13 December 1938. The ONCE's Game has an altruistic character, because it allocates a large part of the profits obtained to social works for benefit of disabled or blind people, as well as to remunerate the sellers.

Law 16/2012, of 27 December, which adopts various measures to consolidate public finances and boost economic activity, made all the prizes paid for draws held by the Autonomous Communities, the Red Cross and the ONCE, which were previously exempt, subject to taxation. With the sale of ONCE gaming products, as well as State Lotteries and Bets, Law 37/1992 of the Iva establishes that Lotteries, Bets and Games organized by the ONCE will be exempt from VAT (Art. 20. One. 19^a). Individuals who obtain a prize or profit from publicly managed games are subject to Personal Income Tax. Specifically, Law 35/2006, of 28th November, on Personal Income Tax (IRPF) establishes in its additional provision thirty-three in section 1. a), that prizes of Lotteries and Bets organised by the State Lottery and Bets Society and by the bodies or entities of the Autonomous Communities shall be subject to this tax through a special tax, and it should be pointed out that the speciality of this tax consists in that those prizes exceeding 2,500 euros shall be subject to a tax of 20 per cent. In cases where the tenth has been divided into shares, the amount exempted will be apportioned among the co-owners according to their share. Each of the payers will have to be identified, and if the collectors are not identified to make the distribution, it will be considered a donation, and therefore subject to Inheritance and Donations Tax.

The Royal Legislative Decree 5/2004 of 5 March, which approves the Revised Text of the Non-Resident Income Tax Law, establishes taxation for cases in which a non-resident obtains profits from a lottery prize. In addition, the prizes included in Law 35/2006 are subject to this tax, through a special tax, which has been obtained by taxpayers without the mediation of a permanent establishment, so that the prizes, in these cases, will be subject

to withholding and payment on account. This obligation to make the withholding will exist even when the prize is exempt to avoid the resulting double taxation, the withholding percentage being 20 per cent. Taxpayers who win prizes are obliged to file a declaration determining the amount of the debt and to pay this amount. However, there is no obligation to present this declaration when the prize obtained is less than the exempt amount. Finally, individuals who obtain profits from a ONCE prize, as with lottery prizes, are subject to a special tax according to the third additional provision of Law 35/2006 on Personal Income Tax.

5. The privately run games

5.1. The Casino

The definition of Casino is contained in Article 1 of the Ministerial Order of 9 January 1979, which approved the Casino Regulations, so that it defines them as "those establishments specially dedicated to the practice of games of chance, consignment or gambling included in the Games Catalogue". In general, it can be said that the Casino is an establishment where gambling machines, gaming tables and any other game of chance included in the Games Catalogue are operated. Casinos are subject to the tax on games of chance, endive or gambling, and the taxpayer is the individual or legal entity that carries out the activity or organizes the celebration of games of chance, endive or gambling, who will be obliged to pay the tax under the taxable base obtained, which is made up of the gross income (difference between the total amount of income obtained from the game and the amounts that the players receive for their winnings) that the Casinos obtain from the game or the amounts that the players dedicate to their participation in the games. This tax base will be determined by direct or objective estimation. In the case of direct estimation, the taxable person is obliged to make the tax settlement.

The tax liability is obtained by applying the regional or state tariff on the taxable base. The tariff applicable to casinos is annual, although it will be applied quarterly to the income accumulated from the beginning of the year until the last day of the quarter in question. If the Autonomous Community has not legislated, based on its powers, the state tax will be applied. The applicable tax rate will depend on the volume of taxable income between 0 euros and more than 4,363,347,88 euros and depending on this volume a rate of between 20 and 55 per cent will be applied. However, in cases where the Autonomous Community has legislated in this respect, it must determine both the volume of the tax base and the applicable rates. For example, in Madrid, the portion of the tax base varies from 0 to more

than 5,000,000 euros, and the applicable rates are from 22 to 45 per cent.

5.2. *Bingo*

The Order of the Ministry of the Interior of 9 October 1979 defines the Game of Bingo as "a lottery played on 90 numbers, from 1 to 90 inclusive, with the players having as a unit of play the cards or tickets made up of 15 different numbers among themselves, and distributed in three horizontal lines of five numbers each and nine vertical columns, in any of which there may be three, two or one number, but never a column without a number" (art. 10). The Game of Bingo is considered a "Simultaneous Game", and is a collective game of money and chance in which players present in different establishments can participate simultaneously in a single game.

The operation of the Bingos is subject to administrative intervention, which is deployed in two main phases. Firstly, the companies must be duly registered in a Gaming Register, which is kept by each of the Autonomous Communities. Secondly, authorisation must be obtained to use the Bingo. The use of Bingo halls is carried out by three types of entities: charitable, sporting, cultural and tourist entities; public limited companies which meet certain requirements; and service companies.

The game of Bingo, like Casinos, is taxed by the tax on Games of Luck, Envite or Chance, which indicates as a taxable base the amounts that players dedicate to their participation in the game of Bingo, discounting the amount destined to prizes. The tax liability is obtained by applying to the taxable amount the general state tax rate of 16%, or the autonomous community tax rate of 40% in the case of Madrid, according to the Bingos Regulations approved by the Order of 9 January 1979, without prejudice to the rules laid down by each Community.

5.3. *Recreational and Gaming Machines*

In Royal Decree 2110/1998, of 2 October, which approved the Regulations on Recreational and Gaming Machines, these are defined as those machines that grant users a price, time for game use and, coincidentally, prize money. About the user's purpose, if he wishes to obtain a prize in money or simply enjoy some playing time, gaming machines can be classified into three categories:

-Type A amusement machines, which are purely recreational or hobby machines, are limited to granting the user sometime of use or play in exchange for the price of the game, without the user being able to obtain any kind of cash prize. An example of these machines is table football and dart machines (art. 4). These machines are usually located in catering

establishments and bars.

- Gaming machines with programmed prizes or type B that, in exchange for a game price, grant the user a game time and, possibly, according to the game program, a prize (art. 5). As with type A machines, most of them are found in restaurants and hotels, although there is a difference in that these machines are also located in gaming halls.

- Type C or random machines that, in exchange for the price of the game, grant the user a time of use or play and, eventually, a prize that will depend on chance. These gaming machines are currently only allowed in casinos.

In Spain, the regulation of gaming machines corresponds to the Autonomous Communities, because they have exclusive competence. Likewise, they are subject to the Gambling of Luck, Envite or Chance tax. The purpose of this tax is merely to make them available to potential customers. To determine the tax liability, in general, the corresponding rate must be applied. Thus, for type B machines (or gaming machines with prizes), the state tax rate is 3,531 euros per year. When two or more players can take part in this type of machine or automatic device simultaneously, and provided that the game is independent of that of other players, different quotas are applied according to the players: if there are two players the general quota is doubled, so it will be 7,062 euros. However, according to Royal Decree-Law 16/1977, if there are three or more players, the general quota is increased by 50 per cent for each additional player from the third (art. 3).

5.4. Raffles and Tombolas

The definition of a Raffle is contained in Article 1 of Decree 129/1989, of 16 August, which establishes the regulation of Raffles, Raffles and Random Combinations. This precept defines a Raffle as a modality of play consisting of the drawing of one or more objects, previously determined, among the purchasers of one or more tickets or tickets of a single amount, correlatively in number or in a differentiated manner. With the enactment of Law 13/2011, of 27 May, the Raffle is defined as a modality of Play, from a face-to-face and online perspective, consisting of the awarding of one or several prizes through the holding of a draw or selection by chance, among the purchasers of tickets, ballot papers or other documents or means of participation, differentiated from each other, whether material, computer, telematic or interactive, on a previously determined date and provided that to participate it is necessary to make a financial contribution. Likewise, the object of the Raffle may be a movable, immovable or semi-movable property or rights linked to the same, provided that they are not monetary prizes (Art. 3 d).

The taxable persons or taxpayers are the organisers and, in cases where there are no regional regulations, the taxable base is established by the amount of the tickets. The taxable base is determined by the total amount of the tickets or tickets offered. To quantify the tax liability it will be necessary to apply certain tax rates to the taxable base. The raffles will be taxed at 35% of the total amount of the tickets or tickets sold in the draw, without prejudice to the traditional charity raffles which are taxed at 15%. In the case of the Autonomous Community of Madrid, the tax rate is 45.5%, in general. The rate is reduced to 19.5% for public benefit raffles and 1.5% for charity raffles. According to the Law on the Reform of the Tax System, the tax is payable with the authorisation of the Ministry of Finance. As regards the accrual of the tax, each time the authorisation is granted or a Raffle is held, the mere organisation is not sufficient for the tax to be accrued (Art. 40 of the Tax System Reform Law).

The Tombola Game is similar to the Raffle but differs in that the goods or prizes are allocated on the same tickets and therefore no draw is necessary. Therefore, the necessary authorisation is related to the number of tickets sold, unlike the Raffle, whose authorisation is required for the draw to take place. However, in the same way, as for the Raffles, the Consolidated Text on Tax Fees provides that the accrual is also given for the Raffles that are held without authorisation. The applicable rate is also 35 per cent of the value of the tickets sold, except for art. 38 c) of the Revised Text on Fiscal Fees, in the case of Raffles held in markets, fairs or local festivals lasting less than 15 days, with the option of paying a daily fee that will vary according to the number of people residing in the town where they are held.

5.5. Betting

Bets are considered a gambling activity in which amounts of money are risked on the results of a previously determined event whose outcome is uncertain and alien to the participants, with the amount of the prize being determined according to the amounts risked or other factors set in advance in the regulation of each type or modality of bet (art. 3 c) of Law 13/2011, of 27 May).

Article 222 of the Law on the Reform of the Tax System provides that the fee shall be payable when betting is held. However, Article 26 of the Revised Text on Tax Fees provides that it shall be payable when betting is authorised, held or organised. Nevertheless, Article 40.2 of the same regulatory text establishes that the chargeable event is constituted at the

moment of the celebration and organisation of the bets and, for this reason, the requirement for authorisation is not related to the chargeable event. Authorisation in the majority of known bets was granted by the government authority and not by the Ministry of Finance (Mantero Saenz, 1976: 70).

The taxable event arises at the time the bet is made and, therefore, it should be called a tax rather than a levy, since there is no administrative activity. The taxable amount of the bets can be constituted by the total amount of the tickets, receipts or proof of participation that have been sold, whatever how they have been made, or by the difference between the total sum of the amounts bet and the amount of the prizes obtained by the participants of the Game. The tax rate applicable to bets is 7%, in general, with two reduced sub-types of 3% for bets on horse races and those held on pelota courts, and 1.5% for winning bets known as sleepers, held on pelota courts with the intervention of a runner.

5.6. *Random combinations*

The definition of a random combination is established by Decree 129/1989, in its article 1, which establishes that it is a modality of Game by which a person or an entity, for advertising purposes, draws a prize in cash or in-kind among those who acquire its goods or services or who are its current or potential customers, without demanding a financial consideration.

To understand the tax on this type of game, it must be clarified that "for advertising purposes" means that to be eligible for the draw, a product or service related to the draw must have been previously purchased, without having to pay any amount to participate (Orón Moratal, 1990: 127). Therefore, only those random combinations to promote themselves are subject to the fee, excluding those that do not have this advertising purpose (Herrero Suazo, 1973: 211).

The Economic-Administrative Court stated, in the Agreement of 3 February 1967, that authorisation cannot be regarded as a taxable event in the Random Combination Game, since it is not necessary for the holding or organisation of that form of the game and, consequently, does not have the characteristics of a tax but of a levy. The taxable event in the Random Combinations Game is the value of the prizes offered. For these purposes, the value of the prizes offered will correspond to the market value. The state tax rate shall be 10% of the value of the prizes offered, according to Article 38.3 of the Revised Text on Taxation.

6. The Online Game

The irruption of new technologies (internet, interactive television, mobile phones and any other technological instrument) has meant a change in the world of gaming and has brought with it the need to establish new regulatory mechanisms to offer legal security to operators and individuals in the various online games.

The importance of the online gaming phenomenon increasingly used nowadays, has led the legislator to regulate and control it, since most of the main operators reside in tax havens. The Explanatory Memorandum of the Gaming Law establishes that this Law must be the sectorial regulation of reference in matters of the exploitation of games through electronic, computer, telematic and interactive means on a state level, seeking the coordination or integration of the regulation. In short, for authors such as Colomer Hernández (2011: 509), the Gaming Law has a clear will to control and regulate online or distance gaming that takes place and/or is destined for Spain.

Online gambling activities are normally state-run, although the regional administration states that the authorisation of gambling in the regional sphere is within its competence, concerning online gambling it cannot be stated, since there is no mechanism to allow only the inhabitants of a specific autonomous community to access gambling, according to Supreme Court Ruling number 652/2017, of 20 April. Going further in this aspect, it can be said that the reiterated doctrine of the Constitutional Court declares that the competence in matters of gambling must be exercised by the State in benefit of the general interest, without prejudice to the competence of the Autonomous Communities for the regulation and authorisation of gambling carried out in their corresponding territorial area, according to the Ruling of the Constitutional Court 35/2012, of 15 March.

The applicable tax for online gambling will be the Gaming Activities Tax and its quantification depends on the taxable base and tax rates. To determine the taxable base, two different models have been used for some time. The first is based on the operators' gross profit and the second is based on the turnover tax (Baez Moreno and Zornoza Perez, 2012: 630-631). Finally, the Gaming Law has established a model based on operators' profits, although the taxable base may be made up of different magnitudes depending on the type of game. For both mutual and sports bets, the tax base is determined by the gross income, that is, the total amount of the amounts dedicated to the participation in the Game, as well as any other income that may be obtained, directly, derived from its

organization or celebration, according to the Gaming Law (art. 48.6 a). In the case of sports betting, crossover sports betting and other Games, the taxable base is constituted by the net income, that is, the total amount of the gross income after deducting the prizes paid to the participants (art. 48.6 b).

The tax on gaming activities is levied on the operator, i.e. the natural or legal persons who organise the activities taxed by the operator, the amount being determined by applying the various types of tax. Natural or legal persons who carry out the celebration or organisation of this type of online game are subject to the gambling tax. The tax applies to the taxable base, resulting from the difference between the global amount dedicated to the Game and the number of prizes distributed, which will be 25%.

For the liquidation of the tax, it is established that, in the case of annual or pluriannual activities, the declaration must be made and the tax must be self-liquidated quarterly, within the month following the end of each quarter. Therefore, it can be said that the tax on Gaming activities is periodic and is liquidated quarterly, being accrued on January 1st for the whole calendar year (Baez Moreno and Zornoza Perez, 2012: 640), being detached from article 21. 1 of the General Tax Law, in which the accrual is defined as the moment when the taxable event is understood to have taken place and when the tax obligation arises.

Regarding IVA, article 20, Uno 19º establishes that the activities that constitute the taxable events of the taxes on Gambling and Random Combinations will be exempt from VAT so that any activity carried out by a Gambling operator is exempt from VAT because it is subject to gambling taxes.

7. The tax regime of the Gambling Regulation Act

7.1. The Gaming Activities Tax

The approval of the Gambling Regulation Act has generated some changes in the taxation of gambling, with the creation of the Gambling Activity Tax, and with the establishment of the tax for the administrative management of gambling, both regulated in articles 48 and 49 of the Gambling Regulation Act, respectively. The Gaming Activity Tax does not abolish the pre-existing taxes on gambling, but the taxable event of these has been modified, converting them into subsidiaries, that is to say, the taxes on gambling will not be applicable when the taxable event is subject to the Gaming Activity Tax. On the other hand, some Autonomous Communities have their taxes on the game of Bingo or

Recreational Machines, and they are compatible with the Gaming Activities Tax, which taxes the economic capacity of the company (Piña Garrido, 2012: 36).

The Gaming Activities Tax will be applied for those games that are carried out in the whole state territory, which are mainly those carried out by electronic, telematic and computer means, as well as Betting, Raffles and Random Combinations. About the taxable event of the Gaming Activities Tax, according to article 48, section 1, it is the authorization, celebration and organization of state-wide Games, Raffles, Competitions, Betting and Activities, as well as Random Combinations for advertising or promotional purposes on a state-wide basis. Regarding the accrual of Gaming Activities Tax, section 3 states that this is produced by the authorization, celebration and organization of the Games. Nevertheless, these activities may be extended in time, so that tax periods are established in which the accrual will occur on the first day of each calendar year, except in the year in which the operating authorization is obtained, in which the accrual will result in the date of authorization.

According to Article 48.4, the persons liable to Gaming Activities Tax are individuals, legal entities or entities that operate, organise or develop the activities subject to this tax, as set out in section 4 of Article 35 of the General Taxation Law 58/2003, of 17 December. The impossibility, usually, of identifying a physical space for online games, made it necessary for the Gambling Regulation Law to extend the responsibility to the media that offer gambling activities when they are held or organized without the required qualification, and also for those who by any means offer such activities to persons with tax residence in Spain.

For the calculation of the taxable base, the Gaming Activities Tax establishes five modalities according to the type of game:

1) The sum of the gross income or the total amount of the amounts dedicated to the participation in the Game and any other income derived directly or indirectly from its organization (modality used for Raffles, Competitions or Mutual Betting, sports and equestrian mutual).

2) The sum of the net income, resulting from the deduction of the amounts of the prizes from the gross income (modality for Offset bets)

3) The result of the sum of the commissions charged by the operator to transfer the prizes to the players who have won, in addition to all the amounts charged by the players for providing services related to the activity of the Game, in the case of cross betting (online poker) or other games in which the taxable person does not deposit the amounts played by

the players.

4) The total amount of the market value of the prizes or advantages granted to the participants, for Random Combinations for promotional advertising purposes.

5) For Games where the amount for participation is made using surcharge instruments, so that the amount dedicated to participation in the Game is the amount of the surcharge, excluding the corresponding indirect tax, i.e. the surcharge will be the taxable base with the corresponding exclusion of VAT (Value Added Tax).

For the calculation of the fee, the charges set out in section seven of the Gaming Activities Act are applied. These are different and proportional percentages according to the type of game, and there is no fixed fee. Such taxes range from 7% for Raffles declared to be of public and charitable interest, to 25%, which is the rate applied to most Games. In the same section, it is foreseen that the Autonomous Communities may increase these taxes when the operator has a fiscal residence in the territory of any of them, and the increased rate may only be applied to the amounts played by participants who have their fiscal residence in the same territory. In this sense, section ten of the Gambling Regulation Act provides that both the taxable bases and the rates of taxation may be modified by the Budget Act.

The State is responsible for the management of the Gaming Activities Tax, establishing that in the cases of authorisation, celebration or organisation of games that reach temporary periods, the taxable persons must declare and self-assess the tax. Furthermore, the taxable event is carried out during one or more tax periods, the self-settlement must be made quarterly, in the month following the end of each quarter.

The Autonomous Communities may participate in the collection of the Gaming Activities Tax on those amounts paid by players resident in their territory, who carry out remote gambling activities. The amounts paid by non-resident Spanish participants cannot be collected by the Autonomous Communities. In short, the collection system is applied without prejudice to the fact that the Autonomous Communities also collect the amounts derived from the increase in the tax rate applied to the amounts played by players resident in their territory.

The introduction of this new tax has resulted in two different tax regimes, some of which will be more advantageous to the incumbent operators, while others will benefit operators operating through electronic channels. For example, face-to-face casinos are taxed through the Gaming Tax, subject to a progressive rate of 20 to 55 per cent, according to the gross income obtained during the year, while casinos operating through electronic channels are

subject to the new Gaming Activities Tax, depending on the type of gambling carried out by the casino, with a less onerous tax rate. In the case of Raffles, the traditional rate is between 1.5 and 7 per cent for face-to-face casinos, while those operating through electronic means are subject to the new tax and pay between 7 and 20 per cent (Piña Garrido, 2012: 34-35).

7.2. The fee for the administrative management of the Game

This is a fee created by the Gambling Regulation Law, whose purpose is to pay for the expenses derived from the activity of the gambling administration so that it presents the same taxable event with six assumptions, which establish a different amount to be paid. The parties liable to pay the tax are those interested in requesting the actions, or the entity to which the inspection or verification is made. Similarly, all operators, organisers and those who carry out gambling activities are liable to pay the fee generated by the activities regulated by the National Gambling Commission.

The fee is due at the moment of requesting the services, except for the inspection or verification actions which will be due at the moment the operator is notified, and for the regulatory activities carried out by the National Gaming Commission, which will be due on December 31st of each year, unless the operator loses the qualifying title beforehand.

The purpose of the fee for the administrative management of the Game is to cover the expenses arising from the activity carried out by the National Gaming Commission. However, the payment of this fee is compulsory for any operator even if they have not contributed to the expenditure generated by the National Gaming Commission. Therefore, we would be talking about a tax and not a levy, as it happens with Games of Luck, Shipping and Chance (Oñate and Gusano, 2011: 98).

8. Conclusions

The regulation of gambling through the Gambling Regulation Act of 13/2011 has structured the gambling market into two different legal regimes one for face-to-face gambling, regulated by the pre-existing regulations which have not been affected by the Legal Regime Act, and another for online gambling, regulated by the same Gambling Regulation Act (LRJ). This situation implies, from a fiscal point of view, that gaming operators are subject to a differentiated control:

- Presential gambling is subject to the tax on gambling fees transferred completely to the Autonomous Communities, and to other tax figures created by the autonomous

entities, such as the tax on Bingo, based on their exclusive gambling competence.

- Online gaming is subject to a tax established by the Gaming Activities Tax and the fee for the administrative management of the game.

Within the regulatory framework of the game, there are a considerable number of different types of taxes and tax bases. The existence of tax inequalities within the same economic sector may be considered discriminatory, since, comparing face-to-face games with online games, the taxable event that is taxed is identical in both cases, and yet taxpayers must pay different fees. In this aspect, online gaming operators benefit more than the face-to-face ones, because they bear a lower tax burden, perhaps because online gaming was not subject to taxation for many years, and the State did not establish very high rates for online gaming operators to look for other countries to carry out this activity.

The Gaming Regulatory Law should have homogenised the taxation of Games in Spain, instead of establishing a different tax model to that of face-to-face Games and configuring a plurality of taxes and different procedures for the calculation of the taxable base according to the modality of online Gaming. This disparity in taxation constitutes discrimination, since taxing a Game according to turnover, as in the case of mutual sports betting, is more expensive than a tax on net income.

Gaming operators in Spain bear an excessive burden so that business activity can only be carried out by those who have more economic resources or by those who are located in territories with more favourable taxation, as in the case of tax havens. The tax burden established by the Gaming Activities Tax, with a very high tax rate with respect to other European countries, together with the few deductions available to gaming operators concerning VAT and Corporate Tax, makes the online gaming sector in our country a business activity subject to higher taxation than in other European countries.

The Gambling Regulation Act not only poses disadvantages for gambling operators in terms of taxation but also in terms of how to access the operation of online games is quite costly. The double licence required by the Gaming Regulation Act to legitimise the gaming operator, i.e. the general and individual licence, configures a very restrictive control system, in the same way as it does with gaming advertising, for which the corresponding licence must also be applied for.

To conclude, the different legal regimes within the gaming sector have led to the concurrence of several administrations with competencies in the field of gaming and, consequently, the existence of different tax levels for gaming modalities in Spain. The

legislation has not taken into account the principles of tax justification set out in Article 31.1 of the Spanish Constitution and, as a result, gaming operators have been disadvantaged. A homogeneous regulation at the European level is needed for online games, due to the high amounts of money that the sector moves and, therefore, its profitability.

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