Proposal by the Government of the Netherlands to Change the Taxpayer for Dutch Online Remote Games of Chance

Annotations to "Tax Collective Act 2021" of the Netherlands

As proposed by the Ministry of Finance

Bas Jongmans, Esq.

Official Annotator

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Clarify or Amend?

The bill "**Tax Collective Act 2021**" contains a proposal to *"clarify"* the tax liability in connection with remote games of chance (with future license applications in the Netherlands in mind). It is not clear to me from a first reading in which context that *"clarification"* should be read. Is the Dutch Gaming Tax Act ("**GTA**") not yet clear on who should be taxed? Is the legislator trying to improve the legal position of the citizen? Is he trying to eliminate a potential danger of an infringement of the First Protocol to the ECHR? After all, taxation is in principle a (justified or not) infringement of the right to undisturbed enjoyment of property. Under the principle of legal certainty, every citizen has the right to be open to information on which homogeneous groups that infringement may occur.[1] Equal cases must be treated equally by the government, which means that unequal cases can be treated unequally.[2]

The curious phenomenon of the temporary taxpayer

The proposed amendment to Article 1, GTA is anything but clear. Currently, the person who gives the opportunity to participate in (domestic) games of chance via the internet (Article 1, subsection b, GTA) has been designated as the person of the taxpayer. However, the legislator wants to now designate the (future) holder of a license as the taxpayer. But it doesn't stop there. In the proposal, the legislator introduces a new, unique phenomenon, namely the temporary taxpayer:

[1] Opinion of Attorney-General to the Supreme Court, IJzerman, 20 September 2013, 13/01160, ECLI:NL:PHR:2013:859.

[2] G.J. van Leijenhorst, 'Gelijke kabouters, gelijke puntmutsen', WFR 1997/6256.

> *"With regard to remote games of chance that are offered temporarily without a license, it is proposed to place the taxpayer with the person who benefits from the (illegal) game of chance at a distance."*

So, if the Tax and Customs Administration can designate a permit holder, they are taxable. If not, then the (probable?) receiver of the gaming revenue shall be designated as the taxpayer? With the said proposal, the pivot point is placed in the event of the (un) established illegality of the occasion. However, the proposal does not stop there:

> *"The board of directors of the games of chance authority may suspend a games of chance license under the terms of Article 31d (2) of the Gaming Act* **("GA")** *and the resulting further rules if the board has serious suspicions that there is grounds to withdraw the license, for example because the information provided with the application was incorrect or incomplete, because the rules laid down by or pursuant to the KSB Act, GA or the Sanctions Act 1977 are no longer met, or because insufficient cooperation has been given to compliance supervision or enforcement."*

Tax neutrality?

Is the principle of fiscal neutrality not being violated by placing such a pivot point? In 2015, the undersecretary of Security and Justice agreed with that position, as follows from the memorandum to the report, on the occasion of the consideration of the bill to legalize remote games of chance:

> *"An important starting point in tax law is fiscal neutrality. This means that the tax authorities are in principle neutral with regard to cost items such as* [...] *fines and bribes."* [3]

The undersecretary is right: the tax authorities should in principle not make any distinction in the tax treatment of assets. Bribes are bribes. They are always illegal. In any case, that is sufficiently clear for the criminals in question and offers that test in the face of a criminal court a sufficiently effective remedy.

The alternative taxpayer

Tax neutrality is abandoned with this proposal. But this proposal goes much further. After all, Tax neutrality is abandoned with this proposal. But this proposal goes much further. After all, taxation is made conditional on whether or not it is illegal. Whether or not the activity would be illegal – even in a temporary status - is made dependent on the opinion of the board of directors of the Netherlands Gaming Authority (*"Kansspelautoriteit"*), an independent administrative body. As a result, it will ultimately be that board that will determine who is liable to pay tax. After all, giving an opportunity without a permit is illegal and a holder can be denied the immediate use of that permit for various reasons. This in turn has consequences for the taxation of games of chance tax because an alternative taxpayer is automatically appointed at that time. Only a limited review is open to disputes about these permits, namely an appeal to the administrative court in The Hague, and subsequently an appeal to the Administrative Appeals

[3] Parliamentary Documentation, II 2014/15, 33 996, 6, p. 179.

Department of the Council of State. There is no access for these cases to the supreme court of the Netherlands. A penal court may also get involved, although that has nothing to do with an effective remedy, now that operators who may or may not be temporarily licensed can also be prosecuted for money laundering with all the far-reaching consequences this entails. (financial crimes investigations, integrity investigations). Once that process has been started, any hope of obtaining a permit in the future can be forgotten.

History repeats itself

The proposal is therefore clearly not intended to clarify the concept of taxable person. The legislator is primarily concerned with making it as simple as possible for the tax authorities when levying games of chance tax (in practice). Such is evident. The said designation of the taxpayer is extended in such a way that it is no longer possible to speak of a homogeneous group. It is not the first time that the legislator has proposed such a solution (successfully). The same concept was introduced for operators of gaming machines and is now included in Article 1 (1) of the Gaming Tax Act.

The proposal states the following:

> *"In certain practical situations, such as in domestic games of chance via the internet, determining the opportunity giver proves difficult for both the potential taxpayer and the tax authorities."* [...] *"A similar issue previously arose in determining who was the taxpayer for the gambling tax at gaming machines. This has been solved with effect from 1 January 2015 by joining the license holder for the tax liability of gaming machines."*

Relevant case law

That, contrary to the legislature's assertion, however, determining the taxpayer in "comparable practical situations" is not that difficult at all, may, for example, follow from the judgment of the Amsterdam Court of Appeal of 17 May 2016. 2.9. the inspector is quoted:

> *"I am the national coordinator of the gambling tax. I am the national contact point. I work for the Tax and Customs Administration and have not been involved in the parliamentary history of the Gambling Act. It was the internal policy of the Tax and Customs Administration that in Article 30h of the Gambling Tax Act the term owner refers to the legal owner; until 1 January 2015, only the legal owner of the slot machines was designated as a taxpayer for gambling tax. This also follows from the parliamentary history of the Gambling Tax Act as it applied until that date. "*

The Court agreed with the tax inspector, but that turned out differently than the inspector might have intended:

> *"From the inspector's statement about (internal) policy of the Tax Authorities,"* […] *"the Court infers that for the period under review, only the legal owner of the slot machines was considered to be a taxable person for the purposes of levying games of chance tax."* [...] *"The Court states first of all that it is the inspector who, in principle, bears the burden of proof of (elements of) the chargeable event, in this case using (in addition to business*

purposes) the use of gaming machines." [...] *"The inspector also invoked fraus legis."* [...] *"To this end he argues that the tax authorities have been misled"* [...] *"The inspector has argued that additional tax is no longer possible at [H bv]."*

The Court subsequently set aside the additional assessment and fine.[4]

Misled or Lost?

It follows from the inspector's statement in the case cited that a taxpayer was already clearly defined in the GTA at the time. How things came to pass (internal policy) may not deserve a first prize, but it was clear in any case. The legislator seems to have thought that those legal owners would also enjoy the majority of revenues on behalf of the gaming machine industry. They would then pay a relatively large amount of tax (because for that group the deduction for VAT was also abolished at the same time, and a director's liability was introduced), but those legal owners could then recover their charges from others (as a kind of informal withholding tax), that was probably the idea. However, this turned out to be a miscalculation and appeared in the majority of situations that the machines were not or were no longer operated by the original legal owners, whereupon the tax liability was extended to allow levying of both licensees and non-licensees.

The underlying motive is merely to ensure taxation

The ECHR has ruled in its ruling *Darby* that Article 14 of the ECHR can be invoked in discrimination in tax matters.[5] After all, the obligation to pay taxes falls within the scope of the property right. Discrimination on the grounds of property is also prohibited, which follows from Article 1 (1) of the Twelfth Protocol to the ECHR. Holders of a future online license - that can be anyone, an operator, a casino holder, an affiliate, a service provider, not a homogeneous group - actually have only one thing in common: they have the presumption of wealth. Applicants will have to provide a substantial security deposit, otherwise they will not be licensed under any circumstances. This is dangerously close to the aforementioned prohibited discrimination on the grounds of (ownership of) property.[6]

The legislator believed in the past that it was sufficient to designate a relatively small group of taxpayers, for example with regard to the revenue made with gaming machines. He had however wrongly suspected that the bulk of that revue generated by these machines could be easily taxed out to the owners of those machines. History is now repeating itself again. One thing has become clearer with the proposal, namely the motive, which is nothing more than to ensure taxation. Once again, legal principles will be expected to suffer. [BJ]

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[4] Amsterdam Court of Appeals, May 17, 2016, 15/00253, ECLI:NL:GHAMS:2016:2767, r.o. 4.3, 4.6.1, 4.12 and 4.13.

[5] ECHR, 23 October 1990, 11581/85, and also see HR 11 June 1997, 32.211, ECLI:NL:HR:1997:AA2157.

[6] Supreme Court, 13 December 1995, 29.716, ECLI:NL:HR:1995:AA3167.