

EFTA Surveillance Authority
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Taxation of online gambling activities

Reference is made to the meeting in Oslo 28 October 2016 regarding taxation of online gambling activities, and to the EFTA Surveillance Authority's follow-up letter forwarded to the Ministry 17 November. Reference is also made to e-mail of 19 December 2016 in which the deadline for answer was extended to 16 January 2017.

In the follow-up letter the Authority has requested further information on certain topics. These are addressed below.

1 The Tax Appeal Board

The Tax Appeal Board is the appeal body for tax complaints. The rules governing the Tax Appeal Board have recently been subject to several changes. New rules entered into force 1 July 2016, and the information below is based on the new rules.

The new Tax Appeal Board is created to enhance the taxpayer's legal rights by strengthening the board's independence, strengthening its competence with stronger requirements for the board members' education and experience and by securing the board their own secretariat that is independent from the tax authority that made the first assessment.

The new Tax Appeal Board replaces the previous system with five regional boards and several special appeal boards. There is now one national appeal board, in addition to one special appeal board, the Petroleum Tax Board.

The taxpayer has the right to file an appeal against the tax assessment to the tax office. The tax office shall consider the case. If the tax office finds that the appeal is justified, it may settle the case in the taxpayer's favor. If this is not the case, the tax office shall forward the appeal (and the documents) to the secretariat of the Tax Appeal Board. The tax office may

submit an opinion on the case.

The decision of the Tax Appeal Board can not be appealed, except when the factual circumstances are described incorrectly. However, the decision may be subject of a lawsuit.

The Tax Appeal Board is an independent body. It is set out in Section 2-9 of the new Tax Administration Act that neither the Ministry of Finance, nor the Directorate of Taxes or the tax office may (generally or in individual cases) instruct the Tax Appeal Board or change its decisions.

The members of the Tax Appeal Board are appointed by the Ministry of Finance. The board currently consists of 51 ordinary members in addition to a leader and a deputy leader. Membership requires education and professional experience as lawyer, economist (with at least a master's degree) or state authorized or registered auditor. Persons employed at the Ministry of Finance, the Directorate of Taxes, the tax office or the secretariat of the Tax Appeal Board can not be members of the Tax Appeal Board.

The secretariat of the Tax Appeal Board prepares the cases and submits a recommendation to the Tax Appeal Board. This is in contrast to the previous system where the tax office that made the initial assessment also wrote the recommendation to the board. The secretariat shall consist of competent persons dedicated solely to the preparations before the Tax Appeal Board. The secretariat is organised under the Directorate of Taxes. However, it is set out in Section 2-9 paragraph 3 of the Tax Administration Act that the secretariat may not (generally or in individual cases) be instructed. The secretariat shall attend the meetings of the Tax Appeal Board.

The Tax Appeal Board is divided into groups. If the group can not make an unanimous decision, or when a member of the group requests it, the appeal is handled by an extended group that includes the leader or the deputy leader of the Tax Appeal Board. The extended group handles the appeals in meetings. The leader or the deputy leader of the board decides whether the complainant is admitted to the meeting.

2 The procedure for ascertaining whether a specific foreign game of chance qualifies for tax exemption under the Taxation Act

According to the Norwegian Tax Act Section 5-50 paragraph 1, gains above 10 000 NOK from competition, games, lotteries and such are considered as taxable income.

Section 5-50 paragraph 2 litra a-d of the Norwegian Tax Act allows income tax exemption for certain kinds of gains above 10 000 NOK. Litra a-c refer to gains from national lotteries and gaming in Norway, and litra d refers to gains from similar lotteries and gambling organized in other EEA states.

For gains to qualify for tax exemption under litra d three conditions must be met:

- i) The gains must be won in lotteries, games of chance or betting organized by companies or organizations established in other EEA states.
- ii) The specific lottery or game of chance must be corresponding to the lotteries or games of chance which legally could be distributed in Norway.

iii) The lottery or game of chance must be subject to public supervision and control in the home state.

The burden of proof lies with the taxpayer, cf. the preparatory works, Ot.prp. No 1 (2003-2004) page 20-22.

The condition in Section 5-50 paragraph 2 litra d ii) has reference to the Norwegian gaming legislation, and implies a comparison of the foreign game and the games that are legally distributed in Norway. If the foreign game is deemed to be equivalent to games that legally could be distributed in Norway, the prize will qualify for tax exemption.

The Norwegian gaming legislation states that lotteries and games of chance may only be held for the benefit of non-profit purposes. The Gaming Act, The Lottery Act and The Totalizator Act all aim to ensure that profit from games can be allocated to approved "good causes". In addition, the regulation defines the limits of maximum bet for the players, play hour, playing time etc.

The Norwegian Tax Act Section 5-50 paragraph 2 litra d ii) was the topic of a judgment pronounced by the Gulating Appeal Court 19 April 2016. The taxpayer, and the gaming company as intervenor, argued that the wording of litra d ii) only refers to the game, not the distributor of the game. They also argued that Norway had failed to fulfil its obligations under Article 36 of the EEA Agreement. The State, on the other hand, argued that the wording of litra d ii), held together with the statements in the preparatory works of the Norwegian Tax Act, require that gains only qualify for tax exemption if the game of chance is being held for the benefit of a non-profit purpose. This implies that the distributor must be a non-profit company. For this matter, the State specifically referred to the judgment of the European Court of Justice in case C-153/08 Commission of the European Communities vs Kingdom of Spain. In premise 30 and 31 the court stated that it is lawful for a member state to restrict the granting of tax advantages to companies/organizations pursuing certain non-profit purposes. The Gulating Court of Appeal decided the matter in favour of the State.

3 Examples of non-Norwegian lotteries and internet gambling games which have been assessed under section 5-50 litra d and the reasoning behind the refusal or the acceptance

3.1 Winnings that have been rejected under the exemption

- Mega Fortune, distributed by Betsson Malta Ltd, a company registered in Malta
Judgement by Gulating High Court – Civil Division 19.04.2016 (Utv. 2016-1060),
cf. below section 2 if.
- Betting Exchange, distributed by Betfair, a company registered in Gibraltar (UK),
Judgement by Oslo City Court 13.10.2014, (not published)
- Odds/NordicBet, distributed by Nordic Odds Ltd, a company registered in Malta
- Adventures in Wonderland, distributed by BLM Group Ltd
(www.Norgesautomaten.com), a company registered in Malta
- Odds/Sports betting, distributed by Betfair Group, a company registered in Gibraltar (UK)
- Odds/Sports betting, distributed by Svenska Spel, a company registered in Sweden
- Bet365, registered in Gibraltar

As regards these winnings assessed by the Norwegian Tax Administration, it is the condition mentioned under Section 5-50 paragraph 2 litra d ii) that has not been met. The main argument in all cases has been that these games are distributed by companies whose main purpose is to provide owners profit.

3.2 Winnings that have been accepted for tax exemption

The winnings in Svenska Spel, Måltips, were accepted under the income tax exemption. Svenska Spel is the Swedish equivalent of Norsk Tipping.

4 The involvement of the Ministry of Culture in the process of deciding whether a specific foreign game of chance qualifies for tax exemption under the Taxation Act.

The Ministry of Culture has the overarching responsibility for all forms of gaming in Norway, with exception for gaming arranged in connection with equestrian activities which lies under the responsibility of the Ministry of Agriculture and Food.

Within the Ministry of Culture's scope of responsibility are the Gaming Act and Lottery Act. The Ministry of Culture is not involved in any way in the process to decide whether a specific foreign game of chance qualifies for tax exemption under the Norwegian Tax Act.

Norsk Tipping AS is established pursuant to the Gaming Act. Norsk Tipping is a state owned limited liability company. The Norwegian Government owns all the shares in the company. The company is subject to political control through the Annual General Assembly, consisting of the Minister of Culture, as well as written directions from the Ministry of Culture to the company.

Norsk Tipping holds an exclusive right to offer certain types of games. The profits from these games offered by Norsk Tipping are distributed yearly to sports and cultural purposes, as well as to humanitarian and socially beneficial organisations.

The Norwegian Tax Administration has in some cases approached the Norwegian Gaming Authority to ask whether a certain foreign game could have been legally distributed in Norway. The Norwegian Gaming Authority is an independent public directorate under the responsibility of the Ministry of Culture. The Authority is responsible for the supervision of the Norwegian gaming market.

As mentioned, the Norwegian Gaming Authority is an independent body. The Ministry of Culture may give general instructions to the Authority, but may not instruct the Authority in individual cases. The Ministry may also give general guidelines to the Gaming Authority through the adoption of regulations.

Yours sincerely,

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This document has been signed electronically and it is therefore not signed by hand