



SOCIEDADE DE ADVOGADOS, SP,RL
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Nº30/23

NEWSLETTER

THE TAXATION OF PROFESSIONAL POKER PLAYER'S INCOME IN 2023

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SUMMARY

The taxation of gambling in Portugal has undergone several changes over the years and is mostly based on the taxation of the operators and on a vision of the gains resulting from luck, the fruit of the so-called games of chance.

However, the nature of poker played by professional players indicates that its character as a mere game of chance may not correspond to reality, and it can even be argued that poker today is predominantly a game of skill or ability, which implies the taxation of income obtained by players, under PIT, as professional or business income (category B).



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INTRODUCTION

The taxation of gambling in Portugal has been focused on the one hand, on the entities that exploit the game. On the other hand, it has looked at the winnings obtained by the gambler as being fortuitous, resulting from mere luck, with a clear focus on the randomness of the bet.

Initially, these gains were taxed under the Personal Income Tax ("PIT"), as patrimonial increments (category G), a tax framework that changed with the reform of the taxation of assets, with such gains now being taxed under Stamp Duty, with tax rates levied on the value resulting from the bet or prize.

The legal and regulatory framework has been undergoing changes in the meantime, and it can be argued that it has also not kept up with the technological evolution of gambling, especially online gambling.

There is currently a lack of clarity regarding the tax framework applicable to the income of professional poker players, and their inclusion in the rules of incidence of PIT is not without doubt.

THE LEGAL FRAMEWORK OF GAMBLING IN PORTUGAL

The game of chance is regulated by Decree-Law no. 422/89, of 2 December (hereinafter named as "Gaming Law").

The concept of gambling is established in this Gambling Law, which defines games of chance as "those which outcome is contingent because it relies exclusively or fundamentally on luck". This Gambling Law only regulates certain types of gambling, namely in casinos. The remaining forms of gambling are excluded, such as the State's social games and poker, horse betting, as well as games where the outcome is based exclusively or primarily on the player's skill: the so-called games of skill.

The exploitation of related forms of gambling and other forms of gambling is subject to authorization by the member of the Government responsible for Internal Administration, who establishes, in each case, the conditions deemed appropriate and will determine the respective supervision regime.

THE ONLINE GAMBLING

Currently, we live in a time of strong expansion of gambling, particularly due to the emergence and exponential growth of a new reality: online gambling.

In fact, the Gaming Law was insufficient to deal with this new reality, raising the need to produce new regulations. In this context, Decree-Law no. 66/2015, of December 3 ("RJO") was created, which regulates the operation and practice of online games and bets.

The RJO established that the right of exploitation of games and bets is reserved to the State. It is allowed, however, through the granting of licenses, that private legal entities, incorporated as a limited liability company or equivalent, headquartered in a member state of the European Union or the European Economic Area, and provided that, in the case of foreign companies, they have a branch in Portugal, may exploit the categories of online gambling and betting expressly authorized.

THE CASE OF POKER

Given the Portuguese legal framework of gambling, the nature of poker as a game of chance may be questioned - at least as far as online poker is concerned - namely considering that the legislator does not include it as one of the modes of gambling in that Gambling Law.

It is in the online game that poker has a different nature from other games (traditionally) played in casinos: players do not play against the house, they play among themselves, and there are players who consistently win more than others. As one can see, if there are players who consistently win more than others in direct confrontations, the question arises whether poker should not be qualified as a game of skill (although in small samples and in the short term, luck may play a predominant role) and not merely a game of luck.

To this doubt has contributed the figure of the professional gambler, who dedicates himself exclusively or mainly to this game, and the income from it is the majority, or exclusively, the income received. While this figure rarely appeared in the days when poker was played physically in casinos, with the expansion of online gaming there are more and more professional online poker players.

THE TAXATION OF POKER IN OTHER COUNTRIES

A comparative analysis of this issue is relevant. Some countries have already moved toward solutions for regulating and taxing poker with a greater hint of professional activity, not as a mere game of chance.

In Brazil, poker is no longer a game of luck or chance *strictu sensu* but is now qualified as a game of strategy and skill, as it has been demonstrated that the "luck" element for professional players tends to decrease over the years.

In the German legal system, whether the player is a professional or an amateur has a huge bearing on the taxes due. Thus, the Federal Tax Court has ruled that professional players must be taxed on their earned income (less any expenses incurred), with an exception for amateur players, who are exempt from taxation on their occasional earnings.

THE TAXATION OF POKER IN PORTUGAL

Gains from online gaming and betting in Portugal are taxed, according to the rules set out in the RJO, in the sphere of the operating entities and not in the individual player's sphere. The operators are subject to the Special Tax on Online Gambling - not subject to Corporate Income Tax ("CIT"), nor to Stamp Duty -, which is levied monthly by the *Instituto do Turismo de Portugal, I.P.*, through its Gaming Commission and its Gambling Regulation and Inspection Service.

This special tax is levied on the gross revenue of the operator at a rate of 25%, being comprised in said gross revenue the commissions charged to the player.

Now, the view that poker is a game of chance leads to the exclusion of the concept of the professional poker player as a taxable person since the very nature of games of chance is not consistent with the generation of income on a periodic and regular basis.

However, it is not possible from the outset to definitively exclude taxation of this regular income earned by the professional online poker player.

In fact, the comprehensive nature of the rule of incidence of professional or business income (category B), provided in the PIT Code, may lead to the understanding that the income earned by the professional poker player is included in the scope of application of this rule and, as such, subject to PIT.

Nevertheless, in order to conclude that this income is taxable, it is necessary to determine whether there are grounds to consider that such earnings result from the player's professional or business activity, his usual source of income, which should, accordingly, be subject to PIT.

It could be argued that in poker a player's winnings are derived from luck, namely the cards the player has available versus those of other players, and that the player's skill, if any, is not a determinant of the winnings that result in taxable income. In this case, it could not be argued that we are dealing with income from professional or business activities, since the determining factor in obtaining the winnings does not lie in any effort, ability or act of the beneficiary of the income.

On the contrary, it could be argued that the professional poker player does not obtain the winnings from the game based on luck. Such earnings result from the development of various technical and cognitive skills, from study and the application of one's time, which allow for improvements in the skill and expertise with which the player is able to achieve his victories, especially online, over his opponents.

This has been, in fact, a trend, notoriously, in growing expansion, with the emergence of study and training in the game of poker and, also, in the development of certain techniques that have evident results in the sphere of professional players.

In this regard, the ability and skills of the poker player are essential for players to reach the end of tournaments, in which significant prizes are given (there are tournaments with a guaranteed minimum first prize value of USD 1.000.000).

Therefore, it seems that there may be a basis to support that poker is not, after all, a game of chance, but can be qualified as a game of skill and strategy, involving the application of skills, knowledge and time, with a habitual character, which generate (almost) all the income of players, which will allow the respective tax qualification in the category of business and professional income (B) of the PIT.

If this were understood, professional poker players earning gross annual income of up to € 200.000 would be covered by the simplified regime, being obliged to keep organized accounts in the event they exceed this amount. Income would then be subject to the general PIT rates, varying between 14,5% and 48% (plus an additional solidarity tax, varying between 2,5% and 5% for income above € 80.000 and € 250.000, respectively).

Doubts remain, however, as to whether professional poker players would be included in any of the activities referred to in (article 151 of) the PIT Code and to what extent the coefficients of the simplified regime would be applicable to them.

In any case, the declaration of this income for PIT purposes is not verified, a fact not helped by the legislator's lack of clarity with regard to the taxation in question.

The nature of poker activity should be clarified, as a game of skill or as a mere game of chance, in order to better determine the inclusion of income earned by professional players, since amateur players, by the very nature, occasional, of their earnings, would remain outside the scope of the taxation rule.

As the Government has established, through Order 978/2019 of January 28th, the Working Group for the Evaluation of the Taxation System for Online Gambling and Betting, and of the System for the Operation and Practice of Territorially-Based Mutual Horse Betting (*"Grupo de Trabalho para a Avaliação do Regime de tributação dos Jogos e Apostas Online e do Regime de Exploração e Prática das Apostas Hípicas Mútuas de Base Territorial"*), we

consider this to be the appropriate time to clarify this point and to establish, more definitively, the tax framework applicable to professional poker players.

CONCLUSIONS

The uncertainty surrounding whether or not professional poker players are taxed on their gains should be eliminated.

Indeed, the legal characteristics of poker as practiced by professional players, whether in tournaments or online, should be determined for all legal purposes. Should it be considered a mere game of chance or, on the contrary, as is mostly recognized by the players themselves, a game of skill, of ability for which the players train, study, prepare themselves adequately, and in which they develop their professional or business activity, on a regular basis, generating all or almost all of their annual income?

Lisbon, March 27th, 2023

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The Taxation of Professional Poker Player's Income
(Overview 2023)

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