

THE PROPOSED NEW GAMBLING TAX IN SOUTH AFRICA

by

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Declaration

This project is an original piece of work which is made available for photocopying, and for inter-library loan.

Signed

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Summary

In the 2011/2012 Budget Speech delivered by the Minister of Finance, Pravin Gordhan, it was announced that a 15% withholding tax on gambling winnings above R 25 000 was to be introduced with effect from 1 April 2012.

This treatise was undertaken to critically analyse the different elements of the proposed new withholding tax.

It was established that the fiscus already benefits significantly from the gambling industry and levies and taxes from the gambling industry dwarf the revenue SARS collect from other forms of taxes such as Donations tax and Estate Duty tax. The necessity, therefore, of taxing gambling winnings in the hands of the individual is debatable.

A comparison with the three foreign countries used by the Minister as an example of countries who have successfully implemented a withholding tax on gambling winnings exposed operational or other characteristics which bear no significant relationship to the situation in which the industry operates in South Africa.

Probably the most significant difference is the fact that in the three foreign countries, losses are deductible and only the net gains are taxed. Although it

could add to an already seemingly administrative-intensive legislation, it is submitted that taxing gambling winnings and ignoring losses suffered by gamblers will be disproportionately unfair towards the taxpayer.

The many questions raised in this treatise illustrate the level of uncertainty still surrounding the new proposed gambling tax. It is hoped that communication will be provided by SARS as soon as possible to address the issues at hand. This would go a long way in ensuring that the implementation of the proposed withholding tax on gambling winnings is as smooth and efficient as possible.

Key words: Withholding tax, gambling, winnings, net gain.

Chapter I

Introduction and Research Goals

1.1 Introduction

Gambling as we know it today, has a relatively short history – however, that is not to say the act of gambling hasn't been around for millennia. There is a myth that Zeus, Hades and Poseidon split the universe by sharing heaven, hell and sea with the throw of the dice. Hades became the king of the dead and ruler of hell. Zeus got lucky with heaven and the third brother, Poseidon, became the king of the seas. Dice is probably the oldest form of gambling where the first dice were made from bones and teeth of animals. Since then, the lights have become brighter, the odds better, but the attraction has remained the same.

For much of its history, most forms of gambling were banned in South Africa. However, in 1996, several types of gambling were legalised in the country¹. Since then, new legislation was introduced which ultimately led to the creation of legal casinos, a national lottery, as well as sports and online gambling.

Up until recently, online gambling activity in South Africa has seen rapid growth, especially through foreign operators in Swaziland and Europe. However, after a recent judgment handed down by the North Gauteng High Court, online

¹ Wikipedia 'Gambling in South Africa' www.wikipedia.org/wiki/Gambling_in_South_Africa, accessed 22/09/2011.

gambling in South Africa has been prohibited². One of the reasons for this is that punters were moving money into offshore accounts without complying with foreign exchange regulations³.

The National Gambling Amendment Act, which was signed into law in 2008 and is awaiting promulgation, will make provisions for the licensing of online casinos.

Yet despite this recent setback, over the years the gambling industry has grown to such an extent that it now represents a significant economic sector in South Africa⁴. This growth has led to an increased regulatory environment and therefore the gambling industry in South Africa has also become a highly regulated sector.

The National Gambling Board ('the NGB') was established in terms of the National Gambling Act, Act No 33 of 1996 replaced on 01 November 2004 by the National Gambling Act, 2004, (Act No 7 of 2004) ('the Act'). The NGB's primary focus is it to regulate the gambling industry in South Africa.

² Gauteng Gambling Board 'On-line gambling transactions are outlawed in South Africa' http://www.ggb.org.za/index.php?option=com_content&view=article&id=3:newsflash-2&catid=3:newsflash, accessed 17-10-2011.

³ Marc Ashton 'Online gambling in disarray after ban' <http://www.fin24.com/Business/Online-gambling-in-disarray-after-ban-20100826>, accessed 17-10-2011.

⁴ 'More questions than answers: Proposed withholding tax on gambling winnings' (April 2011) *CASA Newsletter*, www.casa.org.za/CASA_Newsletter_Issue_22.pdf.

The Act makes provision for the oversight of matters relating to casinos, gambling, betting and wagering and promotes uniform norms and standards in relation to gambling throughout South Africa.

Currently, the NGB, through the Provincial Gaming Boards, imposes taxes and levies on South African casinos, which accrue to the Provincial Revenue Fund – this is over and above the income tax arising in the hands of the casinos, as these would accrue to the National Revenue Fund.

At present, in South Africa, gambling winnings are generally not subject to tax in the hands of the individual, unless gambling is that person's business or trade. Paragraph 60(1) of the Eighth Schedule of the Income Tax Act states that a person must disregard a capital gain or capital loss relating to any form of lawful gambling, game or competition. As a result, gambling winnings are generally exempt from income tax. There could be a few reasons for this - one being that, as mentioned above, gambling authorities are already subject to various forms of taxation at both provincial and national level. The current practice of tax-free gambling winnings is similar to many other countries, including Australia⁵:

“ . . . Australia views gambling winnings as luck, not income. The rationale is that most Australians lose money with gambling and that when they do win, even if it is a big win, it is not income because of the number of people that lose.

⁵ 'Gambling Taxation – A Guide to Taxation of Gambling Winnings' <http://www.gamblingtaxation.com.au/>.

Furthermore gambling is not considered a profession; it is a hobby or pastime that people enjoy more for the entertainment than for any winnings they may earn . . . the third argument is that gambling is already taxed, so it is not fair to tax the gambling again by taxing the gambler.”

However, in his Budget Speech for the 2010/2011 year of assessment, the South African Minister of Finance, Pravin Gordhan stated⁶:

“Gambling is subject to various forms of taxation at both provincial and national level. These arrangements will be reviewed to ensure efficient tax collection. I propose to review the current treatment of winnings in the hands of gamblers as exempt from personal income tax. Measures will be considered to limit opportunities for money laundering, unlicensed online gambling and other abuses.”

The Minister made his intentions clear that future changes were inevitable, and this was confirmed in his 2011/2012 Budget Speech when the following message was delivered⁷:

“. . . last year we indicated that the taxation of gambling winnings would come under review. With effect from April 2012, all winnings above R25 000, including pay-outs from the National Lottery, will be subject to a final 15 per cent withholding tax. This is in line with practice in a number of other countries, such as the United States. I hope it will assist in discouraging excessive gambling.”

⁶ 2010/2011 Budget Speech at 15.

⁷ 2011/2012 Budget Speech at 30.

This announcement was met with wide-spread criticism from most industry bodies. The gambling industry is already subject to weighty taxes (in 2010 the casino industry alone generated revenue in excess of R 13.5 billion out of a total of R 16.2 billion from all forms of gambling and contributed R 4 billion in taxes⁸) and this new proposed withholding tax could prove challenging from an administration point of view. There is also a concern that foreign jurisdictions (i.e the United States, Netherlands and India) as compared to South Africa by the Minister in his speech might not be a comparable measure for promoting a withholding tax on gambling winnings as there are a number of factors that determine the amount of withholding taxes payable by the individual – some of which will be discussed in detail during the course of this treatise.

1.2 Research Goals

The aim of this treatise was to identify the different methods in which gambling winnings are taxed in various foreign jurisdictions and whether or not South Africa could rely on these methods as a basis for creating its own provisions on the withholding of taxes from gambling winnings. In doing so, the following issues were addressed:

- Identification of the current and future withholding taxes in effect in South Africa (Chapter II);

⁸ Casino Association of South Africa newsletter April 2011 Issue 22 pg 2

- Identification of all different forms of gambling as well as the current tax implications for each of these forms of gambling (Chapter III);
- Identification and discussion of withholding taxes on gambling winnings in other jurisdictions (Chapter IV);
- Possible shortcomings of the proposed new gambling tax (Chapter V);
- A summary of the treatise as well as an identification of an appropriate method for implementing and administering the proposed new gambling tax (Chapter VI).

In order to achieve these objectives an online search was conducted on various tax articles and opinions for relevant literature. Because this proposed law will only be enacted in 2012, there is no South African case law available for scrutiny – therefore foreign income tax legislation together with any relevant case law was researched and scrutinised for relevance. Data extracted was analysed in accordance with its relevance to withholding taxes on gambling winnings. Emphasis is placed on identifying a suitable method for implementing and administering the withholding tax in the final chapter from a local perspective.

Chapter II

Withholding Tax

Taxes are laid upon individuals and legal entities around the world to support governments in their duty to provide services to its citizens. Taxation is defined as⁹

“A compulsory contribution to the support of government levied on persons, property, income, commodities, transactions etc., now at fixed rates mostly proportionate to the amount on which the contribution is levied.”

Basically income tax is a tax levied on a person’s income from various sources. Currently in South Africa there are two kinds of taxes imposed on persons, namely direct and indirect taxes. Direct taxes are those levied on the income of individuals and companies, while indirect taxes are levied on certain commodities and transactions¹⁰.

Since its introduction in 1914, the Income Tax Act (“ITA”) has undergone numerous amendments and consolidations and the act in force at present is the Income Tax Act No 58 of 1962 (as amended), which contains provisions for the levying of five different types of tax. These taxes include normal tax (on income and capital gains), turnover tax for micro businesses, donations tax, secondary

⁹ Oxford English Dictionary 3 ed 2250.

¹⁰ Income Tax ‘Present tax structure’ at 1.2 (My Lexisnexus).

tax on companies (to be replaced by the future “dividends tax”) and withholding taxes¹¹.

A withholding tax is a government requirement for the payer of an item of income to withhold or deduct tax from the payment, and pay that tax to the government¹². Withholding taxes are used by the taxation authorities as an administrative mechanism to trap the relevant tax before the non-resident escapes from the grasp of such authority.

Currently the ITA has three withholding tax provisions for payments to non-residents:

1. Withholding tax on royalties – section 35

Royalties paid to non-residents are subject to a withholding tax of 12% unless a double tax agreement (DTA) is in place. This means that the person paying the royalty must withhold 12% and pay it to the South African Revenue Service on behalf of the non-resident.

2. Withholding tax on payments for fixed property acquired from a non-resident – section 35A

In terms of section 35A any person who must pay an amount to a non-resident in respect of the purchase of immovable property (land, buildings) situated in

¹¹ Huxham and Haupt 'Notes on South African Income Tax' (2011), 30 ed, at 7.

¹² Wikipedia 'Definition of withholding tax' www.wikipedia.org/wiki/Withholding_tax, accessed 28-10-2011.

the Republic must withhold an amount from such payment and pay it to the South African Revenue Service. The amount of the withholding tax ranges from 5% to 10%.

3. Withholding tax on payments to non-resident sports persons and non-resident entertainers who earn money in South Africa – section 47B, 47D and 47E.

In terms of section 47B a final withholding tax of 15% must be levied on all non-resident entertainers and sportspersons.

On top of the current withholding taxes in effect in South Africa, recent developments in legislation have meant we will see additional withholding taxes in the near future: for example withholding tax on interest, dividends and gambling winnings.

Currently there is no withholding tax on interest. Non-residents not carrying on a business through a permanent establishment in South Africa are completely exempt from tax on South African sourced interest (in the case of a natural person, they must be physically absent from South Africa for at least 183 days in total during the year of assessment).

However, this exemption will be deleted with effect from 1 January 2013. A withholding tax of 10% will be applicable on interest which accrues to a foreign person (excluding a Controlled Foreign Company) after that date. Certain interest will still be exempt from withholding tax. Relief may be sought under an applicable DTA.

Another withholding tax to be introduced into South Africa legislation is the new Dividends Tax. The result of this new tax is that the liability for dividend tax will be moved from the company paying the dividend to the shareholder receiving it. The tax cost therefore shifts from the company and becomes a cost of the taxpayer. Dividend Tax of 10% will be withheld by the company paying the dividend and the net dividend will be paid over to the shareholder¹³.

A further withholding tax which, for the purposes of this treatise, is where the focus lies is the proposed withholding tax on gambling winnings. As mentioned in Chapter I above, with effect from 1 April 2012, gambling winnings above R 25 000 will be subject to a 15% withholding tax¹⁴. This relates to all forms of gambling, including horse-racing, national lottery and casino winnings.

To date there has been very little communicated to the public relating to this new proposal, but there is certain to be formal communication together with

¹³ Grant Thornton 'Secondary tax on Companies (STC) / Dividends tax' www.budget2011.co.za/fiscal-e-file/other-taxes/secondary-tax-on-companies-stc-dividend-tax/, accessed 28-10-2011.

¹⁴ 2011/2012 Budget Speech

what will most probably be a section inserted in the ITA explaining the finer details of this withholding tax as there appear to be many unanswered questions at this stage, as will be seen during the course of this treatise.

Chapter III

Gambling in South Africa

Since the legalisation of gambling in South Africa in 1996, the gambling industry has grown and evolved substantially¹⁵. Technological advancements on existing forms of gambling and new forms of gambling have emerged and resulted in South Africa's gambling industry being seen as one of the country's biggest "sports" after Cricket, Rugby and Soccer; thus there is growing concern that the new gambling tax 'will kill the fourth-largest sport in the country'¹⁶.

Gross gaming revenues (GGR)¹⁷ have increased dramatically since the turn of the century and amounted to just under R 17 billion (R 18 billion including the national lottery) in 2010. In the casino industry alone, income taxes of roughly R 4 billion were paid over to the South African Revenue Service last year, making the gambling industry an important economic sector in the country¹⁸.

Different forms of gambling make up the gambling industry, namely:

- Casinos
- Bingo
- Limited Payout Machines
- National Lottery
- Betting

¹⁵ Gambling Review Commission 'Review of the South African gambling industry and its regulation' (September 2010) at 8.

¹⁶ Rowan Philp 'Gambling tax 'will kill the fourth-largest sport in the country'' (27 February 2011) www.timeslive.co.za/local/2011/02/27/gambling-tax-will-kill-the-fourth-largest-sport-in-the-country.

¹⁷ GGR is defined as the total rand value of an operator i.e turnover less winnings paid to players.

¹⁸ 'More questions than answers: Proposed withholding tax on gambling winnings' (April 2011) *CASA Newsletter*, www.casa.org.za/CASA_Newsletter_Issue_22.pdf.

Casinos

The casino industry in South Africa is well run and compares favourably with casinos anywhere else in the world. A limit of 40 casinos in the country has been set in legislation and currently there are 37 licenses in issue, of which 36 are operational¹⁹.

The casino industry has made significant contributions to infrastructure development, with cumulative capital expenditure of R 18.8 billion as at March 2009 and has led to the creation of thousands of jobs²⁰.

Bingo

Up until recently, bingo remained a relatively insignificant gambling mode in South Africa. However, since the introduction of electronic bingo terminals (“EBTs”) in 2005 and the opening of bingo clubs in shopping malls across Gauteng, bingo revenues have increased considerably.

This form of bingo, which is dependent on revenues from electronic gaming devices rather than traditional paper-based bingo games, has become a viable

¹⁹ The Gambling Review Commission ‘Review of the South African gambling industry and its regulation’ (September 2010), at 10.

²⁰ The Gambling Review Commission ‘Review of the South African gambling industry and its regulation’ (September 2010), at 10.

component of the gambling sector. Although three provinces have been awarded bingo operating licenses, bingo halls currently only exist in Gauteng²¹.

Limited Payout Machines (“LPMs”)

The LPM industry has not grown in the manner initially anticipated²². Only a small percentage of LPM’s have been rolled out to date, a percentage much smaller than expected.

The objective of the LPM was to create a sector within the gambling industry that has low barriers of entry, which facilitates personal ownership and control, and which contributes to the sustainability of existing business. However, to date this objective has not been achieved²³.

National Lottery

The principle of a state lottery concerned exclusively with revenue maximisation appears to have worked. The national lottery has generated significant funds for the government over the past decade, and is the largest source of funding for charitable causes in the country²⁴.

²¹ The Gambling Review Commission ‘Review of the South African gambling industry and its regulation’ (September 2010), at 10.

²² Ibid

²³ Ibid

²⁴ Ibid at 11.

Internationally, there has been a tendency for lottery expenditure to tail off over time, although the evidence suggests that this expenditure spikes dramatically when there are large roll over prizes²⁵.

Betting

Horse-racing is a well established and reasonably well-managed industry in South Africa. Horse-racing is a major employer in South Africa and as such is a big contributor to the gambling industry as a whole²⁶.

In the 2010 / 2011 financial year, Gross Gaming Revenue (GGR) amounted to over R 17 billion (excluding the National Lottery) and the split between the different forms of gambling can be illustrated by the following graph²⁷:

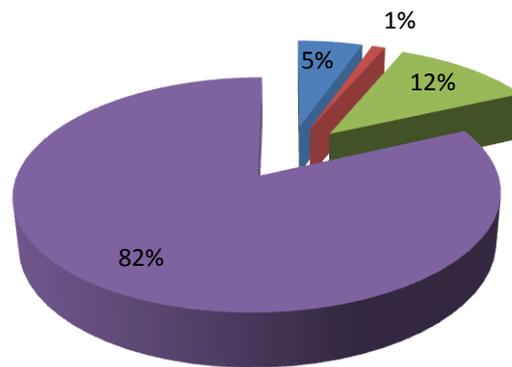
²⁵ Ibid at 11.

²⁶ Ibid at 11.

²⁷ National Gambling Board 'National Gambling Statistics – 2010/2011 Financial Year: 1 April 2010 to 31 March 2011' at 2.

GGR per gambling mode - 2010/2011 financial year

■ LMP (5%) ■ Bingo (1%) ■ Betting (12%) ■ Casino (82%)



As the above graph illustrates, the casino industry is the driving force in the gambling industry as a whole and far outweighs the other forms of gambling.

Over and above the normal income tax implications which the gambling industry is faced with, each individual industry is also subject to fees and levies imposed by provincial gambling legislation.

Each province has its own gambling act which governs casinos. The fees and levies for each respective province relating to the casino industry are as follows:

Gauteng

In Gauteng, gaming tax of 9%²⁸ of a casino licence holder's GGR must be paid on a weekly basis. The following annual licence fees are applicable as well²⁹:

Description	Annual Fee
Licence Fee	R 106 530.00
Registered gaming machine exposed for play to the public	R1 961.00 per machine
Licensed casino table	R3 922.00 per table
Licensed bingo seat	R95.00 per seat

Western Cape

A gambling tax is levied monthly, in respect of a casino operator's licence, and calculated in accordance with the following table in relation to the casinos taxable revenue³⁰:

²⁸ Regulation 85 of the Gauteng Gambling Regulations.

²⁹ Ibid

³⁰ Part B of Schedule 3 of the Western Cape Gambling and Racing Act 4 of 1996.

Taxable Revenue	Rates of tax
Does not exceed R14.2 million	6% of each R1
Exceeds R14.2 million but does not exceed R28.4 million	R852 000 plus 8.5% of amounts exceeding R14.2 million
Exceeds R28.4 million but does not exceed R42.6 million	R2.059 million plus 11% of amounts exceeding R28.4 million
Exceeds R42.6 million but does not exceed R56.8 million	R3.621 million plus 13% of amounts exceeding R42.6 million
Exceeds R56.8 million but does not exceed R71.0 million	R5.467 million plus 15% of amounts exceeding R56.8 million
Exceeds R71.0 million	R7.587 million plus 17% of amounts exceeding R71 million

In addition to this, the holder of a casino licence shall pay the following annual fees:

Description	Annual Fee
Licence fee	R172 650.00
Investigation fee	R5 180.00 per gambling table plus R3 450.00 per slot machine
Exclusivity fee <ul style="list-style-type: none"> • Value of casino development does not exceed R175 million • Value of casino development exceeds R175 million 	<ul style="list-style-type: none"> • R500 000.00 for ten years, escalating annually³¹ • R1 000 000.00 for ten years, escalating annually³²

Eastern Cape

In the Eastern Cape, a gambling tax is levied monthly, in respect of a casino operator's licence, and calculated in accordance with the following table in relation to the casinos taxable revenue³³:

³¹ At a rate applicable in respect of debts due to the State as determined by the Minister responsible for National Finance from time to time. This rate is 9.5% since 1 May 2010 per a notice issued by National Treasury dated 20 April 2010.

³² At a rate applicable in respect of debts due to the State as determined by the Minister responsible for National Finance from time to time. This rate is 9.5% since 1 May 2010 per a notice issued by National Treasury dated 20 April 2010.

Taxable Revenue	Rates of tax
Does not exceed R4 million	3% of each R1
Exceeds R4 million but does not exceed R8 million	R120 000 plus 5% of amounts exceeding R4 million
Exceeds R8 million	R320 000 plus 10% of amounts exceeding R8 million

In addition to this, the holder of a casino licence shall pay the following annual fees:³⁴

Description	Annual Licence Fee	Annual Board Administration Fee
Casino licence	R15 000	R50 000
Provisional licence for a casino	R10 000	R15 000
Temporary licence for a casino	R5 000	R35 000

³³ Part B of Schedule 3 of the Eastern Cape Gambling and Betting Act No 5 of 1997 ("ECGBA").

³⁴ Section 57 of the ECGBA.

Kwazulu – Natal

A gambling tax is levied monthly, in respect of a casino operator's licence, and calculated in accordance with the following table in relation to the casinos taxable revenue³⁵:

Gross gaming revenue	Rates of tax
R0 to R30 million	9%
Exceeds R30 million	12%

In addition to this, the holder of a casino licence shall pay the following annual fees³⁶:

Description	Annual Rate/Fee
Local government levy	0.5% of gross gaming revenue
Casino licence renewal fee	R100 000
Gaming machine licence fee	R1 000 per gaming machine
Table game or other casino game licence	R6 840 per table game or other casino game

³⁵ Regulation 94 of the KwaZulu-Natal Gambling Regulations ("KZNGR").

³⁶ Regulation 93 and 97 of the KZNGR.

In addition to the annual fees noted above, Kwazulu – Natal Gaming Regulations imposes the following once-off licence and registration fees:

Description	Fee
Casino licence, including a temporary casino licence contemplated in section 48 of the Act	R100 000
Gaming machine licence and registration fee	R1 000 per gaming machine
Table game or other casino game licence and registration fee	R6 000 per table game or other casino game

North West

A gaming levy, which is levied monthly, in respect of a casino licence is calculated in accordance with the following table in relation to monthly gross gaming revenue³⁷:

³⁷ Regulation 73 of the North West Gambling Regulations (“NWGR”).

Gross gaming revenue	Rates of levy
Does not exceed R4 million	4% of each R1
Exceeds R4 million but not exceeding R8 million	R160 000 plus 7% of amount exceeding R4 million
Exceeds R8 million but not exceeding R12 million	R440 000 plus 8% of amount exceeding R8 million
Exceeds R12 million	R760 000 plus 10% of amount exceeding R12 million

In addition to this, the holder of a casino licence shall pay the following annual fees³⁸:

Description	Annual Fee
Licence fee	R100 000
Registered gaming machine	R600 per machine
Licensed casino table	R1 200 per table

³⁸ Regulation 72 of the NWGR.

Mpumalanga

A gaming levy, which is levied monthly, in respect of a casino licence is calculated in accordance with the following table in relation to monthly gross gaming revenue³⁹:

Gross gambling revenue	Rates of levy
Does not exceed R10 million	5% of each R1
Exceeds R10 million but does not exceed R15 million	R500 000 plus 7.5% of amount exceeding R10 million
Exceeds R15 million	R875 000 plus 10% of amount exceeding R15 million

In addition to this, the holder of a casino licence shall pay the following annual fees⁴⁰:

Description	Annual Fee
Licence fee	R57 000
Registered gaming machine	R570 per machine
Licensed casino table	R1 140 per table
Licensed bingo seat	R57 per seat

³⁹ Regulation 1 of the Mpumalanga Gambling Levies Regulations ("MGLR").

⁴⁰ Regulation 74 of the MGLR.

Northern Province / Limpopo

A gambling levy, at the rate of 8%⁴¹ of a casino licence holder's gross gaming revenue, must be paid on a weekly basis.

In addition to this levy, the holder of a casino licence shall pay the following annual fees⁴²:

Description	Annual Fee
Licence fee	R83 000
Registered gaming machine	R1 500 per machine
Licensed casino table	R3 100 per table

Free State

A gambling levy, at the rate of 7%⁴³ of a casino licence holder's gross gaming revenue, excluding VAT or any other levies payable in terms of any other Act must be paid on a weekly basis.

In addition to this levy, the holder of a casino licence shall pay the following annual fees⁴⁴:

⁴¹ Regulation 75 of the Limpopo Casino and Gaming Regulations, 2011 ("LCGR").

⁴² Regulation 74 of the LCGR.

⁴³ Regulation 31 of the Free State Gambling and Racing Regulations ("FSGRR").

⁴⁴ Regulation 30 of the FSGRR.

Description	Annual Fee
Licence fee	R55 000
Registered gaming machine	R550 per machine
Licensed casino table	R1 100 per table
Licensed bingo seat	R55 per seat

Northern Cape

A gambling levy, at the rate of 8%⁴⁵ of a casino licence holder's gross win, derived from gambling conducted under the licence, must be paid on a monthly basis.

In addition to this levy, the holder of a casino licence shall pay the following annual fees⁴⁶:

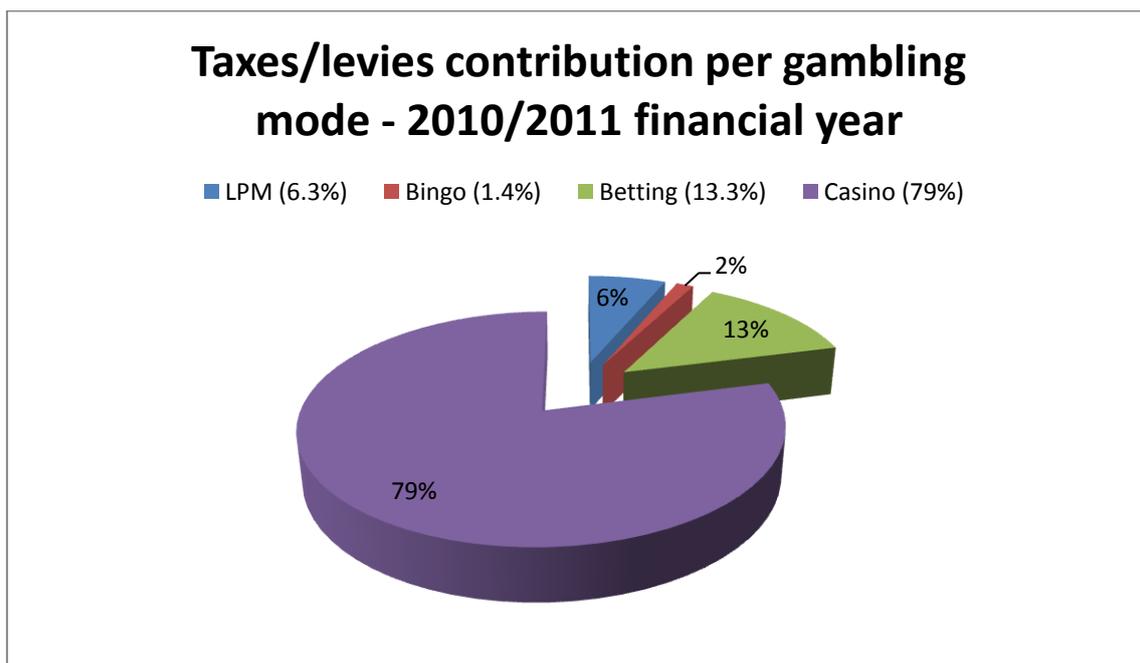
Description	Annual Fee
Licence fee	R50 000
Registered gaming machine	R500 per machine
Licensed casino table	R1 000 per table

⁴⁵ Regulation 2 of the Northern Cape Gambling Levies Regulations ("NCGLR").

⁴⁶ Part A of the Schedule of the NCGLR.

As mentioned above, the table of amounts and figures listed above only relates to tax revenue which accrues to the Provincial Revenue Fund (“PRF”) from the casino industry and is over and above the VAT and income tax which would accrue to the National Revenue Fund.

For the 2010 financial year, the fees and levies based on GGR amounted to just under R 1.7 billion. As a result of the figures represented above, the taxes and levies per gambling mode were as follows:



When considering that Donations tax and Estate Duty tax for that year amounted to R 60 million and R 759 million respectively⁴⁷, it puts into perspective the significance of the taxes and levies contributed by the gaming industry in 2010.

Combined with the income tax that casino operators like Sun International, Gold Reef and Tsogo Sun are subjected to, it is clear that the fiscus already benefits significantly from the gambling industry and thus the necessity of taxing gambling winnings in the hands of individuals is debatable.

Whether it will 'discourage excessive gambling' as the Minister pointed out in his 2011/2012 budget speech remains to be seen. However, as will be illustrated in the following chapter, there are examples of foreign countries that have implemented a gambling tax on individuals and this would suggest that there are indeed merits for such a tax.

⁴⁷ '2010 Tax Statistics' at 44, www.sars.gov.za/Tools/Documents/DocumentDownload.asp?FileID=66359.

Chapter IV

Foreign Jurisdictions Policy on Withholding Taxes on Gambling

When the Minister of Finance, Pravin Gordhan, announced that, commencing 1 April 2012, a withholding tax on gambling winnings would come into effect, he used the United States of America (USA), India and the Netherlands as examples of countries which currently have a withholding tax on gambling winnings in place.

The natural reaction would be to compare South Africa to these countries to determine whether or not a comparison is a viable one. However, in order for one to make such a comparison, it is necessary to gain an understanding on the respective tax laws relating to withholding taxes on gambling winnings in each country. The relevant law currently in effect in each country is as follows:

India

Per section 56 of the Indian Income Tax Act, 1961 (“IITA”), any income from gambling activities is taxable under the heading “Income from Other Sources” and is classified as “speculation business”.

In the context of the tax implications on income from speculative business purposes, the IITA can be summarised as follows:

- In terms of Section 194B any person responsible for paying to any person any income by way of **winnings from any lottery or crossword**

puzzle (or card game and other game of any sort) in an amount exceeding ten thousand rupees (INR 10,000) shall, at the time of payment thereof, deduct income-tax thereon as per the rates in force. In the case where the winnings are wholly in kind or partly in cash and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of the winnings, the law makes provision for the person responsible for paying any amount that shall, before releasing the winnings, ensure that tax has been paid in respect of the winnings.

- Similarly, in terms of section 194BB of the IITA, any person, being a bookmaker or a person to whom a licence has been granted by the Government under any law for the time being in force for horse racing in any race course or for arranging for wagering or betting in any race course, who is responsible for paying to any person any income by way of winnings from any horse race in an amount exceeding five thousand rupees (INR 5,000) shall, at the time of payment thereof, deduct income-tax thereon at the rates in force.

In this regard, section 115BB of the IITA substantiates the rate of tax on winnings from lotteries, crossword puzzles and races including horse races, card games and other games of any sort or gambling or betting of any form or

nature whatsoever. In terms of this section, the amount of withholding tax should be calculated at a rate of 30% plus an education cess of 3% as per the current rates in force. As per Indian tax laws, a certain percentage of total tax payable by an individual is required to be paid as an education cess. This “cess” is a differentiated form of tax and is collected by the government for a specific purpose. The intention behind the education cess is for financing and providing universalised and quality education.

Carry-forward and Set off of losses

An important point to note in this regard is the carry forward and set off of losses from such business. In terms of Section 73 of the IITA, any loss resulting from a speculative business carried on by the assessee, shall only be set off against profits and gains from other speculative businesses.

Where, in any year of assessment, any loss from a speculative business that has not been wholly set off as per the paragraph above, may be carried forward to the following year of assessment and be set off against future gains from speculative business. However, no loss may be carried forward for more than four assessment years from the year it was first computed.

USA

In the United States (US), there are a number of factors which determine the amount of withholding tax to be paid. These include the form of gambling played, the amount won, and the ratio of the winnings to the amount staked.

There must be a withholding tax from a payment of winnings when the proceeds from the wager are more than \$5,000 and the wager was placed in⁴⁸:

- A sweepstakes, wagering pool, lottery, raffle, or poker tournament; or
- Any other wagering transaction, if such proceeds are at least 300 times the amount wagered.

There is an exemption to this rule in that no withholding tax is required on winnings from bingo, keno, or slot machines no matter what the amount is. However, this exemption is subject to an exception (refer below).

The “proceeds from a wager” are the difference between the amount of the winnings and the amount of the wager. The applicable rate of tax is a flat rate of 28% (2010: 25%).

Example

In 2011, your organisation conducts a raffle, and Mr R purchases a ticket for \$ 1. At the drawing, Mr R's number is drawn and he wins \$ 6,000. Because the proceeds from the wager are more than \$ 5,000 (\$ 6,000 - \$ 1 ticket), you must withhold \$ 1,680 ($\$ 5,999 * 28\%$) from the winnings.

⁴⁸ 'Tax Exempt Organisations and Gaming', ch 6 at 23

A non-cash prize, such as a car won in a raffle, with a fair market value exceeding \$5,000 after deducting the amount of the wager is also subject to a withholding tax. The tax is computed and paid under either of the following methods:

- The winner of the non-cash prize pays the withholding tax to the organisation conducting the gaming activity. In this case, the withholding amount is 28% of the fair market value of the non-cash item less the amount of the wager; or
- The organisation pays the withholding tax on behalf of the winner. In this case, the withholding amount is 33.33% of the fair market value of the non-cash item less the amount of the wager. The withholding percentage in this case is higher because the winner gets not only the value of the prize but also the value of having the taxes paid by the organisation.

No withholding tax is required on winnings from bingo, keno or slot machines. However, a “backup” withholding tax of 28% may be required on gambling winnings (including winnings from bingo, keno, slot machines and poker tournaments) under the following circumstances:

- The winner of the reportable winnings does not furnish a correct Taxpayer Identification Number (“TIN”);
- 28% has not been withheld; and
- The winnings are at least \$600 and at least 300 times the wager (or the winnings are at least \$1,200 from bingo or slot machines or \$1,500 from keno or more than \$5,000 from a poker tournament).

Example

An organisation (XYZ) has slot machines in its bar area. Mr B wins \$ 1,200 at the slot machine. Mr B refuses to give XYZ his taxpayer identification number (TIN). Because winnings of \$ 1,200 or more from a slot machine are reportable winnings, XYZ must report the winnings on Form W-2G. Slot machine winnings are not subject to regular withholding at the rate of 28%, but because Mr B refuses to give XYZ his TIN so that they can properly complete the Form W-2G, XYZ must backup withhold \$ 336 ($\$ 1,200 * 28\%$).

The table below provides a summary of the relevant different withholding requirements:

Type of Gaming	Regular Withholding at 28% if Winnings are:	Backup Withholding at 28% if Winner does not provide TIN and Winnings are:
Bingo	N/A	>=\$ 1,200
Slot Machines	N/A	>=\$ 1,200
Keno	N/A	>=\$ 1,500
Sweepstakes, wagering pools, lotteries and raffles	>\$ 5,000	\$ 600 to \$ 5,000
Wagering transactions when winnings are at least 300 times the amount wagered.	>\$ 5,000	\$ 600 to \$ 5,000
Poker tournaments	N/A if winnings are reported on Form W-2G	>\$ 5,000

The Netherlands

For games of chance⁴⁹, such as lotteries and sports or horserace betting, a gaming tax of 29% (previously 25%) is imposed on winnings⁵⁰.

Gambling taxes on prizes won in lottery games (including the State Lottery, the Instant Lottery, the Lotto and charitable lotteries), as well as by sports and horserace betting, are withheld at the source i.e. winnings are paid to the players net of tax⁵¹.

The Act on Gaming Taxes provides for a so-called cumulative rule for lottery winnings and winnings on sports and horserace bets: all winnings which are paid to the same winner on the same occasion are treated cumulatively, as if they had been won in a single event⁵².

However, no gaming tax is levied if the prize money does not exceed € 454⁵³, or if the prize money does not exceed the stake money⁵⁴.

In most cases it is the operator itself which pays the net prize, having deducted the withholding tax, which it then pays over to the government. However, if a

⁴⁹ Games of chance in subsection a) of Article 1 of the Act on Games of Chance (1964) as an opportunity to compete for prizes, where success depends completely or predominantly on coincidence and cannot be influenced by the player.

⁵⁰ The Act on Gaming Taxes, O.J., 2005, 683

⁵¹ Article 5a para 2 of the Act on Gaming Taxes

⁵² Article 4 para 2 of the Act on Gaming Taxes

⁵³ Since the legal prize maximum in a bingo game is € 350, bingo prizes are not subject to gambling tax.

⁵⁴ Article 4 para 1(a) and (b) of the Act on Gaming Taxes

player wins money on a foreign gambling internet website, there is no withholding tax and the player himself is obliged to give notice of this on a gaming tax return.

As can be seen from the above-mentioned laws relating to withholding taxes on gambling winnings in India, USA and the Netherlands, there are notable differences between the three countries in details such as the rates of tax and how the different forms of gambling are treated and taxed. However, there is indeed a similarity between those foreign countries in that their gambling tax laws are extremely detailed and very specific: when compared to South Africa's intention to withhold 15% on all winnings greater than R 25 000 "across the board", it suggests that perhaps a more refined approach should have been adopted by the powers that be which would have provided more clarity on the proposal.

Although it is expected that closer to the enactment date (1 April 2012), more details will surface which in turn will seek to clarify any and all questions which, as will be seen in the following chapters, need to be answered.

Chapter V

Potential short-comings of the proposed new withholding tax on gambling winnings

As illustrated in the previous chapter, there are differences between how gambling winnings are treated and taxed in the US, India and the Netherlands respectively. This only adds to the difficulty in trying to compare these three foreign countries to South Africa and the treatment and taxing of gambling winnings that it intends to implement.

But a comparison needs to be made in order to establish whether or not, based on the three foreign countries profiled in this treatise, a new withholding tax in South Africa on gambling winnings is likely to succeed. It is also necessary to identify the problems, if any, experienced by the above-mentioned foreign countries regarding the withholding tax on gambling winnings in order to foresee any similar problems South Africa might encounter.

The noticeable differences between the three foreign countries and South Africa

In India, there is a high level of State involvement and control over gambling activities. When considering the National Lottery, for example⁵⁵:

- The State government oversees the registration of lottery outlets.

⁵⁵ 'More questions than answers: Proposed withholding tax on gambling winnings' (April 2011) *CASA Newsletter*, www.casa.org.za/CASA_Newsletter_Issue_22.pdf.

- Lottery tickets are sold by organising agents appointed by the relevant State government.
- The State government itself is responsible for paying prize money to winners, and deducting the relevant tax at source in the cases where they exceed ten thousand rupees.
- Additionally, the State government is responsible for making payments to the organising agents in relation to prize winning tickets which are either unsold or remain unclaimed.

The practice in India is materially different to the South African lottery regulatory framework, in terms of which the lottery operator conducts the lottery under a licence it has obtained for its own account, and itself makes payment of winnings.

Therefore, even though there is a withholding tax payable on lottery winnings in excess of Rs 10,000 in India, the collection of these taxes is easily accomplished as it is directly administered by the state government itself, without recourse to the holder of a licence, and without any disclosure being required by the taxpayer concerned.⁵⁶

⁵⁶ Ibid

In the Netherlands, as mentioned in the previous chapter, there is a tax of 29% recoverable from any person who has won an amount in excess of € 454 in a game of chance. Such taxes are however not payable if the amount spent exceeds the prize money.

In the National Lottery, the operator itself pays the net prize, having deducted the withholding tax, which it then pays over to the government.

Casino games in the Netherlands are primarily offered by the State-controlled Casino Holland, and are therefore relatively monopolised, while in respect of other games of chance a State-sponsored duopoly is in place. The National Sports Totalisator Foundation (“De Lotto”), a non-profit-making private law entity controlled by the State, holds an exclusive licence to organise sports-related prize competitions, lotteries and number games, while Scientific Games Racing BV holds the monopoly on betting and horse racing. This oligopolistic scenario, with its high level of State involvement and control, creates an enabling environment for the imposition and administration of withholding taxes in respect of games of chance⁵⁷.

⁵⁷ Ibid

This approach, much like the Indian approach mentioned above, differs significantly to the South African framework and thus renders it difficult to use as a comparison.

In the United States, there are a number of factors which determine the amount of withholding tax to be paid. These include the form of gambling played, the amount won, and the ratio of the winnings to the amount staked. This immediately differs from South Africa's intention to tax all forms of gambling at a flat rate of 15% for all amounts over R 25 000 won⁵⁸.

The question over the deductibility of losses

As mentioned in the previous chapter, gambling losses, albeit with certain limitations, are deductible in the three foreign countries profiled. There is a considerable level of respite afforded to taxpayers in recognition of the fact that gambling winnings are usually offset by prior or future losses. However, thus far, there has been no indication locally that gambling winnings made by South African gamblers will be offset by losses.

In *Merkin v Commissioner of Internal Revenue*⁵⁹, the United States Tax Court had to deal with the treatment of gambling losses. It was held that the Internal Revenue Code ("IRC") treats gambling losses in one of two ways: taxpayers

⁵⁸ Ibid

⁵⁹ Merkin v Commissioner for Internal Revenue T.C Memo 2008 - 146

engaged in the trade or business of gambling may deduct their gambling losses up to the amount of their winnings from such transactions in arriving at adjusted gross income. In contrast, taxpayers who are not in the trade or business of gambling are typically called recreational or casual gamblers and may deduct their gambling losses less favourably below the line as an itemised deduction in arriving at taxable income. However, irrespective of whether the taxpayer is a professional or a casual gambler, 'losses from wagering transactions shall be allowed only to the extent of the gains from such transactions'⁶⁰.

As mentioned already, the question of how to account for gambling losses is a contentious one. Not only would an allowable deduction more often than not cancel out the gains made (as most gamblers make net losses rather than gains), but there would be difficulties from a taxpayer point of view in substantiating their losses. However, the fact that losses are deductible (only to the extent of the gains) in the three foreign countries mentioned in this treatise, illustrates that it is viable to at least allow for the deductibility of gambling losses. Although it could add to an already seemingly administrative-intensive legislation, it is submitted that taxing gambling winnings and ignoring losses suffered by gamblers will be disproportionately unfair towards the taxpayer.

⁶⁰ Callaway Mtwana 'Tax on Gambling Winnings' (December 2011) *De Rebus*

Other noteworthy possible problems

The additional problems illustrated below could potentially hamper the implementation of the proposed withholding tax on gambling winnings:

When section 35A was inserted into the Income Tax Act in 2004 there were delays in its implementation as SARS had to consult with estate agents and conveyancing attorneys. As a result, section 35A only came into operation towards the end of 2007, although the introduction of the withholding tax it relates to had been announced as far back as the 2004 budget speech⁶¹.

In a press release issued by CASA subsequent to the budget speech announcement in February 2011, the CEO of CASA, Derek Auret, expressed the association's frustration with the fact that the announcement was made without any form of consultation with the gambling industry. At the time of the article going to print, CASA had written to Minister Gordhan following the announcement in the 2010 budget speech that some form of tax was being considered for gambling winnings, requesting an opportunity to engage with him, but unfortunately no response had been received⁶².

⁶¹ Callaway Mtwana 'Tax on Gambling Winnings' (December 2011) *De Rebus*

⁶² *Ibid*

It appears likely that consultation will once again only commence after the new legislation has been prepared and, if this is the case, it could lead to similar delays in implementing the legislation.

Under section 35A on the Act, an amount of 5% must be withheld. The withholding tax is payable to the extent that the purchaser has actually paid amounts due to the seller and does not arise immediately on the full consideration payable by the purchaser where the consideration is to be paid over a period of time⁶³. Thus, in the above situation, it is the payment made to the non-resident seller which triggers the liability for the withholding tax.

Regarding the proposed tax on gambling winnings, the payment of the winnings by the payer to the winner should be the trigger of the liability for the withholding tax. However, it is not always as simple as that. Winners of large payouts from the National Lottery are paid out their winnings over a period of time; in this case it would be interesting to note what will trigger the liability.

Regarding casino games, the trigger would surely not be the payment of the winnings to the winner; if this is the case, then a patron with R 30 000 in playing chips would logically only cash in R 24 000 of those chips at one time and then the remainder another time. SARS would want to block this obvious loophole

⁶³ B Croome 'From 1 September 2007 purchasers of immovable property must withhold tax from amounts due to a non-resident seller' (September 2007) *Tax Ensign*, www.ens.co.za/newsletter/briefs/taxSept07Withhold.html

and the only conceivable way of doing this is if the trigger for the liability was the moment a patron won an amount of R 25 000 or more at a table in the casino.

But this in itself would cause problems – play at the table would have to be halted while the appropriate gambling tax is withheld there and then from the patron. On top of this, documentation would need to be completed to record the withholding transaction. Would the dealer or croupier be responsible for handling this transaction, or would additional staff be involved? If one considers the hustle and bustle of a live casino environment, one can only imagine the level of frustration that this proposed gambling tax would create and also increase the administrative aspect from the operator's point of view.

Although not efficient, it seems that having the dealer responsible for handling the withholding transaction as well as the administration around it will be the most practical. However, there is already a system in place in casinos whereby tables stipulate minimum and maximum bets that can be made by patrons. (e.g. one blackjack table could have a minimum bet of R 25 while the table next to it has a minimum bet of R 50.) Therefore casino operators could possibly look to make the situation more manageable by setting the ranges at appropriate levels to ensure they control what tables the withholding tax threshold can be crossed.

For example, in the game of Roulette, the odds are 36/1; therefore if a patron puts R 50 on the number 32 and wins, he will win R 1 800. Therefore, working back from the R 25 000 threshold, we can determine that R 694.44⁶⁴ is the threshold point after which winnings are subject to withholding tax. Therefore tables could be set up that at Table A the maximum bet that can be made on any one number is R 650 whereas a high-stakes Table B could stipulate a minimum bet of R 700. This way the casino knows that only on Table B could a transaction take place that warrants withholding tax on the winnings and as such put the necessary steps in place to take care of the administration behind dealing with withholding tax.

However, this remains an issue that can only be addressed once the finer details of this tax are outlined by SARS.

Not only is the timing of the liability an area of concern, but there will no doubt be concerns in certain situations as to who the liability relates to. In an attempt to garner greater support in an ever-increasing battle for consumer supremacy, corporations run competitions with lavish prizes such as motor vehicles or luxurious holidays. In this instance the trigger would be the awarding of the prize to the winner. But the question as to who is liable for the withholding tax is a controversial one. The consumer cannot be expected to pay the withholding

⁶⁴ R 25 000 divided by 36

tax, and if so, probably would not enter the competition in the first place. In the United States, the organisation has the option to pay the withholding tax on behalf of the prize winner, at a rate higher than the normal rate of withholding tax. It would therefore appear logical that the same option should apply in South Africa, but this would leave the organisations out of pocket and cause a rethink for running a competition in the first place.

However, in the end, one feels that there will be no way around this and in an attempt to stay ahead of their competition, corporations just might have to “bite the bullet” in this particular situation or think of new strategies in their quest for greater market share.

Under section 35A, there is a fixed period of 14 days after the date on which the amount was withheld in which the withholding tax should be paid to SARS. This could impose an arduous requirement on casino operators if they would be required to pay the amount within 14 days from withholding date, especially if one considers the amount of people who may win more than R 25 000 in a month. This in turn could lead to hiring of more staff which would increase the operator’s cost. However, as mentioned above, casino operators could set up tables and limits such that withholding transactions can only occur on specific tables. A withholding tax register would need to be kept and updated at these tables and these could be collected at the end of each day. These registers

could be collated with the cashiers who would have kept their relevant registers when patrons cashed in chips on said day and the total amount of withholding tax could be paid over within 14 days.

However, this approach does appear extremely administrative-intensive and one which could lead to many instances of payments not being made on time by casino operators, not to mention the difficulty SARS will face in keeping track of payments received and relevant periods involved. It is submitted that the logical solution to this is for SARS to allow withholding taxes to be paid on a monthly basis. It will be interesting to note what SARS decide once more details are released.

Another problem which faces this proposed new gambling tax relates to how the winnings arise, whether from hard work, inheritance, good luck or even through criminal means. Illegal gambling is widespread in South Africa and with the recent prohibition of online gambling as well, it remains a contentious issue.

In South Africa, income from illegal activities is still considered taxable and as such there is no reason why winnings from illegal gambling should not be subject to withholding tax. However, due to its nature, it could prove difficult to enforce the new gambling tax on winnings from illegal gambling activities.

In addition, a particularly valid issue relates to what a “win” will be classified as and how it will be determined. This can be illustrated by the example below⁶⁵:

Example

A patron is playing at a gambling table in the casino and in a series of hands produces the following results:

- Loses R 20 000,
- Wins R 10 000,
- Loses R 10 000,
- Wins R 10 000,
- Loses R 15 000,
- Wins R 10 000.

In the scenario above, how much, if anything has the patron “won” for the purposes of the proposed tax? Will he be regarded as having won R 30 000, or has having lost an effective amount of R 15 000? Or will his effective “loss” be of no consequence? This is a practical example which frequently occurs, especially in high-stakes games, and a definitive guideline is needed from SARS in order to explain the treatment of this scenario. In this case, the taxpayer could argue that the series of losing bets were made which led to the

⁶⁵ Ibid

eventual winning bet and as such the cost of the winning bet should include the cost of the series of losing bets.

It is submitted that each hand played should be considered individually and only amounts greater than R 25 000 (net gain, see below) should attract withholding tax. As such, in the above example, the taxpayer is not subject to withholding tax as no individual hand won an amount of R 25 000 or more. Based on the vague nature of details given by the Minister in his 2010/2011 Budget Speech, this could actually be the practice that is put in place. This, however, remains to be seen.

Similarly, in horse-race betting, if there are nine races on a given race day, a punter who places a R 5000 bet on each of the nine races, could be R 40 000 down after the first eight races, and then win R 25 000 on the ninth and final race of the day. Must the punter be expected to pay a withholding tax on the R 25 000 winnings from the last race without taking into consideration the R 40 000 losses incurred prior to the last race?

Logically, this is flawed and cannot be the intention of SARS; but without any communication from the government, it appears that this gross unfair treatment towards the taxpayer is on the cards. However, from a SARS point of view, it could also be argued that the bet that led to the R 25 000 win was in fact only

the specific R 5000 wagered on that particular race, so to give the taxpayer a deduction for all his previous bets (which had no bearing on the amount won) could be construed as being unfair towards SARS.

In the above example, the solution to the problem appears more straightforward and should be considered. As the punter would have to keep his ticket stub indicating the bet placed and the amount staked, it would be possible to determine the net gain of this particular transaction. It is submitted that the net gain⁶⁶, and not the winnings, should be subject to withholding tax.

This way, SARS would get the tax while the taxpayer would get a deduction for the “cost” of his win. It is submitted that this is the most logical solution – one which, however, would necessitate the proposed law to allow for deductions of losses incurred by the punter. It remains to be seen whether SARS will see it this way.

⁶⁶ The net gain being the amount won less the amount wagered on the specific winning bet.

Chapter VI

Conclusion

The purpose of this treatise was to critically analyse the proposed new withholding tax on gambling winnings, by identifying the different methods in which gambling winnings are taxed in various foreign jurisdictions and whether or not South Africa can rely on these methods as a basis for creating its own provisions.

The initial consideration is that if this proposed gambling tax has been implemented and is in operation in the three foreign countries profiled in Chapter IV, then it is plausible to think that the same tax could in fact succeed in South Africa.

However, as has been illustrated, the legislation regarding the taxation of gambling winnings in the US, India and the Netherlands is substantially different to South Africa's. While the foreign legislation is comprehensive and specific, South Africa's proposal raises more questions than answers; this makes the initial comparison with South Africa difficult to say the least. To date there has been no indication of the finer details of the proposed gambling tax and the proposal suggests that a flat-rate treatment across all spheres of gambling will be implemented.

However, what is evident from the matters discussed in this treatise, is that of the three foreign countries mentioned by the Minister and used as a basis for implementing the proposed gambling tax in South Africa, there are glaring dissimilarities between those environments which make the gambling withholding tax practicable in their respective foreign countries, and the conditions prevalent in South Africa.

In India and the Netherlands, there is a high level of State involvement which makes gambling activities easier to manage and allows for the collection of the withholding tax to be that much simpler, while in the US, although the State level of involvement is less and withholding taxes are collected by the operators, the prospect of taxpayers being able to claim deductions in respect of amounts lost in gambling makes it a more attractive legislation.

The South African government, although involved in the regulation of gambling activities, does not itself hold an interest in gambling activities and this makes it difficult if not impossible to compare itself to either India or the Netherlands. On top of this, as there has been no indication that gambling losses will be allowed as a deduction, this would make comparison with the US also impractical.

It is submitted that the attempt of the Minister to use the foreign countries as a basis for proving how a proposed gambling tax would be able to succeed in

South Africa is flawed. It is submitted that, based on the information currently available, the only certainty we have is that South Africa cannot base its decision to tax gambling winnings on the foreign countries mentioned above.

It is further submitted that one thing that can be assured is that operators of gambling activities will be especially burdened by the new proposed legislation. If current and past withholding taxes in South Africa are anything to go by, operators will have very time-consuming and arduous responsibilities placed on them regarding the administration and compliance with the proposed gambling tax once it is implemented.

What is of concern is the reason for introducing the withholding tax on gambling winnings. In his 2012 budget speech, the Minister stated that the new proposed gambling tax would be introduced with the hope of *“discouraging excessive gambling.”*

One would hope that there is a more sound reason for wanting to introduce this gambling tax as the reason provided appears unfounded and a desperate attempt at validating the government’s intention. It is hard to imagine what sort of impact such a tax would have on gambling in this country. Some individuals gamble to support an addiction they have. Much like an addiction to alcoholism, smoking or any other drug, a person will persist with gambling regardless of any

taxes imposed on gambling winnings. In any case it seems that more people lose than win. Odds are set in favour of the gambling operators. If this was not the case they would cease to operate.

In addition to this, if the new tax did discourage excessive gambling, then gambling operators would see reduced turnover and this would lead to lower profits and less taxes to SARS; therefore there is a possibility that the decrease in revenue received by SARS from the gambling industry could exceed the increase in revenue from taxing gambling winnings which would leave SARS worse off.

Understandably, SARS will always be under pressure to increase its revenue from taxpayers and will continue to seek ways in which to do so. With the current economic conditions best being described as weak, a significant increase in job creation does not appear to be realistic let alone salary increases considerably higher than inflation. The government would need to seek new ways in which to generate revenue; short of increasing the tax net, perhaps a tax on gambling winnings would serve as an alternative solution. Perhaps this is the real reason for the proposal.

However, whether taxing gambling winnings by means of a withholding tax is the right way to go, is debatable. With the difficulties faced in terms of

administration and compliance with the legislation, together with the contention surrounding the treatment of gambling losses, perhaps the government should consider a more efficient method for taxing gambling winnings.

The question of requiring gamblers to account for their winnings on their tax returns in the normal means of disclosing income should not be brushed aside as an afterthought. Although the natural response would be to suggest that relying on the honesty of the taxpayer is in itself problematic, the income tax model in South Africa is essentially a self-assessment system and as such relies on the honesty of and integrity of taxpayers.

National Lottery winnings above a certain amount (R 50 000) can only be claimed from the operator itself. As such, it will be possible for the lottery operator to keep a complete record of individuals who have won substantial payouts. These records could be submitted to SARS who in turn could use the information and compare it to the actual tax returns that taxpayers submit annually. Alternatively a tax certificate, similar to the current IT3A, could be issued.

Similarly for machine games in the casino, as they are all card-based (whereby gambling cards are obtained from the casino and money is loaded onto the card), the same system could be used to record the individuals who have won

large sums of money once the cards are redeemed for cash. There is no reason why the same system cannot work for horse-racing as well as patrons have to redeem their winnings from the tote and records can be maintained there.

The benefit of the above system is that in reality, it is probable that gambling operators already have a system in place which maintains a record of large payouts, so there is no reason to think that this method of taxing gambling winnings would cause an increase in administration from the operator's point of view.

If a separate line item for gambling winnings was inserted on individual tax returns, SARS would be able to specifically give the opportunity to the taxpayer to declare honestly while also having the records from gambling body operators to use as a control. A similar system is already in place for donations tax.

However, the treatment of gambling losses should also be addressed. In staying consistent with the treatment of expenditure for individuals in South Africa, SARS should determine the status of the taxpayer, namely, whether he or she is engaged in the trade or business of gambling or not, when determining the treatment of gambling losses. In *Morrison vs Commissioner for Inland*

*Revenue*⁶⁷, the court held that gambling can in certain circumstances constitute the carrying on of a trade or business if the individual has an organisation or associated activity which is sufficient to convert a pastime, hobby or pursuit into a business activity.

The numerous questions raised in this treatise illustrate the level of uncertainty still surrounding the new proposed gambling tax. It is hoped that communication will be provided by SARS as soon as possible to address the issues at hand. This would go a long way in ensuring that the implementation of the proposed withholding tax on gambling winnings is as smooth and efficient as possible.

⁶⁷ Morrison v Commissioner for Inland Revenue 1950 (2) SA 449 (A) at 5.

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