

The Emergence of Esports

In this article, the authors discuss what esports games exist, how they are played, which types of income are relevant for the various games and what are the tax consequences.

1. Introduction

Esports is competitive computer gaming in tournaments with professional players, mostly using the Internet (online), but sometimes performing at special organized events (offline). Although still in its infancy, esports is becoming a major industry, as the top gamers around the world compete with each other, creating a huge spectator sport and attracting bigger sponsors. In addition, the developers of the games have an interest in tournaments with considerable prize money because this increases the status of their games and the sales to amateur users.

Esports is the collective term for a wide range of games. The games can be played on various websites and can be viewed on Twitch, YouTube and other channels. There are hardly borders for esports; the games are most popular in Asia and the United States, as well as in Europe and other places.

Betting games, such as poker, are not considered esports, because it is not the capacities of the players but the luck of the draw that is most influential on the results of those games.

This article discusses what esports games exist, how they are played, which types of income are relevant for the various games and what the tax consequences may be.

2. Shapes and Sizes of Esports

2.1. Top games

The most successful esports games in order of prize money up to 2017 were:¹

- (1) Dota 2;
- (2) Counterstrike: Global Offensive (CS:GO);
- (3) League of Legends;
- (4) StarCraft II; and
- (5) Fortnite.

This list should not be regarded as static, because games become outdated with the release of newer ones. For instance, in 2018, Dota 2 lost its top position to League of

Legends (1), Playerunknown's Battlegrounds (PUBG) (2) and Hearthstone (3). Meanwhile, Fortnite is rising fast.²

2.2. Multiplayer online battle arena

Multiplayer online battle arena (MOBA) games, such as Dota 2 and League of Legends, are very popular. In these games, typically, two teams of four to five players play against each other, and both the players and the spectators view the game from above. Each player has his own character in the game, and the main goal is to destroy the base camp of the opponent. It is important for a team to choose the right combination of characters to best play out the game. MOBA game players train between tournaments alone or with the team to improve their performances. Professional teams very often have coaches who study the opponents, come up with a strategy and select the players for the team.

2.3. First-person shooter

Also, very popular are the first-person shooter (FPS) games, such as CS:GO and Overwatch. In these games, the teams fight with each other from a first-person perspective. CS:GO is a standard FPS game, with two teams of five players playing half of the rounds in defence and the other half in attack. Teams win through their ability to aim, knowledge of the map and execution of their strategy to set off and/or disable a bomb that finishes the game.

Overwatch, although also an FPS game, focusses more on picking the right combination of characters, each of which has different abilities and plays a certain role in the game. Each play round consists of four maps with different goals.

2.4. Battle royal games

Relatively new and upcoming are battle royal (BR) games, such as Fortnite, PUBG and (in part) Call of Duty. The games are played either individually or in teams of two to four players with the goal of eliminating the opponents. PUBG teams already have coaches, but with Fortnite this is not yet common.³

2.5. Real-time strategy games

Notwithstanding StarCraft II, real-time strategy (RTS) games appear to have fallen mostly out of favour within esports. RTS games are often played between individuals and, therefore, players are not managed by coaches.

* Masters student Tax Law, Erasmus School of Law, Rotterdam. The author can be contacted at vanoverbeeksebastiaan@gmail.com.

** All Arts Tax Advisers and researcher, Tax Law Department, Erasmus School of Law, Rotterdam. The author can be contacted at dmolenaar@allarts.nl.

1. See E-Sports Earnings, available at www.esportsearnings.com.

2. Newzoo, 2018 Global Esports Market Report.

3. At the moment, Fortnite is very popular amongst amateur players, especially as it is about identity in a big group with other players.

2.6. Turn-based games

Less common in esports are turn-based (TR) games, such as Hearthstone. These games look like, for example, chess because only one action can be taken per turn. Hearthstone works with a deck of cards, and the players make their moves on the cards that are drawn. Partly, players have no control over the outcome of the match due to the luck of the draw. The goal in Hearthstone is to bring down the points of the opponent to zero.

2.7. Sports-based games

Such sports-based (SP) games as FIFA(19) are based on football. FIFA(19) and the equivalents for other sports allow players to play the sport in a virtual environment, either in teams or on their own. In the Netherlands, football teams have their own electronic(e)-players who represent the club of a national e-division, which is structured similarly to the national football league. By way of FIFA(19), the clubs are trying to attract more young people to the game of football and hopefully to the stadiums for traditional football matches.

UEFA has announced an eChampions League and will add an esports tournament to EURO 2020. This means that FIFA(19) will attract more attention in the coming years.

3. Online and Offline

Competitive gaming is not a new phenomenon. From the days of Pacman, people have competed with each other in achieving the highest score. With the existence of the Internet and its widespread availability, it comes as no surprise that gaming has grown to a competitive environment. As a result, players and companies organize tournaments in which competitors earn prize money. As the tournament scene grew larger, esports was born.

At present, the most attractive esports are played on location (offline). Players travel to a studio, venue or stadium where computers have been setup for them to play on. Fans can visit these events and watch the game on a big screen. At the same time, these games are streamed to websites like YouTube and Twitch. Examples of major offline tournaments are:⁴

- The International 2018 for Dota 2, which ran from 15 to 25 August 2018 in Vancouver, with USD 25 million in prize money, of which USD 11 million went to the winning team, OG.⁵ This was the largest prize pool ever in esports.
- 2018 League of Legends World Championships held in Korea (Seoul, Busan, Gwangju and Incheon) from 1 October to 3 November 2018. The final was held in the Incheon Munhak Stadium, with Invictus Gaming from Korea being the final winner. The total prize money was USD 2.25 million, of which

4. See E-Sports Earnings, *supra* n. 1.

5. With two players from Finland and others from Australia, Denmark and France.

USD 843,750 was won by the winning team, Invictus Gaming.⁶

- The Kuala Lumpur Major 2018 for Dota 2 that ran from 9 to 18 November 2018, with USD 1 million in prize money, of which USD 350,000 went to the winning team, Virtus.pro.⁷
- Blizzcon 2018 for Hearthstone held in Anaheim, California on 2 and 3 November 2018.

Players also participate in online esports tournaments, which they can join from all over the world using their own computers. As online tournaments are more accessible, it allows a wider range of competition. Online tournaments most often have lower rewards than offline tournaments, and very few attract a significant viewership, but this is not true for every game. An example is the Esports Championship Series Season 6 for CS:GO, played online, with USD 660,000 in prize money, of which USD 250,000 was won by the winning team, Astralis.

4. Esports Earnings

A major source of income for esports is advertising for esports-related products as well as for other services and products. Manufacturers of computer equipment or software, such as Sony PlayStation, Microsoft Xbox and others, have an interest in advertising, as do other brands, such as MasterCard, T-Mobile and other big companies.

Furthermore, prize money is important. This was initially funded by the developers of the games because of their interest in promoting the games and attracting more (amateur) users and viewers but was later augmented with income from advertising, sponsoring and ticket sales, and consumption at offline events.

Other income can be obtained from the (amateur) players by means of in-game sales of new characters or extra options. With regard to the esportsers themselves, income is for a large part derived from their own streaming channel, which gives viewers the option to subscribe and donate cash. Since 2014, Twitch processed USD 257 million in donations by viewers.⁸

Newzoo has calculated that the total esports market will have been USD 906 million in 2018,⁹ which is 38% more than in 2017. North America will have accounted for USD 345 million, Europe for USD 250 million and China for USD 164 million. Brands will have invested USD 694 million in the market via sponsoring, advertising and such, which is 77% of the total market.

In 2017, there were 588 major esports events, which generated USD 59 million – an increase from USD 32 million

6. With three players from China and three from Korea.

7. With four players from Russia and one from Ukraine. The famous Ninjas in Pyjamas came 4th in this tournament and earned USD 80,000, with players from Bulgaria, Denmark, Germany, Macedonia and the United States.

8. See BBC capital, The rise of the Twitch-preneurs and the evolution of tipping, available at www.bbc.com/capital/story/20180924-the-rise-of-the-twitchpreneurs-and-the-evolution-of-tipping.

9. Newzoo, *supra* n. 2.

in 2016. The total prize money for all esports events held in 2017 reached USD 112 million. The League of Legends World Championship was the most watched event on Twitch in 2017 with 50 million hours. It also generated USD 5.5 million in ticket revenue. The expectation is that the total esports market will grow in 2021 to USD 1650 million.

The 2018 revenue streams can be allocated as set out in the following Table:

Table: 2018 revenue streams from esports		
Revenue streams	Amount (USD million)	Percentage (%)
Media rights	161	18
Advertising	174	19
Sponsorship	359	40
Merchandise plus tickets	96	11
Game publisher fees	116	12

5. Is Esports a Sport?

Some discussion is underway about whether esports can be regarded as a sport.¹⁰ The main critics note the lack of transparency because most of the games are controlled by the game publishers. They set and change the rules as they want, select the teams and do not allow normal sports governance and procedures, such as appeals against decisions and doping checks. Critics believe that esports is just entertainment because it lacks these key elements to qualify as a sport.

Undoubtedly, there are entertainment elements in esports, as in most traditional sports, but esports resembles sports because of the element of competition, scoring and tournament structures. For the players and viewers, esports can be considered sports.

At the 2018 Asian Games, esports was scheduled as a demonstration sport, with six games, including Hearthstone, League of Legends and StarCraft II. The International e-Sports Federation (IeSF) is in discussion with the International Olympic Committee (IOC) to take part in the Olympics 2024 in Paris, but President Bach of the IOC expressed his doubts in September 2018 because of the violent character of most of the games.

For tax purposes, the scope of the term “sports” has been discussed in the OECD Model (see section 8.) and by the European Court of Justice (ECJ) in its decision on “duplicate bridge” (see section 9.).¹¹ The conclusion from these two very different sources leads to the opinion that, with regard to taxation, esports can be considered a sport.

10. For instance, EU Sport Forum on Malta in March 2017, in respect of which, see the report, eSport Keynote, *The Secret Billion Dollar Industry*, available at <https://ec.europa.eu/sport/sites/sport/files/docs/docs/eusf-esports.pdf>. See also J. Holden, A. Kaburakis & R. Rodenberg, *The Future is Now: Esports Policy Considerations and Potential Litigation*, 27 J. Leg. Aspects Sport, pp. 46-78 (2017).

11. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Models IBFD.

6. Esports: A Game of Chance?

The first tax consideration to be weighed is whether a game can be regarded as betting because the luck element in the game is dominant, or whether it is a skills-based game because of the influence of the player. Numerous discussions have taken place regarding poker, including in tax courts, and even though some experts have argued that the personal skills element is more important than the luck element, the decisions of the tax courts are that the luck element brings poker under the betting tax.¹²

This may give national tax administrations the idea that other online games would also be considered betting, but in the authors’ opinion, this conclusion is too simple and not based on a good insight of the various esports games. Only Hearthstone is played with cards and therefore includes the luck of the draw, but success in other big games, such as Dota 2, League of Legends and Fortnite, depends on the capacities, skills, training and talent of the players. Inevitably, some luck influences the outcome, but no more than in traditional sports. Consequently, in the authors’ view, betting tax is not the correct way to tax income from esports.

Some countries have made a connection between betting tax and normal income or corporation tax. In such circumstances, betting tax can be deducted as a withholding tax from the final tax obligation. This can even lead to a tax refund when the income comes from the same country. In cross-border situations, the credit for foreign betting tax should be restricted to an equal part of the income or corporation tax, as with the ordinary tax credit in treaty situations. This can easily lead to excessive taxation with a partly non-creditable foreign tax. Within the European Union, this should be regarded as an obstruction with regard to entering other EU markets and, therefore, an obstruction of the freedom principles. The ECJ has decided in cases regarding the gross taxation of non-resident artists to the effect that the non-deductibility of expenses cannot be allowed and that the use of normal tax rates should be provided for non-residents.¹³ However, it remains for the relevant Member States to apply the source taxation on non-residents.¹⁴

7. Employment Status

With regard to the payments from teams or tournament organizers to esports players, the legal status of the relationship is important. Are the players employees because they must follow the instructions of the team, or can they be regarded as self-employed because they act during preparations and games as skilled experts in their own way? As well as for taxation, this difference also has con-

12. Such as in the Netherlands, in the decision of the *Hoge Raad* (Supreme Court, HR) in NL: HR, 11 July 2014, ECLI:NL:HR:2014:1624.

13. See, for example, DE: ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord*, ECJ Case Law IBFD and DE: ECJ, 3 Oct. 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, ECJ Case Law IBFD.

14. See, for example, NL: ECJ, 18 Oct. 2012, Case C-498/10, *X NV v. Staatssecretaris van Financiën*, ECJ Case Law IBFD concerning the Football Club Feyenoord.

sequences for labour law, social security, work permits and other legal areas.

It can be imagined that, especially for teams in which players need to play together and use coaches to select the players, observe the opponents and come up with a team strategy, the chance is very likely that the players would be considered employees. This means that the team has to withhold wage tax and pay social security contributions, and often the deduction of expenses has been restricted, as is normal for employees.

Individual players outside teams are regarded as self-employed, which means that they have to pay income tax and arrange insurances themselves. This may also be the case for players in not so strictly organized teams. Some countries allow self-employed special tax advantages, which can make it profitable for teams and players to assume self-employed status rather than that of employment. This also takes away the employer's responsibilities from the team. However, the tax administrations in those countries are aware of this behaviour and may well carry out audits as to whether the correct employment status is being applied by teams.

8. Income Taxation and the OECD Model

Esports is played on an international stage, which means that the chance of the double taxation of income is high. Most countries apply a source withholding tax on income earned by non-residents, while almost every country taxes its residents on their worldwide income. This creates an overlap because foreign income is taxed twice within these two systems. A result of this can be that less foreign activities are undertaken, which is bad for the economy. Countries, therefore, concluded bilateral tax treaties with each other, thereby allocating taxing rights and granting tax exemptions or credits so that double taxation should be prevented.

This issue was first addressed internationally in the OECD Draft (1963), which, in its later versions, is followed not only by the 30 OECD member countries, but also by many others.¹⁵ Esports falls under all four basic articles of the OECD Model. Sponsorship is taxed in accordance with article 7 (Business profits) of the OECD Model, media rights under article 12 (Royalties), prize money by way of article 17 (Entertainers and sportspersons) and employees from teams, including either players or supporting staff, via article 15 (Income from employment).

The exceptional rule of article 17 of the OECD Model for entertainers and sportspersons creates many problems in practice. This article is an anti-avoidance measure because top stars are very often so mobile that they can presume to live in another country than would otherwise be the case. With tax havens, such as Monaco, not having any income tax, it may be profitable to move residence to the Principality. In traditional sports, cyclists, tennis players, golf players and Formula 1 drivers have taken this step. Without a source tax in the countries in which the tour-

naments are held, there would be no income taxation for these self-employed persons.

In contrast, 95% of mid-range and lesser entertainers and sportspersons suffer from the harsh measures that have been instituted against such tax avoidance, as very often source tax is levied from gross prize money and appearance fees, and expenses are not deductible, while information about the taxation in the various countries visited during a sports year is very often missing. This means that the taxable base in the residence state is most often much lower than in the work state, and foreign tax cannot be credited completely in the residence state. The result is that article 17 of OECD Model gives rise to excessive or even double taxation.

Unfortunately, this is also the case for esports because a brought-in view of sports has been included in the Commentary on Article 17 of the OECD Model. It does not give a precise definition but makes clear that it does not restrict sports to traditional athletic events and mentions other sports, for example golf, cricket, tennis, billiards, snooker, chess and bridge.¹⁶ As a result, esports definitely meets the conditions for article 17 of the OECD Model.

With regard to offline tournaments, it is easy to determine in which country the esports match or tournament takes place, but this is different for online tournaments. In this case, the computer server is very often in another country from the players, and the organizing company paying the prize money can be based somewhere else. It is therefore difficult for countries to apply a legitimate source withholding tax on online esports tournaments.

9. EU VAT

9.1. Is esports a sport for EU VAT?

The question as to whether esports is a sport for EU VAT purposes refers back to the decision of the ECJ regarding duplicate bridge.¹⁷ Duplicate bridge is a form of bridge in which each partnership successively plays the same deal as their counterparts at other tables. Scoring is therefore based on relative performance. The ECJ concluded that duplicate bridge cannot be considered a sport because it is characterized by a physical element that appears to be negligible. Consequently, a VAT exemption does not apply.¹⁸ The English Bridge Union had argued that duplicate bridge involves logic, memory and planning, which constitutes an activity beneficial to the mental and physical health of regular participants, but the ECJ found this "contribution" was insufficient to support the conclusion that this was a "sport" for VAT purposes because it had to be a physical or mental activity itself. The ECJ gave the English Bridge Union some help by explaining that dupli-

15. *OECD Draft on Income and on Capital* (30 July 1963), Models IBFD.

16. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17* paras. 5 and 6 (21 Nov. 2017), Models IBFD.

17. UK: ECJ, 26 Oct. 2017, Case C-90/16, *The English Bridge Union Limited v. Commissioners for Her Majesty's Revenue & Customs*, ECJ Case Law IBFD.

18. Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, art. 132(1)(m), OJ, L147 (2006), EU Law IBFD [hereinafter: the VAT Directive (2006/112)].

cate bridge could fall under “cultural services”, for which a VAT exemption also exists.¹⁹

It appears highly likely that the facts of the decision of the ECJ in *Bridge* (Case C-90/16) are too distant from esports to have effect. First, the sports exemption only applies to non-profit-making organizations, which is not the case in esports. Second, esports games require significant physical and mental activity, which can be comparable to traditional athletes. For instance, a five-year study by Professor Ingo Froböse of the German Sports University in Cologne revealed that esports players achieve up to 400 movements on the keyboard and the mouse per minute, four times as much as an average person, while the activity is asymmetrical because both hands are being moved and various parts of the brain are being used at the same time. Most games are extremely complex because, in addition to motor skills, the games require a high degree of tactical understanding to defeat an opponent. The research also showed that the production of the stress hormone cortisol is at the same level as that of a race car driver, combined with a high pulse rate, sometimes up to 160 to 180 beats per minute, which is equivalent to what happens during a very fast run, almost a marathon. An esports career, therefore, most often ends in the mid-20s when reflexes start to wane. Younger competitors are at an advantage, and only with physical and mental training and nutrition can a career be extended.²⁰

Consequently, esports should be considered sports for VAT purposes. This means that the entrance fee for both players and audience for online and offline events can be taxed at the low VAT rate, provided the Member State has taken up this option in the VAT Directive (2006/112).²¹

9.2. No EU VAT on prize money

Normally, esports teams and self-employed players are taxable persons for VAT purposes. They provide services for which they receive payments and, therefore, they must charge VAT on the invoices for these payments. Strangely enough, earning prize money through competition does not fall within the scope of VAT, which follows from the decision of the ECJ in *Bastova* (Case C-432/15).²² In this case, the Czech horse breeding company, *Bastova*, had various activities for which it was charged VAT, including prize money from horse races. The ECJ decided that the participation in the horse race did not constitute a supply of services for the purposes of article 2(1)(c) of the VAT Directive (2006/112), because it did not give rise to a fixed remuneration. It depends on the other activities whether this could have consequences for the deductibility of the input tax. However, if so, this ECJ decision disturbs the neutrality principle of the VAT for taxable persons.

Appearance fees for teams are still taxable for VAT, and only variable prize money is affected by *Bastova*. Most teams agree with the players that they should receive a large percentage of the prize money as extra compensation for their work, very often up to 80% or 90%, which means that only 10% to 20% of the prize money stays with the team. This means that the potential negative VAT effect on the deductible input tax for the team should be marginal or even nil. In addition, the players are very often not taxable persons, because they are either employees or self-employed, but only working for one client. Consequently, esports could escape without harm from this strange ECJ decision.

9.3. Reverse charge system for cross-border services

Esports is very international and payments for services in respect of advertising, sponsoring and media rights can easily come from another country. Within the European Union, the reverse charge system can apply if the recipient in the other country has a valid VAT identification number, i.e. in relation to business-to-business (B2B).²³ This means no imposition of EU VAT in the residence Member State of the service provider, i.e. regarding the esports team or a self-employed player, but a listing must be undertaken to comply with EU administration. When the recipient has his place of business outside the European Union, no EU VAT applies in any event, so the invoice falls with the zero rate and no listing is required. This system does not have any effect on the deductibility of the input tax on the expenses.

However, there is an important exception for the entrance fees for esports events because the VAT Directive (2006/112) stipulates that the national VAT of the Member State in which the event takes place applies.²⁴ However, as discussed in section 9.1., most Member States have taken up the option in the VAT Directive (2006/112) to apply a low VAT rate to entrance fees for sports activities.

9.4. EU VAT exemption for gambling

As discussed in section 6., esports does not fall under betting taxes. This means that it cannot be regarded as gambling, in respect of which there is an EU VAT exemption.²⁵ The negative effect from the exemption is that input tax is not deductible in respect of gambling-related expenses and for a pro rata part of overhead expenses.

10. Conclusions

Esports is a young and fast-growing branch of sports. Gaming has already existed for many years, but Internet opportunities paved the way for a thrilling new professional sports category with young players worldwide.

19. Id., at art. 132(1)(n).

20. I. Froböse, *Science shows that eSports professionals are real athletes*, DW, available at www.dw.com.

21. Annex III, posts 13 (admission to sporting events) and 14 (use of sporting facilities) VAT Directive (2006/112).

22. CZ: ECJ, 10 Nov. 2016, Case C-432/15, *Odvolačí finanční ředitelství v. Pavlína Bašťová*, ECJ Case Law IBFD.

23. Art. 44 VAT Directive (2006/112), as amended by Council Directive 2008/8/EC of 12 February 2008, amended Directive 2006/112/EC as regards the Place of Supply of Services, OJ L44 (2008), EU Law IBFD [hereinafter: VAT Directive (2008/8)].

24. Art. 53 VAT Directive (2006/112), as amended by VAT Directive (2008/8).

25. Art. 135(1)(i) VAT Directive (2006/112).

There may be doubts as to governance and control in esports, which is run by the game developers and publishers, and not by associations as in traditional sports. Also, the violent aspects of most of the games keep it separate from the traditional sports scene, such as the 2024 Olympics in Paris. Some say that this hinders the recognition of esports as a sport, but, in the authors' opinion, it is only a matter of time before esports will be taken seriously everywhere.

Esports is a basket with different games, each having its own characteristics and public following. Esports cannot only be played online, but also offline, in respect of which the major events that have been organized have already been held in regular sports stadiums. Sources of income come from sponsorship, media rights, advertising, merchandise, ticket sales, and from game developers and publishers.

The authors have concluded that esports does not fall under betting taxes, as with poker and other card games, because, for esports, the skills and capacities of the players clearly prevail over the luck of the draw in esports.

Also, the division between employees and self-employed is relevant in esports, thereby leading to wage tax and social security contributions. Esports is very international and can easily cross borders, so the special taxing rule in article 17 of the OECD Model can apply to esports income. This may result in excessive or even double taxation because of the rigid rules underlying this exceptional rule.

With regard to EU VAT, the authors have considered whether esports could meet the criteria set out in the decision of the ECJ in *Bridge* but have concluded that these do not apply and a VAT low rate or even a VAT exemption can be used by esports. On the other hand, the strange and disturbing ECJ decision in *Bastova* regarding variable prize money could have negative consequences for the deductibility of input tax. Finally, esports must follow the specific rules for cross-border services with a central role for the reverse charge system.

Altogether, the authors conclude that esports is a fascinating new branch in the sports world with interesting tax implications. With income streams growing, the tax aspects will become more important, and the authors will continue studying them.



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Rietlandpark 301
1019 DW Amsterdam

P.O. Box 20237
1000 HE Amsterdam,
The Netherlands

Tel.: +31-20-554 0100 (GMT+1)

Customer Support: info@ibfd.org

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