

Preliminary observations on the tax aspects of Esports within the Italian legal framework

Primeiras observações sobre os perfis fiscais dos Esports no panorama jurídico italiano

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Abstract

This contribution, with some adaptations, reiterates the intervention of Prof. Fabio Saponaro at the conference “International Taxation, between Sport, Esports, and Gaming,” organized by the University of Salento (Italy) on March 7, 2024. The event was of scientific relevance to the world of eSports, involving scholars and experts in the field, as well as the participation of Italian and international sports and eSports authorities.

One of the topics discussed at the conference was the fiscal issues related to the phenomenon of virtual sports, which have now reached a global spread. The legal phenomenon under examination has, to date, been regulated by only a few countries (including France, South Korea, Brazil, and Mexico), although the transnational nature of egamers’ activities would require a clear and coordinated regulatory framework at the level of international taxation, as the risk of double taxation on income produced is becoming a tangible concern.

In the intervention, starting from the legal definition of esports and identifying the key features of the phenomenon, including from a tax perspective, the tax treatment of egamers in the Italian experience is examined. The discussion begins with domestic tax rules, adapted to the case in question, and progresses to the interpretation of conventional, bilateral, or multilateral rules on double taxation (generally aligned with the OECD Model Convention), which are indirectly concerned with regulating the phenomenon. The contribution highlights some concerns regarding the current lack of legal certainty faced by legal practitioners when dealing with esports, as well as the opportunity to move beyond this transitional phase towards a new and more comprehensive legal framework. This would apply both to the national level (in Italy, on this matter, Bill No. 970, “Regulation of Videogame Competitions,” was presented on December 19, 2023) and to the supranational and international levels, in order to ensure that operators can navigate within a framework of legal certainty. This would also promote and support public and private initiatives aimed at contributing to the development of a more competitive European esports landscape compared to other extra-European experiences. The relevance of this contribution is confirmed by the recent announcement from the International Olympic Committee (IOC) regarding the celebration of the first esports Olympics in 2025, in Saudi Arabia.

Keyword: Taxation; Esports; Egamers.

Resumo

O presente contributo retoma, com algumas adaptações, a intervenção do Prof. Fabio Saponaro na conferência “A fiscalidade internacional entre desporto, esportes eletrônicos e jogos”, organizada pela Universidade do Salento (Itália) no dia 7 de março de 2024. Um evento de relevância científica para o mundo dos esportes eletrônicos, que contou com a participação de estudiosos e especialistas da área, bem como a presença de autoridades esportivas e de esports italianas e internacionais.

Um dos temas abordados durante a conferência foi precisamente o das problemáticas fiscais relacionadas ao fenômeno dos esportes virtuais, que já atingiram uma disseminação global. O fenômeno jurídico em questão, até o momento, foi regulamentado por poucos países (incluindo França, Coreia do Sul, Brasil, México), embora o caráter transnacional da atividade dos egamers exigisse uma regulamentação clara e coordenada do fenômeno no âmbito da fiscalidade internacional, considerando o risco concreto de dupla tributação internacional sobre os rendimentos produzidos.

Na intervenção, partindo da definição jurídica de esportes eletrônicos e da identificação dos elementos caracterizadores do fenômeno também no campo tributário, examina-se o tratamento tributário destinado aos egamers na experiência italiana. Inicia-se pela disciplina fiscal doméstica, adaptada ao caso específico, para se chegar à interpretação das

normas convencionais, bilaterais ou multilaterais, sobre a dupla tributação (geralmente em conformidade com o Modelo de Convenção da OCDE), que estão, indirettamente, interessadas em regulamentar o fenômeno em questão. No pano de fundo da contribuição, surgem algumas dúvidas quanto à pouca segurança jurídica com que o operador do direito se depara hoje ao falar de esports, bem como a oportunidade de, superada esta fase de transição, se alcançar em breve uma nova e mais complexa fase de regulamentação jurídica do fenômeno. Tudo isso, tanto a nível nacional (na Itália, sobre este tema, foi apresentado o Projeto de Lei n.º 970, “Regulamentação das competições de videogames”, em 19 de dezembro de 2023) quanto a nível supranacional e internacional, com a capacidade de garantir aos operadores um quadro de segurança jurídica que lhes permita melhor orientação, promovendo e apoiando, também, iniciativas públicas e privadas destinadas a contribuir para o desenvolvimento de um cenário europeu de esports mais competitivo em relação a outras experiências fora da Europa. A atualidade da contribuição é confirmada pelo recente anúncio do Comitê Olímpico Internacional (COI) de celebrar as primeiras Olimpíadas de esports em 2025, na Arábia Saudita.

Palavras-chave: Fiscalidade; Esports; Egamers.

Sintesi

Il presente contributo ripropone, con alcuni adattamenti, l'intervento del Prof. Fabio Saponaro al convegno “*La fiscalità internazionale, fra sport, sport e gaming*”, organizzato dall'Università del Salento (Italia) il 7 marzo 2024. Un evento di rilevanza scientifica per il mondo degli *esports*, che ha visto il coinvolgimento di studiosi ed esperti del settore nonché la partecipazione di autorità sportive ed esportive italiane ed internazionali.

Uno dei temi trattati in occasione del convegno è stato, appunto, quello delle problematiche fiscali correlate al fenomeno degli sport virtuali, che hanno ormai assunto una diffusione globale.

Il fenomeno giuridico in esame, ad oggi, è stato disciplinato solo da pochi Paesi (tra cui Francia, Korea del Sud, Brasile, Messico), sebbene il carattere transnazionale dell'attività degli *egamers* richiederebbe una regolamentazione chiara e coordinata del fenomeno sul piano della fiscalità internazionale, rendendosi concreto il rischio di doppia imposizione internazionale sui redditi prodotti.

Nell'intervento, partendo dalla definizione giuridica di *esports* e dall'individuazione degli elementi caratterizzanti il fenomeno anche sul piano tributario, si esamina il trattamento tributario riservato agli *egamers* nell'esperienza italiana. Si parte dalla disciplina fiscale domestica, adattata al caso di specie, per giungere all'interpretazione delle norme convenzionali, bilaterali o plurilaterali, sulle doppie imposizioni (generalmente conformi al Modello di Convenzione dell'Ocse) interessate, indirettamente, a regolamentare il fenomeno in esame. Sullo sfondo del contributo, si colgono alcune perplessità in merito alla poca certezza giuridica in cui si muove, oggi, l'operatore del diritto quando si parla di *esports* e sull'opportunità che, superata questa fase di transizione, si giunga presto ad una nuova e più complessa stagione di normazione giuridica del fenomeno. Il tutto, sia sul piano nazionale (in Italia, in questa materia, il 19 dicembre 2023 è stato presentato il Disegno di legge n. 970, “*Regolamentazione delle competizioni videoludiche*”) sia su quello sovranazionale ed internazionale, in grado di garantire agli operatori di ben orientarsi in un quadro di certezza del diritto e che permetta, altresì, di promuovere e sostenere iniziative pubbliche e private finalizzate a contribuire allo sviluppo di un panorama europeo degli *esports* maggiormente competitivo rispetto ad altre esperienze extraeuropee.

L'attualità del contributo è confermata dal recente annuncio del Comitato Olimpico Internazionale (CIO) di celebrare le prime olimpiadi di *esports*, nel 2025, in Arabia Saudita.

Parole chiave: Fiscalidad; Esports; Egamers.

Introduction

Discussing esports, and in particular the tax profiles of this modern, global, inclusive phenomenon, accessible to everyone regardless of gender, age, and in some cases even an individual's physical or mental abilities, means delving into a field that is still largely unexplored from a scientific perspective. Nevertheless, esports now represent, worldwide, a new way of jointly understanding the sporting phenomenon and gaming.

In Italy, as in other legal systems, there is no civil law framework that explicitly regulates esports, and consequently, there is also no tax regulation that specifically addresses this complex phenomenon.

For this reason, interpreters must necessarily refer, from a hermeneutical perspective, to laws that govern similar cases to fill regulatory gaps or, in the absence of such laws, rely on the general principles of the legal system.

However, while esports may lack legal typicity, a gradually emerging practice is taking shape. This practice is objectively valuable in ensuring that interpreters can identify a common economic and social framework within the esports phenomenon upon which the resulting tax effects can be constructed.

The challenge, then, is to attempt to structure the esports phenomenon within a systematic framework to identify its relevant tax profiles.

Another important aspect from a research perspective is the identification of suitable tools capable of enhancing a phenomenon rich in opportunities for our country. The goal is to make Italy particularly "attractive" through tax measures and incentives that can be adopted by the national legislator, thereby allowing for the broadest possible dissemination of esports and possibly encouraging the relocation of gamers' tax residence to the national territory. For example, recent international tax reform measures approved by Legislative Decree 209/2023 are relevant here, as they introduce new criteria for determining tax residence in Italy and address the tax regime for returning workers.

In fact, esports, with a few rare exceptions, have not yet been recognized as an active sport by the Italian National Olympic Committee (CONI) or by sports federations in general. As a result, although many esports teams in recent years have been established as amateur sports associations or companies, affiliating with some sports promotion bodies, they benefit from very few tax incentives in Italy (though it remains to be seen whether these incentives will be expanded following the establishment of the Sports Activities Register – SAR on August 31, 2022, under the Department of Sports at the Office of the Prime Minister).

Furthermore, it is worth noting that the Italian National Olympic Committee (CONI) seems to focus solely on video games that replicate a real-world sport in the

virtual world and are represented by national sports federations and associated sports disciplines. However, considering the significant business that esports generate, the rest of the esports industry also deserves attention, particularly in terms of the tax treatment that should be applied to them.

Definition of Esports: Key Elements

The term “virtual sport” has been widely used for years, especially since the International Olympic Committee (IOC) in 2021 granted, for the first time, the Olympic license for the Olympic Virtual Series (OVS), announcing that the first esports Olympics will be held in Riyadh, Saudi Arabia, in 2025.

However, the legal assimilation of esports to traditional sports does not appear to be supported at the Union level. The European Parliament, in its resolution of November 10, 2022, on “Esports and Video Games,” classifies esports as “entertainment activities,” repeatedly emphasizing, with meta-legal reasoning, that they do not belong to the traditional sports sector, as by definition they are digital and therefore fall within the video game sector. Furthermore, they belong to private entities that enjoy full legal control and all exclusive and unconditional rights over the video games themselves.

To date, although the recognition of esports as a sports discipline seems to many as an opportunity not to be missed — as it would effectively extend the more favorable tax treatment provided for “sports workers” (Art. 36, paras. 6 to 6-quater of Legislative Decree 36/2021) — it appears difficult to justify such an assimilation for egamers, even from a purely analogical interpretive standpoint.

The absence of a clear regulatory framework and the new supranational definitional forms could lead the Financial Administration (AF) to consider esports as akin to skill games (regulated by Art. 38 of Decree-Law 223/2006, known as the Bersani Decree), administratively managed by the Customs and Monopolies Agency. However, this carries the risk of crossing the boundaries of social games and entering the realm of gambling or, alternatively, prize contests and competitions (regulated by Presidential Decree 430/2001), thus improperly assimilating esports activities to systems far removed from their true nature and function, with the application of particularly stringent and burdensome regulations.

At this point, it becomes clear that a legal framework for esports must be based on an analysis of their defining characteristics, which can be summarised as follows:

1. The existence of a competitive event between two or more players, which can take place in individual matches, tournaments, or leagues. In all cases, there is the involvement of players (egamers) who compete individually or in teams, either in person or online, either occasionally or professionally. The competition always involves both physical and mental input from the player, varying in degree depending on the type of game;

2. The competitive event presupposes the existence of a game software, usually protected by copyright, which belongs to a digital creator who must authorise the use of the video game in a competition;
3. The use of the software typically occurs via a hardware platform (console, computer, mobile devices), which enables the game software to function or ensures network connectivity to the server hosting the video games;
4. The competitions aim to achieve an economic outcome, which may be represented by remuneration, a prize, or compensation, i.e., the provision for the payment of a sum of money as a consequence of the result achieved (victory or a good placement in the competition);
5. The competitions typically involve third parties who offer often substantial prizes for the winner, alongside sponsors and advertisers who financially support the games, tournaments, or egamers themselves, sometimes economically exploiting the image of the latter;
6. Competitions usually also involve spectators (often numerous), both live and remotely, through platforms that broadcast the gaming event (Twitch, YouTube Gaming, etc.).
7. These key elements should serve as a starting point for framing the overall esports phenomenon, including from a tax perspective.

Tax Treatment of Egamers for Direct Taxation Purposes

The esports phenomenon is highly heterogeneous, and the ways in which individual egamers can earn compensation are equally complex.

In this regard, and referring to the traditional income categories provided for in the Italian tax system, it seems possible to classify the earnings of egamers into at least four different sources.

Remuneration for esports activity in the strict sense, if paid by a team, could be classified as:

- a. Employment income, under Art. 49 of the Consolidated Income Tax Act (TUIR), if the egamer's activity is performed under the employment and direction of the team;
- b. Income similar to employment income, under Art. 50, paragraph 1, letter c bis, TUIR, if paid in relation to coordinated and continuous collaboration agreements, applying in both cases the principle of comprehensiveness established by Art. 51 TUIR, which aims to include in this income category all values received by the employee during the employment relationship;
- c. Self-employment income, under Art. 53 TUIR, if the activity is performed individually on a habitual basis, with taxation of the proceeds received net of the expenses incurred;

- d. Miscellaneous income, if the activity is occasional, whereby the income produced would be taxed under Art. 67, paragraph 1, letter d) TUIR, as prizes derived from skill games, taxable on a gross basis, i.e., without the possibility of deducting the costs incurred by the gamers to earn them.

The same taxation rules appear applicable to the compensation gamers receive directly, such as payments from video streaming platforms for streaming content (e.g., Twitch, YouTube, Facebook Live, etc.) or payments received from sponsorship agreements, endorsements, testimonial advertising, or even the sale of image exploitation rights.

In fact, if such rights are transferred by the team, they would constitute employment income. In all other cases, depending on whether the performance is habitual or occasional, they would be classified as self-employment income in the case of the transfer of image rights as compensation received “(...) as a result of the transfer of intangible assets related to the artistic or professional activity performed,” or in all other cases as miscellaneous income for “the assumption of obligations to do, not do, or permit,” under Art. 67, paragraph 1, letter f) TUIR.

A particular case could arise, given the unique nature of gamers, in the sale of the right to exploit the image not of the player but of their avatar (i.e., the digital image). In this case, the image subject to the transfer right is not that of the natural person but that created as a work of authorship by its creator (the gamer). Therefore, only in this case could the income be classified as miscellaneous income under Art. 67, letter g) TUIR, as income deriving from the economic exploitation of works of authorship, unless the sale is habitual, in which case it could be classified as income similar to self-employment income.

Finally, it is worth considering the monetary donations often made by followers to support the gamer's activities. Unlike traditional compensation, these should be considered direct donations of modest value for tax purposes, which do not appear to contribute to the formation of the IRPEF tax base. Moreover, they should not be subject to the gift tax, in line with administrative interpretation on this point (cf. Ag. Ent., Circ. n. 3/E of January 22, 2008).

Territoriality of Compensation and Treaty Provisions

The territoriality of compensation paid to gamers varies depending on whether it is classified as self-employment or employment income. If the activity is performed in Italy, the income earned by an gamer for winning an esports competition will be considered Italian-sourced income if the connection to the virtual gaming platform occurs from Italian territory (for income similar to employment income, the relevant criterion is the residence of the payer).

However, due to the transnational nature of the egamers' activities, both offline and online (involving individuals located in different parts of the world), significant issues arise in terms of international taxation, leading to the real risk of double taxation of the same income. For example, it may occur that the country of residence of one or more egamers is different from that of the tournament organizer (who pays the prize), or that the server used is located in yet another country. It may happen, for example, that one country taxes the egamer because they are a resident, while another taxes the same egamer because they earned the prize in its territory, or because the server used is connected there.

Such issues are usually addressed by relying on bilateral or multilateral double taxation treaties, generally aligned with the OECD Model Tax Convention, which takes precedence over domestic law and typically uses, as a criterion to avoid double taxation, exclusive taxation in the taxpayer's country of residence. This applies both to business profits and income derived from professional services or other independent activities, unless a permanent establishment is present in the source state (Art. 7 OECD Model), as well as to employment income, subject to the conditions set out in Art. 15, paragraph 2, of the OECD Model.

However, in certain cases, this approach is overridden by the application of anti-avoidance provisions under Art. 17 of the OECD Model. This provision, which applies to artists and athletes, derogates from Art. 15 of the same model and provides that the taxation of income earned takes place in the state where the individual's activity is exercised on a case-by-case basis.

Thus, the criterion of close connection between the performance and the income produced is applied, to be evaluated based on individual contractual agreements.

On the possible application of Article 17 of the OECD Model to the case of egamers

The OECD Commentary does not clarify the meaning of "entertainers" and "sportspersons," indirectly highlighting the public and entertainment nature of the performance. Given that the term "sportsperson" is not necessarily limited to traditional sports and does not depend on whether the activity is professional or amateur, it has been suggested by many that the rule could also apply to egamers, as their activity undoubtedly has a recreational and entertainment function (as also clarified by the European Parliament). This implies that the provisions of Article 17 of the OECD Model could apply to Italian egamers.

With regard to the objective scope of application of the aforementioned Article 17, it should be noted that it covers all income that is directly related or has a close connection with the personal performance rendered by the egamer. In this sense, it will be essential to conduct a case-by-case analysis to determine, based on the

contractual agreements, whether income deriving from sponsorships, advertising activities, merchandising, or the exploitation of image rights also falls within the scope of these provisions. In such cases, the taxation of the egamer's income in the foreign State (different from their State of residence) would be permitted, assuming that the entertainment activity is materially performed there.

Therefore, it is necessary to determine, on a case-by-case basis, the location where the egamer performs their activity. On this point, the greatest uncertainties arise. For offline tournaments, the answer is simple as it is the location where the competition is held in person. For online tournaments, however, it could be the place from which the egamer connects remotely to participate in the competition or the location of the server hosting the digital gaming platform to which the users connect to participate in the competition. Drawing a parallel with film production, where the following may be relevant: a) the State where the actor is present for filming; b) the State of residence of the production company; c) the State of residence of the actor.

It is indisputable that if Article 17 clearly refers to "the personal activities as such exercised in the other Contracting State," the answer can only be the first, i.e., the location where the film shootings occur. Therefore, in the case of gamers, this would correspond to the State from which they remotely connect to the virtual gaming platform that allows them to participate in the online competition (which should coincide with their State of residence).

It must be acknowledged, however, that the treaty rule appears inadequate, given that new forms of online entertainment do not require any physical presence and take place on virtual gaming platforms. For these forms of entertainment, there is, therefore, doubt as to how to determine a source rule for the income that could replace the one based on physical presence. One might consider allowing taxation in the State of residence of the entity organising the virtual competition (based on the model of Article 16, which taxes the income of directors in the country where the company in which they exercise their functions is resident).

The uncertainty illustrated is further amplified when addressing the conventional classification of miscellaneous income, such as the occasional assignment of image rights, which could either fall under Article 21, covering income not included in other articles, or under Article 12, treating the case as royalties, although it is not easy to equate income received for the assignment of image rights with that received for the assignment of intellectual property rights.

Concluding Remarks

The scenario described above highlights the lack of clarity encountered by national legal practitioners when addressing esports. The hybrid nature of the phenomenon and the absence of an organic regulatory framework make a clear legal

classification difficult. For now, esports are often assimilated to other realities that do not accurately reflect the true nature of virtual sports (such as traditional sports, video games, social games, gambling, prize competitions, etc.).

The absence of a regulatory framework, even at the supranational level, could lead the tax authorities to interpretations that do not reflect the reality of the situation, potentially applying excessively stringent rules that are not aligned with the essence and nature of esports activities as a whole. This could foster, both administratively and judicially, possible disputes concerning the correct application of the relevant national and international tax rules. Moreover, and even more seriously, it could discourage investments by industry operators, as well as encourage egamers to settle in countries with clearer and more favourable tax systems, thus being more attractive.

The comprehensive regulation of the phenomenon is still in a transitional phase, awaiting a hoped-for national legislative intervention, including fiscal provisions, to regulate the sector. Additionally, a European Union initiative is needed to promote and support public and private initiatives that can contribute to developing a more competitive European esports landscape (as announced in the Resolution of 10 November 2022). On the international tax law front, it is also hoped that the OECD will introduce principles and rules better suited to regulate this growing phenomenon unequivocally.

Italy should not miss the opportunity to swiftly introduce national regulations, including fiscal ones, as other countries have already done (including France, South Korea, Mexico, and more recently, Brazil), that ensure the widest possible dissemination of esports—set to grow exponentially—within a clear, fair, and incentivizing legal framework. The hope for Italy is that the recent bill no. 970 of 19 December 2023, may successfully complete its legislative process and kick off the much-anticipated esports regulatory era. Finally, it remains to be seen what effect the International Olympic Committee's (IOC) announcement regarding the organization of the first esports Olympics in 2025 will have on national legislations, including the Italian one.

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