

Is the Tax on Prizes applicable to draws and promotional lotteries?

The tax on prizes distributed by means of sport draws and lotteries

Act 20,630¹ set an emergency tax on the prizes distributed by means of certain sport draws and lotteries. In spite of the “emergency” name given to the tax -and hence essentially temporary - the tax is still in force, after more than forty-five years as from the enactment of the legal regulation that created it.

The Act that regulates the tax states that the purpose thereof are the prizes won in draws (lotteries, raffles and the like) as well as in sports betting contests other than horse-races bets, organized in the country by official or private entities bearing the relevant authorization.

The organizing entities -official or private- are obligated to pay the tax as surrogate taxpayers of the winners' obligations and said payment is performed by withholding a sum detracted from the total amount of the prize -if the prize is in cash - or by paying the tax, which must be required to the winner at the time the prize is delivered -if it is in kind².

The tax is not imposed on any draw or lottery

Section 1st, first paragraph of Act 20,630, sets forth that private entities will fit into the framework of the taxable event -only- when an official authorization is to be required to organize the relevant sports forecasting draw or lottery.

When said authorization should not be required, the organizing private entities are not included in the budget that generates the tax obligation and the prizes are not reached by the Act governing the tax.

In other words, the authorization is a defining feature to be subject to Act 20,630 and therefore for the payment of the tax. If the authorization is not necessary, the tax must not be paid³.

¹ Enacted on December 27, 1973. Passed on January 14, 1974.

² As set forth in sections 4th and 5th of Act 20,630, the tax considers as a net amount of each prize ninety percent (90%) thereof, on which a rate of thirty-one percent (31%) shall be applied. In short, the national tax authorities gathers twenty-seven percent point ninety (27,90%) of the value of each prize when the net amount thereof reaches or exceeds AR\$ 1,200,- (One thousand two hundred Argentine Pesos), under said amount the prizes are exempted from the tax.

³ This is confirmed not only by the terms of section 1st of Act 20.630, but also by section 6th of decree 668/74 - that regulates the Act - which on establishing that the value of the prizes in kind is referred, in the case of games and raffles organized by private entities, to the value that has been assigned or accepted by the competent authority at the time of granting the “respective authorization”.

The “relevant authorization” that includes the taxable event

It is clear that when defining the taxable event, Act 20,630 mentions the prizes of draws that will be subject to the tax, it means those resulting from lotteries, raffles and the like organized in the country by private entities with the “relevant authorization”.

At the time the Act was enacted, said “relevant authorization” was regulated by national decree 7342/65 -then regulating the organization of raffles, tombolas, charity raffle ticket and other similar games - and then also by Act 18,226⁴ which was required because said draws were games of chance -since they implied bets - that the law had reserved to the National Government and the Provinces, so they could exploit them as a monopoly.

Ultimately, the prizes comprised in the tax created by Act 20,630 were those that implied a bet; the payment of a bill or ticket to participate in a game in which some win and others lose. Those who lost -of course - paid their access to the chance of winning, either through tickets or raffles or charity raffle tickets and were not favored by chance with a prize.

What the Government reserved to the then existing *Lotería Nacional de Beneficencia y Casinos* and the provinces and forbid to others -except for public welfare organizations that complied with different requirements, among which the basic one was to apply for and obtain an authorization - was the “game of chance” or “betting game”, understood as the exploitation of its benefits, consisting in the difference between the value of prizes and the sums collected from all those who paid their right to participate in the draw.

The onerousness of access to the draw as an objective element of the taxable event has not been amended⁵.

Any other prizes won in draws that did not bear said features, and therefore were not comprised within the terms of the analyzed regulations and were not subject to the obtention of an authorization, should not pay

⁴ Creation of the then *Lotería de Beneficencia Nacional y Casinos*.

⁵ When section 1st of the regulation of Act 20,630 states that the prizes reached by the Act are all those won in games or forecasts referred to in its section 1st, regardless of the fact that the right to participate in same is an onerous or gratuitous act, it clarifies that even the ticket, coupon or right to participate in a draw as those mentioned in section 1st of the Act has been given as a gift, gratuitously assigned or awarded in turn as a prize - to some merit or through a draw - the tax is likewise imposed. But it does neither modify, nor could modify on a regulatory basis, the objective element that defines the draws comprised in the tax that were those requiring the authorization set forth in decree 7342/65 and then in Act 18,226.

the tax of Act 20,630, but -in any case- that of the Income Tax Act 20,628⁶.

Draws or lotteries made as part of sale promotions of products -or services- in which prizes were randomized, were neither comprised in the regulations of Act 18,226 nor in decree 7342/65 -since there was no “bet”- hence, no authorization should be required from the Ministry of the Interior or the then *Lotería Nacional de Beneficencia y Casinos* to make them, and therefore the tax provided for in Act 20,630 should neither be paid on them.

The sale promotions with prizes distributed by draws

Many sale promotions with prizes distribute prizes by draws; for example among the consumers that upload certain personal data in a Website and -eventually- the data of the promoted product or who send said information to certain telephone number by using the WhatsApp application or who send coupons obtained with the purchase of the product -or without purchasing the product, which is an obligation in promotional draws and lotteries as set forth in section 14, subsections a) and b) of decree 274/2019.

In promotions, consumer may participate in the raffles, draws or lotteries gratuitously.

Not only because, on the basis of the regulations in force, the coupon, label, container or any other element related to the promoted product or service necessary to participate in the raffle included in a promotion may be obtained without acquiring the product or hiring the promoted service.

But also -and essentially - because the price paid for the product, when it is acquired, does not pay the right to participate in the draw or lottery, but -I apologize for the obviousness - the value of the product. The product bears the same prize for the person who participates in the promotional draws or lotteries and for that who does not participate in the same. And it bears the same price -assuming that the inflation level of an economy is “normal”, of course- before, during and after the life of the promotion that includes the draw or lottery.

⁶ *The prizes not reached by Act 20,630 were levied, at the time of enactment of said Act, by the Income Tax, which Act, in section 2nd, second paragraph, considered as levied income “those arising from games of chance, bets, draws or sport, artistic or any other kind of competitions, when they are not reached by the tax on prizes of certain games and draws” (Act 20,628, original text). Said other prizes were levied then by the Fifth Category of the Income Tax, as per operation of section 79 subsection b) of said Act and by section 99 (in fine) of its regulations.*

Said regulation was later amended by Act 21,286, that deleted the second paragraph of section 2nd and as from January 1st, 1976, the prizes previously reached by the Income Tax Act, were exempted from said tax. The Tax on Eventual Benefits (Impuesto sobre los Beneficios Eventuales) did not levy said prizes either, in spite of section 1st, subsection a) of the respective Act, due to an express exemption contained in its section 3rd.

Hence, in the sale promotions with prizes no betting game is exploited, because there is no benefit expected by its organizers resulting from the difference between the value of the prizes and the price to have access to the draw or lottery, which does not exist.

In the lotteries organized under decree 274/2019 (that replaced the derogated Fair Commercial Practices Act N° 22,802), to promote the sale of products and services, the essential element that would imply to invade an area reserved to the governmental monopoly is missing, i.e. to make the “bet” -the payment of a price for the “ticket” or “charity raffle ticket” or “chance” to participate in the same.

The promotional draw or lottery is not organized to obtain a profit from the game. There are no bets, and that is the reason why, some win and others lose. A prize may not be won in the draw but no one loses in the terms of a betting game, because the “chance” is not paid.

In consideration of the foregoing, these draws were never subject to the authorization set forth by decree 7342/65 and by Act 18,826 which, I insist, were borne in mind by the legislator to delimit the taxable event provided for in Act 20,630.

The authorization of promotional draws required by the derogated decree 588/98

The authorization required by the end of year 1998 and the beginning of 2018 for every type of promotional draws, raffles or contests of products or services, as provided for by decree 588/98 issued by the National Executive Branch⁷ and of Resolution 157 of Lotería Nacional Sociedad del Estado⁸, was an authorization different from the one borne in mind by the legislator by the end of year 1973.

But, aside from the objections that could be raised on the capacity of these regulations to include the taxable event of the tax on prizes, on February 14, 2000 the Legal Bureau of the Federal Administration of Public Revenues (*Administración Federal de Ingresos Públicos*), issued a report sustaining that as from the effectiveness of decree 588/98 the prizes obtained in lotteries or draws conducted within the framework of sale promotions of products o services and with respect of which the

⁷ Decree 588/98 was in force almost 20 years, between the beginning of June 1998 and February 2, 2018, which it was derogated by section 19 of the emergency decree 95/2018.

⁸ At present undergoing the liquidation process.

authorization of Lotería Nacional S.E. should be obtained, according to the provisions of said decree, were reached by the tax on prizes created by Act 20,630.

Decree 588/98 was derogated on February 2, 2018 by section 19 of the emergency decree 95/2018 and Lotería Nacional Sociedad del Estado was declared as undergoing a liquidation process by section 17 of the same regulation. No national authorization is required since 2/2/19 to organize promotional draws or lotteries.

The authorization is now required by the provincial regimes

Lately, regimes have been set up in some provinces which establish that it is compulsory to require from any provincial entity an authorization to carry out sale promotions with delivery of prizes distributed with the intervention of chance.

Such is the case, for example, of the provinces of Neuquén, since 2015⁹, of Río Negro, since 2016¹⁰ and of Salta, since 2005¹¹.

In the three cases the grounds for the issuance of said regulations -weak because it does not consider that the promotional draws or lotteries do not imply bets - are that the “game” is not an issue delegated to the Nation and therefore its regulation corresponds to the provinces. Also in the three cases the regulations impose upon organizers of promotions the payment of amounts of money in favor of the provincial states -which are classified as fees or rates - and represent up to twenty-five percent (25%) of the value of the prizes offered in the jurisdiction.

Then -since the draws and lotteries must not be authorized by the national authority - I wonder if the obligation to pay the Tax on Prizes of Act 20,630 survives when the promotional mechanisms are valid in one or more Jurisdictions in which the authorization of the provincial state is required to conduct them.

In other words, do the authorizations required by the provincial regulations constitute the “relevant authorization” referred to in section 1st, first paragraph of Act 20,630?

⁹ *General Regulations of Promotional Operations (Reglamento General de Operatorias Promocionales), Annex II of the Resolution issued by the Instituto Provincial de Juegos de Azar (IJAN) N° 532/15.*

¹⁰ *General Regulations of Commercial Promotions and Encouragement of Commercialization of Products and Services (Reglamento General de Promociones Comerciales y de Estímulo de Comercialización de Productos y Servicios), that makes-up the Annex to the provincial decree 575/2016.*

¹¹ *Resolution 26/2005 issued by the Enforcement Authority of the Games of Chance (Ente Regulador del Juego de Azar) of the province of Salta.*

In my opinion the answer to this question is no.

Basically, because in the promotional draws regulated by the provinces there is no onerousness, as mentioned above. In order to participate in the same no “bets” are required. And the existence of bets was -and still is - the necessary condition to obtain the “relevant authorization” set forth in Act 20,630.¹²

Notwithstanding the foregoing, bearing in mind that when the decree of the National Executive Branch 588/98 was issued, the AFIP did not consider -in spite of the text of Act 20,630- that the existence of bets was a necessary requirement for the “relevant authorization” referred to in the said Act, it cannot be set aside that said AFIP may consider now that the provincial authorizations are enough to have the taxable event.

Assignment of prizes for events other than a final draw.

In spite of the fact that the AFIP’s opinion could be applied to the Tax on Prizes of Act 20,630 in the cases in which the promotional draws should be authorized by one or more provincial authorities, we highlight that, according to section 3rd of decree 668/74 -as mentioned above, which regulates Act 20,360- the prizes of games that combine chance with elements or circumstances that are not related to chance, such as the participants’ culture, ability, skill, expertise or strength, will be considered reached by the Act only if the award of said prizes depends on a final draw or raffle.

Therefore, even when the election of the potential winners of the offered prizes is made with the intervention of chance, if the right to receive the prize is conditioned to the fact that the participant selected by chance must successfully face skill, ability, expertise, strength or cultural tests the tax shall not apply.

Hence, if, for example, the selected winners of the draws must in addition answer correctly questions of general culture as a necessary requirement for the assignment of prizes, the tax shall not apply.

This does not preclude the merit existing as regards the degree of complexity or difficulty of the questions, since it cannot define the

¹² Said “relevant authorization”, as I mentioned above, was regulated, at the time Act 20.630 was issued, by the national decree 7342/65 – which then regulated the organization of raffles, tombolas, charity raffle tickets participating in draws and other similar games - and then also by Act 18,226 which was required because said draws were games of chance - and implied bets - that the law had reserved to the National Government and the provinces, so they could exploit them as a monopoly.

exclusion or not from the scope of application of the tax, unless the questions in fact are not such because they contain the answers. If it is not a mere fiction of questions, the higher or lower difficulty for the answers must be accepted for the exclusion of the tax payment.