Neutral Citation Number: [2013] EWCA Civ 1464

Case No: A3/2012/3101

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(Tax and Chancery Chamber)
The Hon. Mr Justice Briggs
[2012] UKUT 242 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 15th November 2013

Before:

LORD JUSTICE MOSES
LADY JUSTICE BLACK
and
LADY JUSTICE GLOSTER

- -

Between:

Aspinalls Club Ltd	**Appellant**
- and -	
Commissioners for Her Majesty's Revenue & Customs	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Andrew Hitchmough QC and Mr Jonathan Bremner (instructed by **PricewaterhouseCoopers Legal LLP**) for the **Appellant**
Miss Elizabeth Wilson (instructed by **the General Counsel and Solicitor for HM Revenue and Customs**) for the **Respondents**

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Judgment

Lord Justice Moses:

1. Aspinalls Club Limited offers incentive schemes to wealthy customers whom they wish to encourage. Those schemes offer either commission proportional to the amount of chips staked or a percentage rebate of losses, once the customers have achieved a minimum turnover requirement during the short (usually 14 days) duration of the agreement between customer and club. Aspinalls seeks to deduct the commissions and rebates from the "banker's profits" chargeable to gaming duty under the Finance Act 1997.

2. The Commissioners for Her Majesty's Revenue and Customs rejected such deductions. The First Tier Tribunal [2011] UKFTT 325 (TC) and Mr Justice Briggs sitting as the Upper Tribunal (Tax and Chancery Chamber) [2012] UKUT 242 (TCC) dismissed Aspinalls' appeals. Aspinalls now appeal against the decision of Briggs J.

3. The First Tier Tribunal and the Upper Tribunal set out the agreed facts, (paragraphs 17-27 of the First Tier Tribunal included in the Upper Tribunal decision at paragraphs 26 and 27).

4. The relevant statutory provisions with their history are explained by Briggs J (between paragraphs 8 and 25). Gaming duty is chargeable on premises where dutiable gaming takes place (s.10(1)) of the Finance Act 1997). Section 11 sets out the rates of duty. Gaming duty is chargeable for any accounting period by reference to specified rates applied to the "gross gaming yield"; percentages charged increase in line with increases in the gross gaming yield (s.11(2)). Section 11(8) provides:-

> "For the purposes of this section, the gross gaming yield from any premises in any accounting period shall consist of the aggregate of –
>
> (a) the gaming receipts for that period from those premises and
>
> (b) where a provider of the premises (or person acting on his behalf) is banker in relation to any dutiable gaming taking place on those premises in that period, the banker's profits for that period from that gaming."

It was agreed that the club was both the provider of the premises and the banker (provider is defined in s.15(3)). The method of calculating the banker's profits is identified in s.11(10):-

> "In sub-section 8 above the reference to the banker's profits for any gaming is a reference to the amount (if any) by which the value specified in paragraph (a) below exceeds the value specified in paragraph (b) below, that is to say:-
>
> (a) the value, in money or money's worth of the stakes staked with a banker in any such gaming; and

(b) the value of the prizes provided by the banker to those taking part in such gaming otherwise than on behalf of a provider of the premises."

5. There were three types of incentive provided. Under the "Cash Chip Agreement" Aspinalls agreed to pay a player a commission based on the total amount of cash chips staked on all bets over the course of the agreement providing the player had staked enough to meet the turnover requirement.

6. In clear and beguiling submissions Mr Hitchmough QC, on behalf of Aspinalls, submitted that the value in money or money's worth of the stake staked was the value which the player risked. It was not, accordingly, necessarily the face value of the chip. On the contrary, the value of the stake staked had to be determined by reference to the contract between Aspinalls and the player under the Cash Chip Agreement. The value of the stake staked by a player who had entered into such agreement was therefore the value of the stake, less any commission due to him under the agreement.

7. Contrary to Briggs J's criticism, this argument does not depend upon "a perception of value to the player or value to the banker". It is consistent with the objective ascertainment of value assured by s.11(10)(a) (UT [35]).

8. But I reject the argument. Section 11(10)(a) is clear. The value in money or money's worth of the stakes staked is the face value of the chip. Staking a chip is the same as staking money and the value in money of the chip is its face value (see Davis LJ in *CHT Limited v Ward* [1965] 2 QB 63,79 and Lord Goff in *Lipkin Gorman v Karpnale Limited* [1992] 2 AC 548 (HL) 575 cited at FTT [30], and UT [35]). The stake is the amount risked in connection with the game; it is the value of that stake which is put at risk in the game. The value put at risk in the game is not altered by reference to any commission the player receives under the Cash Chip Agreement.

9. Mr Hitchmough sought to make good his argument by deployment of the reference in s.11(8) to "banker's profits". The concept of profit itself, so he submitted, contemplates the deduction of that which it cost to earn those profits; in short, the expression is a reference to what Mr Hitchmough called the underlying economic reality.

10. I accept that it is easy, when seeking to construe a statutory expression in its proper context, to overlook the impact of the particular expression or words used by the draughtsman. "If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean" (Lord Hoffmann in *Macdonald v Dextra Accessories Limited* [2005] AC 1111 [18]).

11. But there is no ambiguity in the definition of "banker's profits". "The value, in money or money's worth, of the stakes staked" means what it says: it is the value of the chips risked in the relevant charging period.

12. The Cash Chip Agreement did not depend on whether the player won or lost. In contrast, the other two incentive agreements, the "Rolling Chip Agreement" and the "Rebate Agreement", depended on the total value of chips staked on losing bets over the period of the agreement. Under the "Rolling Chip Agreement", Aspinalls agreed to pay a commission to a player based on the total value of "rolling chips" staked on

losing bets. Rolling chips are chips distinguishable by colour from ordinary cash chips. Under the Rebate Agreement, Aspinalls agreed to pay a percentage of the player's aggregate loss over the duration of the relevant period once the player met the turnover requirement.

13. Aspinalls contended that the sums paid under these two agreements and, for that matter, the sums paid under the Cash Chip Agreement, were prizes to be added into the calculation of the value of the prizes provided by the banker for the purposes of s.11(10)(b). At first blush, the value of the prizes provided by the banker, otherwise than on behalf of a provider of the premises, seems to be a reference to the value of the winnings. But, contends Mr Hitchmough, prizes are to be distinguished from the winnings and include the rebates and commissions identified in the incentive agreements.

14. Mr Hitchmough QC seeks to make good this argument by reference to what he submitted was a significant amendment introduced by s.105 and Part 4 of Schedule 25, paragraph 16, and 18(1) and (2) of the Finance Act 2007. Before that Act came into force, s.11(10)(b) referred to winnings and not prizes. Previously it read:-

> "The value, in money or money's worth, of *the winnings* paid by the banker to those taking part in such gaming otherwise than on behalf of the provider of the premises." (my emphasis)

15. The substitution of "prizes" for "winnings" carries with it, so Mr Hitchmough contended, the implication that "prizes" include more than the amount won by those taking part in the chargeable gaming. His argument derives even greater purchase from the Explanatory Notes to clause 104 in Schedule 25 of the Finance Bill 2007:-

> "Sub-paragraph 2 of clause 18 in Schedule 25 amends s.11(10(b) to align the treatment of winning with that which applies to remote gaming."

Remote gaming duty was introduced by the Finance Act 2007 following its legalisation, under licence, under the Gambling Act 2005 which came into force at the same time as the Finance Act 2007. The duty on remote gaming is charged in accordance with s.26A-26N in the Betting and Gaming Duties Act 1981 (see s.8, Schedule 1, part 1, paragraphs 1 and 2 of the Finance Act 2007). Remote gaming duty is charged on remote gaming profits for an accounting period, being the amount of gaming receipts less the amount of expenditure (see s.26C). Remote gaming receipts are defined (s.26E of the Betting and Gaming Duties Act 1981). Provision is also made for the calculation of expenditure:-

> "**26F Remote Gaming Winnings**
>
> (1) The amount of P's expenditure on remote gaming winnings for an accounting period is the aggregate of the value of prizes provided by P (the provider of facilities for remote gaming) in that period which have been won (at any time) by persons using facilities for remote gaming provided by P.

> (3) A reference to providing a prize to a user (U) includes a reference to crediting money in respect of gaming winnings by U to an account, subject to stated conditions.
>
> (4) The return of a stake is to be treated as the provision of a prize.
>
> (6) Where P credits the account of a user of facilities provided by P (otherwise than as described in subsection (3)), the credit shall be treated as the provision of a prize; but the Commissioners may direct that this subsection shall not apply in a specified case or class of cases."

16. When the Finance Act 2007 introduced those provisions into the Betting and Gaming Duties Act 1981 in relation to the calculation of the duty chargeable in respect of remote gaming, it did not introduce those provisions into the Finance Act 1997 in relation to the calculation of the duty chargeable on premises where gaming takes place.

17. But the Finance Act 2007 *did* amend the Finance Act 1997 in other respects. It amended s.11(10) by substituting "*prizes provided*" for "*winnings paid*". Moreover, it added s.11(10A):-

> "Sub-sections (2)-(6)(a) of s.20 of the Betting and Gaming Duties Act 1981 (Expenditure on Bingo Winnings: Valuation of Prizes) apply, with any necessary modifications, for the purposes of gaming duties they apply for the purposes of bingo duty."

18. It is not necessary to set out the whole of s.20 of the Betting and Gaming Duties Act 1981. Its flavour can be discerned from two sub-sections:-

> "(1) A person's expenditure on bingo winning…is the aggregate of the values of prizes provided by him in that period by way of winnings…
>
> (3) Where a prize is a voucher which
>
> (a) may be used in place of money as whole or partial payment for benefits of a specified kind obtained from a specified person
>
> …
>
> the specified amount is the value of the voucher for the purposes of sub-section (1)."

Section 20 contains no equivalent to the deeming provisions in s.26F(6) of the 1981 Act.

19. The lack of any explicit reference anywhere in s.11, as amended by the Finance Act 2007, to "crediting money" or "crediting the account of a user of facilities" is

significant. After all, it was the self-same Finance Act, namely the Finance Act 2007, which amended the Betting and Gaming Duties Act 1981, in reference to remote gaming, and the Finance Act 1997 in relation to gaming duty. It seems to me plain that if it was intended that the "prizes" to which s.11(10)(b) of the Finance Act 1997 refers, after amendment, were intended to include the crediting of money or the crediting of an account, whether by way of commission or rebate, then the Finance Act 2007 would have said so explicitly. The Finance Act 2007 enlarged the concept of prizes for the purposes of remote gaming but did not do so for the purposes of the duty on premises under the Finance Act 1997.

20. The absence of such provision is so striking that I am unable to accept that the substitution of the expression "prizes provided" for "winnings paid" carried with it the inclusion of the commission or rebates provided under the incentive agreements.

21. Mr Hitchmough's acute eye spotted the absence of any reference to 'winning' a prize in s.11(10)(b) in contrast to s.26F of the 1981 Act. But it is inconceivable that the draughtsman by a subtle substitution required "prizes" to carry the implication of commission and rebates; still less when he made express reference to similar credits in relation to remote gambling.

22. I am called upon to construe the statute and not the Explanatory Note. The Explanatory Note may itself be explained by the reference to prizes in the bingo duty provisions in s.20 of the Betting and Gaming Duties Act 1981 as amended. But whether it can be explained or not, I cannot believe that the draughtsman sought to introduce so substantial an amendment in so opaque and coy a manner.

23. For those reasons, I would dismiss this appeal. Other arguments previously advanced either by the Commissioners or Aspinalls were, sensibly, not pursued.

Lady Justice Black:

24. I agree.

Lady Justice Gloster:

25. I also agree.