[2016] UKUT 259 (TCC)

Appeal number: UT/2015/0006

GAMING DUTY – non-negotiable chips and free bet vouchers provided free of charge to players and used for gaming – value for gaming duty purposes – whether face value or no value – s 11, Finance Act 1997

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LONDON CLUBS MANAGEMENT LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MR JUSTICE HENDERSON
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, 7 Rolls Buildings, Fetter Lane London EC4 on 26 April 2016

Andrew Hitchmough QC and Barbara Belgrano, instructed by BDO LLP, for the Appellant

Elizabeth Wilson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal raises the question of the liability to gaming duty in respect of the playing as stakes in casino games of free bet vouchers or "non-negotiable" chips which have been provided by the casino to the player free of charge. The essential statutory question, as we shall describe in more detail, is the value, in money or money's worth, of the stake staked in the game when a free bet voucher or non-negotiable chip is played. The First-tier Tribunal ("FTT") (Judge Sinfield) decided that the value for this purpose was the face value of the voucher or chip and that accordingly the liability of the appellant, London Clubs Management Limited ("LCM"), to gaming duty fell to be calculated by reference to that face value. It is from that decision that LCM now appeals.

2. Mr Hitchmough QC and Ms Belgrano appeared for LCM, as they did in the FTT, and HMRC were represented by Ms Wilson, who also appeared before the FTT. We are grateful to them for their helpful skeleton arguments and oral submissions.

The facts

3. The facts can be shortly stated. There was no dispute in that respect in the FTT, and the FTT summarised the position at [3] to [10] of its decision.

4. As a promotional tool, LCM provides selected customers with a range of means of placing bets free of charge. Those means, non-negotiable chips and certain vouchers collectively called free bet vouchers, are described by the FTT at [6] to [10]. There are certain differences between them, but it was not suggested that those were material to distinguish one from another for the purpose of this appeal.

5. As the FTT described the position at [6] to [7], non-negotiable chips are similar to normal cash gaming chips ("cash chips") which are either purchased for cash at the gaming tables or won by customers on a winning bet. Non-negotiable chips are used to place bets at the gaming tables in the same way as cash chips. Like cash chips they are replayable until lost. If a player places a bet with non-negotiable chips and wins, the banker pays out the winnings in cash chips and the player retains the non-negotiable chips to place further bets. When such a player loses, the banker takes the non-negotiable chips and places them in the table's "drop box" as the FTT described at [7].

6. Whilst non-negotiable chips are similar to cash chips, there are differences. First, of course, the non-negotiable chips are not purchased for cash, but are provided free of charge. Secondly, a non-negotiable chip can only be used to place a bet at the gaming tables; unlike a cash chip it cannot be encashed or used to pay for goods and services. Thirdly, there are certain physical differences which enable a non-negotiable chip to be distinguished from a cash chip.

7. Apart from "free gaming chips vouchers", which are exchangeable for non-negotiable chips at the casino's cash desk without charge, free bet vouchers are

similar to non-negotiable chips in that they may be used to place a bet at the tables. "Free play vouchers" and "replayable vouchers", whilst subject to terms and conditions such as in relation to the games capable of being played, the types of bet and what prizes might be won, are the same, in playing terms, as non-negotiable chips, the only difference being the use of the voucher instead of a chip. Other free bet vouchers, namely "one-hit" vouchers and "cash match" vouchers are different in that, unlike the non-negotiable chips, they may not be replayed even after a winning bet. Those vouchers are placed in the drop box irrespective of whether the bet with them has won or lost.

8. We refer, as did the FTT, to the non-negotiable chips and free bet vouchers collectively as "Non-Negs". Although it was not argued that there should be any distinction drawn between them, we should just interpose at this stage that it did not appear to us that the free gaming chips vouchers should have been included in the same category as other Non-Negs. As we shall describe, the relevant element of the banker's profits by reference to which the charge to gaming duty arises requires the value of the "stakes staked" to be taken into account. In contrast to the other Non-Negs, free gaming chips vouchers are not used in the game itself, nor do they end up in the drop box; it is the non-negotiable chips into which those vouchers may be exchanged which are used in the game and which, on a losing bet, are placed in the drop box.

The law

9. Gaming duty is an excise duty that was introduced with effect from 1 October 1997. So far as material, s 10(1) of the Finance Act 1997 ("FA 1997") provides:

> "… a duty of excise (to be known as 'gaming duty') shall be charged in accordance with section 11 below on any premises in the United Kingdom where gaming to which this section applies ('dutiable gaming') takes place on or after [1 October 1997]."

10. It is not in dispute that the gaming at issue in this appeal is within the scope of s 10 and is dutiable gaming. In its current form, which has applied from 27 April 2009, s 10(2) provides that s 10 applies to "casino games". Before that s 10(2) specified particular games. That sub-section is relevant to this appeal in both forms, as LCM's claim for repayment covers the period 1 October 2008 to 30 September 2012, but it is accepted that nothing turns on the change.

11. Section 11 FA 1997 sets out the rate of gaming duty. It is not necessary for us to set out the rates, which are subject to change, but s 11 otherwise relevantly provides:

> "(1) Gaming duty shall be charged on premises for every accounting period which contains a time when dutiable gaming takes place on those premises.
>
> (2) … the amount of gaming duty which is charged on any premises for any accounting period shall be calculated, in accordance with the following Table, by—

(a) applying the rates specified in that Table to the parts so specified of the gross gaming yield in that period from the premises; and

(b) aggregating the results.

[Table *not reproduced*]

…

(8) 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 [*not relevant to this appeal*]; and

(b) where a provider of the premises (or a 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.

…

(10) In subsection (8) above the reference to the banker's profits from 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 the 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.

(10A) Subsections (2) to (6)(a) of section 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 duty as they apply for the purposes of bingo duty."

The FTT's decision

12. The FTT rejected the argument for LCM that the Non-Negs did not have any value in money or money's worth within the meaning of s 11(10)(a) FA 1997 because the player does not pay for the Non-Neg and does not risk anything of value when he or she plays the Non-Neg. It accepted instead the argument for HMRC that the value of the Non-Negs, in money or money's worth, is their face value.

13. Two particular authorities were considered by the FTT, *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 and *Aspinalls Club Ltd v Revenue and Customs Commissioners*, both in the Upper Tribunal, [2012] STC 2124, and in the Court of Appeal, [2014] STC 602. In rejecting the submission of Mr Hitchmough that the player risked nothing when playing with a Non-Neg because it was a free bet, the FTT said, at [27] to [28]:

"27. Mr Hitchmough emphasised Moses LJ's use of the word risk in *Aspinalls CA* and linked it to the description of the character of a chip in *Lipkin Gorman* to support his submission that a Non-Neg had no

> value as a stake because it did not represent money deposited with the casino. He contended that the player risked nothing when playing with a Non-Neg because it was a free bet. I do not accept that submission. In this case, the Non-Negs have a monetary face value. The fact that the player does not risk losing any money does not mean that the Non-Neg does not have any value in money when used as a stake in a casino game. If the player makes a winning bet then the monetary value stated on the Non-Neg is used to calculate the player's winnings in cash chips. If the player makes a losing bet then the player does not lose any money but no longer has the right to bet the monetary value stated on the Non-Neg for free. In the language of section 11(10)(a) FA97, the amount stated on the Non-Neg is the value, in money, of the stake staked with the banker in the game.
>
> 28. I do not regard the judgments in the *Aspinalls* appeals as supporting a different analysis. The cash-backs and commissions paid by the Club to certain high-rollers for staking stakes in games on the premises did not affect the 'stakes staked' with the banker in the gaming, nor the value in money of 'the stakes staked' in the game. It seems to me that the value, in money or money's worth, of the stake staked is the value of the stake as staked and not the value as determined by some other agreement or circumstance. In my view, that is what Briggs J meant in *Aspinalls UT* when he held that section 11(10)(a) FA97 assumes an objective ascertainment of value. I do not consider that Moses LJ in *Aspinalls CA* applied anything other than an objective assessment of value when he talked about 'the value put at risk'. In that case, the player had deposited money with the Club in relation to the chips used and so that money was at risk when those chips were staked. In using the word 'risk', it seems to me that Moses LJ was doing no more than reflecting the facts of that case. In my opinion, the learned judge was not saying that where a player has no money at risk when he stakes a stake then that stake has no value in money for the purposes of section 11(10)(a). In fact, it appears to me that Moses LJ made the position clear at [8] when he said:
>
> > 'The value in money or money's worth of the stakes staked is the face value of the chip.'"

14. The FTT, at [29], concluded that the objectively ascertained value, for the purpose of s 11(10)(a), of a chip staked as a stake in a casino game is the face value of the chip, and that it was irrelevant whether a stake staked is given to the player free of charge.

15. The FTT also rejected submissions for LCM based on the provisions of other legislation in relation to profits-based taxes on betting and gaming. It held, also agreeing with Ms Wilson for HMRC in this respect, that those different statutory provisions could not assist the arguments for LCM in this case.

Discussion

Construction of s 11(10)(a) FA 1997

16. We are faced with the same question of statutory construction as the FTT. Essentially what Mr Hitchmough submits is that the FTT wrongly construed s 11(10)(a) FA 1997, and that it should have accepted LCM's argument that there was no value in money or money's worth of a stake staked by means of a Non-Neg, because in playing the Non-Neg the player risked nothing.

17. It is common ground that, when played in the various games in which they may be employed, the Non-Negs are "stakes staked with the banker in … gaming". The nature of a stake was considered by the House of Lords in *Lipkin Gorman*. In that case the issue was whether certain monies which had been fraudulently obtained by a gambler and then exchanged for chips with which the gambler had gambled could be recovered by the true owner, at least to the extent that the club had thereby become unjustly enriched.

18. The claim was for money had and received. It was resisted in part by the club on the basis that the club had given valuable consideration in good faith for the money the gambler had paid to it. There were two aspects to that defence. One concerned whether the club, by accepting the bet, had given valuable consideration: that argument was readily rejected on the basis that gaming contracts were, at that time, void under s 18 of the Gaming Act 1845, so that obligations under such contracts were binding in honour only.

19. It is the other aspect of the club's defence in *Lipkin Gorman* that is of relevance in this appeal. The club's argument, in essence, was that it had supplied chips in exchange for money. The contract under which the chips were supplied was, it was argued, a separate contract, independent of the gaming contract, and so was not void. Accordingly, the submission went, the club had at that stage given valuable consideration for the money.

20. It was in this context that, in a passage relied upon by Mr Hitchmough, Lord Goff said, at p 575F:

> "In common sense terms, those who gambled at the club were not gambling for chips: they were gambling for money. As Davies L.J. said in *C.H.T. Ltd. v. Ward* [1965] 2 Q.B. 63, 79:
>
> > 'People do not game in order to win chips; they game in order to win money. The chips are not money or money's worth; they are mere counters or symbols used for the convenience of all concerned in the gaming.'
>
> The convenience is manifest, especially from the point of view of the club. The club has the gambler's money up front, and large sums of cash are not floating around at the gaming tables. The chips are simply a convenient mechanism for facilitating gambling with money. The property in the chips as such remains in the club, so that there is no

> question of a gambler buying the chips from the club when he obtains them for cash."

21. Where a club issues cash chips, therefore, the stake staked is not the chip itself, but the money or credit represented by the chip. In such a circumstance, that is the money or money's worth of the stake staked for the purpose of s 11(10)(a) FA 1997. In *Aspinalls*, the question arose as to how that value was to be ascertained where, as a consequence of certain incentive schemes operated in relation to wealthy customers whom the club wished to encourage, commissions or rebates were provided to those customers, based on the amount of chips played or the losses incurred by the player.

22. In *Aspinalls* there were a number of such incentive schemes, with their own particular features, but in each case the starting point was that the customer had deposited with the club, or made credit arrangements with the club for, an amount of money equal to the face value of the chip. The chips in question were, accordingly, cash chips. In one case, under a "Cash Chip Agreement", the club 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 provided that the player had staked enough to meet a turnover target.

23. The argument for the club that the value in money or money's worth of the stake staked was the value which the player risked, and that the value should therefore be reduced by the amount of the commission due to the player, was rejected. In the Court of Appeal, Moses LJ (with whom Black and Gloster LJJ agreed) said, at [8]:

> "… 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 Ltd v Ward* [1963] 3 All ER 835 at 838, [1965] 2 QB 63 at 79 and Lord Goff in *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512 at 530, [1991] 2 AC 548 at 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."

24. The Court of Appeal accordingly upheld the decisions of both the First-tier Tribunal and Upper Tribunal in *Aspinalls*. In the Upper Tribunal, Briggs J said, at [35]:

> "In my judgment the value, in money or money's worth of the stakes staked with the banker in any casino game using chips is nothing more nor less than the face value of the chip. I agree that the starting point is the need to recognise, as reflected in the *Lipkin Gorman* case, that gambling with chips is not merely gambling for money but, in substance, with money. A chip is a form of private legal tender carrying the casino's promise that, when presented at the desk at the end of a session, it will be exchanged for cash (or other monetary credit) in the amount stated on its face. It is in my view nothing to the point that, pursuant to an agreement with the casino operator who is

> also the banker, the player may in due course receive an additional payment or credit as the result of having staked that chip. This is not primarily because the agreement with the casino is 'collateral' or even because (as Ms Wilson submitted) it is an agreement separate and distinct from the rules of the game applicable to all those players who gamble at casinos using chips. My reason for concluding that the Cash Chips Agreement is irrelevant is that the value concept in s 11(10)(a) assumes an objective ascertainment of value, rather than one derived either from a perception of value to the player, or value to the banker. If, in substance, staking a chip is the same as staking money, then the value in money of the chip must be its face value. To the extent that Ms Wilson's rules of the game are the origin for treating a chip as tantamount to money, then I agree with her submission, but no further."

25. The essential difference between the parties on the question of the statutory construction of s 11(10)(a) can be summarised in this way. Mr Hitchmough argues for an approach of economic, or real world, reality, which recognises that, whilst it is the stakes staked that fall to be valued in money or money's worth, and accordingly, as *Aspinalls* shows, there can be no adjustment for commissions and the like outside the game, in a case where those stakes are not representative of money, and not exchangeable for goods or services in the way a cash chip would be, no value is risked by a player in staking such a stake, and its value in money or money's worth is nothing. Ms Wilson, by contrast, argues that money or money's worth refers only to the value that has been played in the game, in other words what a player has staked in order to have a chance of winning. That value, being the value by reference to which winnings are calculated, is the face value. That is the relevant value in the context of the game; and the game is in the real world, providing the opportunity to win real winnings in monetary terms.

26. In our judgment both the legislation itself and the authorities support the argument that the value of the stake staked is the amount which is put at risk by the player when staking the stake. That amount is the real amount of money or money's worth that is risked in the game. It is not any notional amount represented by the face value of the stake.

27. In our view the argument that the value of a Non-Neg must be equal to the face value of the stake pays insufficient regard to the requirement that the value is in money or money's worth. That expression is one that is commonly used to mean either a value in money or in something else that may be converted into money. In the context of gaming, where it is clear on authority that gambling with a cash chip is not gambling with the chip itself, but is in substance gambling with money, it is the money which is the stake, and the money which falls to be valued, as money, for the purpose of s 11(10)(a). In the case of a Non-Neg, by contrast, there is no money deposited for the chip or voucher which can fall to be valued in the same way. Nor, contrary to Ms Wilson's argument, can the value of the stake staked with a Non-Neg be the amount which, if a cash chip had instead been employed, would have been the amount of money staked. That would be to value something different from the actual stake staked with the Non-Neg.

28. It is right, as Ms Wilson argued, that the focus of s 11(10)(a) is on the game and on the banker *qua* banker in the game itself and not on the banker as the club. That is why in *Aspinalls* the value of the stake fell to be determined by reference to the gross amount of money staked in the game, and not by reference to any adjustments that might be made outside the game. But in this case Ms Wilson's arguments sought to go further, and focus exclusively on the role of the stake in the game purely as a numerical value and not the money or money's worth represented by the stake. That in our view is to narrow the focus too far. The ascertainment of value in money or money's worth must have regard to the economic substance underlying the stake, and cannot be represented by the nominal or face value of the stake otherwise than where that face value reflects, as it did in *Aspinalls*, the economic substance of the amount risked in the game.

29. That analysis finds support in *Aspinalls*. The reference by Moses LJ to the value of the stake put at risk in the game is properly understood as a reference to the real economic risk. That was the way the case had been put for Aspinalls by Mr Hitchmough. The difference, and why Aspinalls did not succeed, was that the economic risk had to be measured by reference to the stake staked in the game and not by reference to anything else, such as the Cash Chip Agreement. Contrary to Ms Wilson's argument in this respect, risk as described by Moses LJ does refer to the risk of economic loss; it does not simply mean the playing of a game of risk.

30. This can be demonstrated further by the reasoning of Briggs J in *Aspinalls* in the Upper Tribunal. There, in the context of a cash chip, Briggs J made it clear, at [35], that it was only where in substance the staking of a chip was the same as staking money that the value in money of the chip must be its face value. That reasoning was repeated by Moses LJ in the Court of Appeal; his reference, at [8], to the value, in money or money's worth, of the stakes staked as being the face value of the chip was in the context, expressed in the following sentence, in which staking the chip was the same as staking money. That is to look at the underlying substance of the stake, and not to the face value of the chip as the basis for a valuation for the purpose of s 11(10)(a).

31. Nor is that inconsistent with an objective ascertainment of value. It is right, as Briggs J said in *Aspinalls* in the Upper Tribunal, at [35], that value for the purpose of s 11(10)(a) must be objectively ascertained, and not be derived either from a perception of value to the player or value to the banker. But, as Moses LJ recognised in the Court of Appeal, at [7], Mr Hitchmough's arguments on economic risk in that case did not depend upon a subjective perception. Likewise in this case the argument is not about perception but about substance, as objectively ascertained. An objective assessment of value, in money or money's worth, must not take account of the subjective perceptions of value of the persons involved, but it can, and indeed must, have regard to the observable economic features of the relevant circumstances.

32. It is important to have regard to what is required to be valued by s 11(10)(a). It is the "stake staked", and not the chip or voucher or anything else. For a cash chip, therefore, what is being valued is not the chip, but the money which is the real stake. That money is taken into account gross, without any deductions such as those at issue

in *Aspinalls*. Likewise, a cash chip which is given by the player who has deposited the cash represented by it to another player, and which can be redeemed for money, represents that money when it is staked on a game. It is the same if what is provided free of charge to a player is something which, whilst not representing a deposit of money, nonetheless has a value in money by being redeemable for money or in money's worth by being redeemable for goods or services to a monetary value.

33. We do not regard as anything to the point that the Non-Neg might provide the player with a right to play a game, or a right to have the chance to win, or a promise from the club in those respects, which Ms Wilson argued was a valuable right. The mere fact that such a right might subjectively be regarded by the holder of the Non-Neg as a valuable right, in the sense that it would enable that holder to play a game without putting money at risk, is not material to an objective valuation, in money or money's worth, of the stake staked.

34. On the other hand, the objective valuation of a stake would, in our view, have to have regard to the monetary value, if any, that could be obtained on an arm's length assignment to a third party of the right to place that stake, in the same way that it would if the Non-Neg was redeemable for cash or for goods and services. That would be money's worth for the purpose of s 11(10)(a). It was not, however, HMRC's case that the stakes of the Non-Negs should have any value other than the face value of the Non-Negs, and there were no findings of fact either that the Non-Negs were transferable or, if they were, what value might be realisable on a transfer. Furthermore as s 11(10)(a) requires the individual stake to be valued, there would have to be evidence of a value generally obtainable in a market in Non-Negs or evidence that a particular Non-Neg could have been, at the time it was staked, assigned for money or money's worth. In the absence of such evidence, it is not possible to ascribe any money's worth to the stake by reference to any assignable right.

35. It follows, in our judgment, that the FTT erred in law when it concluded, at [27], that the value, in money or money's worth, of a Non-Neg was its monetary face value, on the basis that the face value would be used to calculate winnings in cash chips and on a losing bet the player would no longer have the right to bet that monetary value for free. In our view, the FTT failed to have proper regard to the requirement that the value in s 11(10)(a) must be a value in money or money's worth. On the true construction of that provision, the stakes staked by the Non-Negs did not represent any money paid or deposited with LCM, nor did they have any value in money's worth by reason of being redeemable in money or for goods or services to a monetary value or, on the evidence, otherwise assignable for money or money's worth. Consequently, for the purpose of s 11(10)(a), the stakes staked by the Non-Negs have no value in money or money's worth.

Further arguments of LCM

36. In view of our conclusion on the proper construction of s 11(10)(a), it is not necessary for us to consider in any detail the arguments put forward by Mr Hitchmough in support of LCM's case which were based on the history of the gaming

duty legislation and the approach adopted in other legislative provisions relating to different profits-based taxes on betting and gaming. However, as we heard argument on those matters, we make the following brief observations.

37. The first argument was based on the proposition that at the time of the introduction by FA 1997 of the modern charge to gaming duty, advertising of, and inducements to bet (which Mr Hitchmough submitted would have included the Non-Negs) were unlawful, and did not become lawful until the Gambling Act 2005 came into force in September 2007. The argument went, therefore, that in passing FA 1997 Parliament cannot have had Non-Negs in mind, and cannot have intended to include them within the scope of the charge to duty.

38. For this submission Mr Hitchmough placed reliance on the reasoning of the Court of Appeal in *Investment Trust Companies v Revenue and Customs Commissioners* [2015] STC 1280 with regard to the construction of s 80(7) of the Value Added Tax Act 1994. In that case the court held that s 80(7) could not be construed so as to exclude claims in restitution by claimants who had not been accountable for the relevant VAT and who had not paid it to HMRC. The particular passage relied on by Mr Hitchmough was at [81], where the court held that the language and legislative history of s 80 pointed towards Parliament never having had in mind, when enacting the relevant provisions, claims in restitution by the end consumers (as opposed to those liable to account for the tax).

39. We do not consider that *Investment Trust Companies* could assist Mr Hitchmough in this case. The Court of Appeal was considering whether there could be found to have been any legislative intent to restrict claims for the recovery of overpaid VAT to the machinery of s 80 regardless of the identity of the claimant. It was doing so because of its earlier finding that, construing s 80(7) in its context, the natural meaning of that provision referred to the refunding of tax to the taxpayer, and not to any other possible claimant. The question was whether a purposive approach to the construction of s 80(7) could give rise to some wider and less natural meaning. In our judgment, *Investment Trust Companies* goes no further than that. It cannot be relied upon for any general proposition, such as Mr Hitchmough's argument would seem to require, that a taxing provision, irrespective of the natural meaning of the statutory language, is capable of extending only to matters that were within the actual contemplation of Parliament at the date of enactment of the provision in question.

40. Nor, were it to have been required, could any assistance be derived from the different approaches adopted in other betting and gaming legislation. Mr Hitchmough's argument in this respect was that, in the case of certain other profits-based taxes on betting and gaming, express provision is made for free bets in the statutory code. This, he submitted, indicated that where it is Parliament's intention to tax free bets, then it says so. Thus, in the context of general betting duty, it used to be provided by s 5(5) of the Betting and Gaming Duties Act 1981 ("BGDA") that in the case of an offer of free bets, or bets at reduced cost, the amount which the person making the bet is treated as due to pay is the amount he would have been required to pay without the offer, and similar provision is now made by s 139 of the Finance Act 2014 ("FA 2014"). Similarly, as regards remote gaming duty, both the former s

26E(3) BGDA and the current s 159(4) FA 2014 contain provision for regulations to be made to the same effect.

41. Had our view on the construction of s 11(10)(a), absent consideration of these other statutory provisions, been different, we would not have been persuaded to any contrary conclusion by the fact that, in these different contexts, albeit with regard to other profits-based betting and gaming duties, express provision regarding free bets and the like has been included. Nor has that assisted us in reaching our own conclusion.

42. Finally, in this regard, we should also record that we reached our own conclusion on the construction of s 11(10)(a) without regard to what was common ground in *Lydiashourne* (Decision no E00092, 13 August 1998) in the VAT and Duties Tribunal, upheld on appeal by the High Court (Lloyd J) [2000] V&DR 127, that if forged cheques, which were inherently worthless, had been accepted by the casino as absolute payment for cash chips, the sum represented by the chips lost in gaming would not have formed part of the gross gaming receipts of the casino. Although our own conclusion is consistent with that common ground in that case, we derived no assistance from *Lydiashourne* in reaching that conclusion.

Value of Non-Negs as "prizes": s 11(10)(b) FA 1997

43. The appeal was argued before us on the basis of LCM's submission (which we have accepted) that the Non-Negs are to be regarded as having no value for the purpose of s 11(10)(a) FA 1997. LCM's claim in this respect carried with it the corollary that, in the case of a winning bet where the Non-Neg staked on that bet would be retained by the player and could be used as a further free bet, the value of the retained Non-Neg, if treated as a "prize" for the purpose of s 11(10)(b), would likewise be zero. HMRC's case, on the other hand, was that the Non-Negs were to be valued at their face value both for the purpose of s 11(10)(a) and s 11(10)(b), with the result that only when a Non-Neg was not retained by or returned to the player would any amount by reference to the face value of the Non-Neg effectively be incorporated into the banker's profits.

44. It was thus not part of LCM's claim, or its case in this appeal, that if, as we have decided, no value should be attributable to the Non-Negs for the purpose of s 11(10)(a), Non-Negs provided as prizes should nonetheless have value for s 11(10)(b) purposes. On the other hand, understandably, LCM did not dispute HMRC's analysis of the position with regard to Non-Negs as prizes were HMRC's argument on the value to be given to the Non-Negs for the purpose of s 11(10)(a) to have prevailed.

45. Given the respective positions of the parties on this question, it would not we think be satisfactory for us to leave matters there without at least expressing our own view. Although we recognise that this will not be binding, it is important, we consider, that the question of the valuation for gaming duty purposes of chips and vouchers for free bets should be regarded as a whole, thus taking into account both the positive and negative elements of the calculation of the banker's profits.

46. The question of the value of a prize for the purpose of s 11(10)(b) has, since 1 September 2007, been governed by parts of s 20 BGDA, as adapted for gaming duty purposes. HMRC's analysis of the position under s 20 was based on s 20(3), which relevantly provides:

> "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,
>
> (b) specifies an amount as the sum or maximum sum in place of which the voucher may be used, and
>
> (c) [*not relevant*],
>
> the specified amount is the value of the voucher …"

47. If the conditions of s 20(3) are satisfied, the value of the Non-Neg as a prize for the purpose of s 11(10)(b) FA 1997 would be the face value of the Non-Neg. However, s 20(4) provides in certain cases for that value to be zero. Section 20(4) relevantly provides:

> "Where a prize is a voucher … it shall be treated as having no value for the [relevant purpose] if—
>
> (a) it does not satisfy subsection (3)(a) and (b), or
>
> (b) its use as described in subsection (3)(a) is subject to a specified restriction, condition or limitation which may make the value of the voucher to the recipient significantly less than the amount mentioned in subsection (3)(b)."

48. Our view is that the Non-Negs fall within both (a) and (b) of s 20(4), and consequently must be regarded, for the purpose of s 11(10)(b) FA 1997 as having no value. The effect, which we regard as providing a coherent structure for the treatment of free bets, is that Non-Negs are taken into account on neither side of the calculation of banker's profits.

49. First, we consider that the Non-Negs fail to satisfy s 20(3)(a) and (b) BGDA. The Non-Negs, when returned or retained as "winnings" are capable of being used to play a game. But that does not constitute them being so used "in place of money as … payment for benefits". The benefit which a retained Non-Neg provides is no different from that referable to an original Non-Neg, for which no payment is required or made. There is accordingly no payment in money which the Non-Neg can replace; the benefit of a retained Non-Neg cannot be equated to that of a cash chip for which payment in money would be required.

50. Secondly, the use of a retained Non-Neg is restricted to the same use as any other Non-Neg. It cannot therefore have any different value in money or money's worth. As we have determined the value of a stake staked by a Non-Neg to be zero, it follows that the value of a Non-Neg representing a prize must also have a value of zero, which is significantly less than its face value.

51. In either case, therefore, our view is that the effect of either of s 20(4)(a) or (b) is that a Non-Neg received or retained by a player as a prize has no value for the purpose of s 11(10)(b) FA 1997.

Decision

52. For the reasons we have given, LCM's appeal is allowed. We therefore set aside the decision of the FTT, and by virtue of s 16 of the Finance Act 1994 we quash the decision of HMRC refusing LCM's claim under s 137A of the Customs and Excise Management Act 1979 and allow that claim accordingly.

MR JUSTICE HENDERSON

UPPER TRIBUNAL JUDGE ROGER BERNER

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