[2022] UKFTT 00120 (TC)

TC 08451/V

REMOTE GAMING DUTY – freeplay – whether the award of freeplay is expenditure on prizes in terms of Finance Act 2014 – if so is it the nominal amount where there are restrictions on withdrawing the monies – yes – is it expenditure when awarded or when it is capable of being withdrawn or when it is actually withdrawn – when withdrawn – which failing when capable of being withdrawn – appeal dismissed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00280

BETWEEN

BROADWAY GAMING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER GILL HUNTER

The hearing took place on 1 and 5 October 2021 via the Tribunal video platform.

Kevin de Haan, QC, instructed by Ampla Consulting Limited, for the Appellant

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

DECISION

INTRODUCTION

1. The appellant ("Broadway") appeals the Respondents ("HMRC's") decision to refuse a claim for repayment of Remote Gaming Duty ("RGD") in the sum of £4,969,362 in respect of the period 1 December 2014 to 30 September 2017 inclusive ("the Claim period").

2. In summary, Broadway is a licensed provider of online gaming services and offers promotional incentives, which we refer to as "Freeplays", whereby a credit is placed in the customer's online account. That allows the player to place a stake or a wager in one of Broadway's games for free. However, Freeplays are subject to extensive conditions that are set out in each game's Terms and Conditions ("T&Cs"). In particular, winnings cannot be withdrawn until a customer has re-wagered the winnings to a specified multiple of the Freeplay used to place the wager ("the wagering requirements"). The multiple varies across the different T&Cs.

3. The claim for repayment is predicated on the basis that Broadway is entitled to treat Freeplays awarded to customers as expenditure on prizes for the purposes of calculating profit and ultimately RGD.

4. HMRC's primary case is that winnings from Freeplays that, in terms of the relevant T&Cs, cannot be withdrawn by a player ("non-withdrawable winnings") are not money prizes until the wagering requirements are exhausted, and further and alternatively, there is no deductible expenditure for the purposes of computing the RGD liability.

The Hearing

5. We had a hearing bundle extending to 614 pages and an authorities bundle extending to 181 pages. We had Skeleton Arguments for both parties and the advantage of a reading day. We heard evidence only from Mr David Butler, the Chief Executive Officer of the appellant since February 2010. He had furnished a witness statement and thereafter a supplementary witness statement in response to a request for information from HMRC. That witness statement included some examples of how Freeplays work and the modelling for that was based on notional or average players. It was a simplified model. In response to that supplementary witness statement, HMRC then produced what they described as an appendix to their Skeleton Argument which consisted of hypothetical examples of possible outcomes of staking Freeplay credits based on different proposed terms.

Overview of Remote Gaming Duty

6. RGD is an excise duty charged on a chargeable person's participation in remote gaming. A chargeable person is either an individual who usually lives in the UK, or a body corporate which is legally constituted in the UK. Remote gaming means playing a game of chance through any means of remote communication such as the internet, telephone, television, radio or any other kind of electronic or other technology for facilitating communication.

7. Prior to 1 December 2014, remote gaming was taxed on a point of supply basis. Accordingly, if the entire technical infrastructure required to provide the remote games was located offshore, no RGD was payable by the provider, irrespective of where the customer was located at the time of play.

8. From and after 1 December 2014, regardless of whether the technical infrastructure was located offshore, the provider was liable to RGD at the rate of 15% of the profits derived from UK customers, ie remote gaming is taxed on a point of consumption basis.

9. The legislative framework for RGD from 1 December 2014 is provided for under Sections 154 to 162 of the Finance Act 2014 ("FA 14"). With effect from 1 August 2017, Sections 159 and 160 were amended by Finance Act (No 2) 2017 ("FA 17").

10. We have set out the full text of the relevant legislation at Appendix 1.

11. In the period between FA 14 and FA 17, HMRC issued:-

(a) a consultation document on the tax treatment of Freeplays in RGD which was published on 9 August 2016 ("the Consultation"), and

(b) a Policy paper on reforming the tax treatment of Freeplays which was published on 5 December 2016 ("the Policy paper").

Overview of Part 3, Chapter 3 FA 14

12. Section 154(1) defines remote gaming (see paragraph 6 above). The following subsections distinguish between "pooled prize gaming" where all or part of the gaming payments are paid into a pool from which prizes are paid and "ordinary gaming" which is any other remote gaming. This appeal concerns "ordinary gaming".

13. In terms of Section 155(3), for the claim period, RGD is charged at 15% of the provider's profits for an accounting period, and for the purposes of this appeal, Section 155(4) states that those profits are the profits calculated in terms of Section 157.

14. Section 157(1) provides that profits in respect of ordinary gaming are calculated by deducting from aggregate of the "gaming payments" in the accounting period the amount of the provider's expenditure for that period on prizes. It is not disputed that Freeplays are not included in the gaming payments.

15. Section 157(2) provides that expenditure on prizes in the accounting period is the aggregate of the value of prizes, provided by or on behalf of the provider, which have been won at any time.

16. The term "gaming payment" is defined in Section 159 as being the aggregate of:-

(a) any amount that entitles a person to participate in the gaming, and

(b) any other amount payable for or on account of or in connection with the gaming.

17. Subsection (4) states that the Treasury may make regulations where a person relies on an offer which waives a gaming payment or permits a lesser payment.

18. Section 160(1) states that providing a prize "includes" crediting money to an account if the person is told that the money is being held in the account and the person is entitled to withdraw it on demand. Subsection (2) provides that where the account of a person was credited other than as specified in subsection (1) it will be treated as a prize. Subsections (5) and (6) relate to prizes that are vouchers and subsection (7) with prizes that are neither money nor a voucher.

Overview of the relevant changes made by FA 17 to FA 14

19. A new subsection (4) was added to Section 159 providing that where a person participates in remote gaming using a Freeplay then the person is treated as having made a gaming payment of the full amount that would have been paid without the Freeplay.

20. Section 159, as amended, was made subject to a new Section 159A, the effect of which was to exclude play using non-withdrawable winnings from being gaming payments.

21. Section 160 was amended by removing subsection (2) so a credit can only be a prize if subsection (1) applies.

22. Section 160, as amended, was made subject to a new Section 160A, the effect of which was to stipulate that where the prize is a Freeplay offer, whether or not in the form of a voucher, the expenditure is deemed to be nil for the purposes of calculating the profits.

Background

23. Broadway is licensed by the Gambling Commission as a provider of online gaming services and provides a number of online games of chance to its customers through its various gaming brands. Those games include bingo, casino table games and slots. It operates a number of bingo brands. It is based and registered in Malta and also holds a licence issued by the Malta Gaming Authority to provide those games to players outside Great Britain.

24. Broadway offers promotional incentives to customers in respect of the games provided through its various gaming brands. As we indicate at paragraph 2 above this appeal is concerned with Freeplays which are the offer of free credits deposited in a customer's online account with Broadway. Those credits allow the customer to place a stake in one of Broadway's games for free. The terminology used by Broadway to describe these offers varies dependent on the gaming brand in question. They are variously known as "Bonus Wins", "Freeplay" and "Free Spin".

25. The initial Freeplays are credited to the customer's online account and that is not taken into account for RGD.

26. Broadway uses games provided by Microgaming and they pay a licence fee for each use. The licence fee is based on the net loss sustained by the customer, whether the loss is of the customer's own cash or of bonus monies which result from winnings from Freeplays, ie non-withdrawable winnings.

27. Awards of Freeplays are predominantly made via Microgaming's player management systems. Automated parameters are set within the systems to award Freeplays at the point when the customer logs into their account or when they make a deposit.

28. Broadway's customer service team can also award Freeplays through manual entries to a customer's account.

29. The customer service team devise strategies and campaigns to maximise profit and as part of the execution of that can set up triggers in the system.

30. Cash amounts and bonus monies (winnings from Freeplays) are shown separately in a customer's account although that was not the case for Casino of Dreams from its launch in November 2015 until November 2016.

31. As an overview, in summary, when a customer chooses to play a game the wager is first deducted from the cash balance and the Freeplays or bonus monies are only played when the customer has insufficient credits in the cash balance. Winnings on wagers made from cash are credited to the cash balance and winnings from Freeplays to the bonus monies balance.

32. Wagering requirements exist in order to prevent bonus abuse by players. The wagering requirement has to be met before any bonus monies can be transferred to a player's cash balance where it can then be withdrawn.

33. Once the wagering requirements have been met, on certain further conditions, the bonus monies are credited to the cash balance. Any Freeplays that are not played will expire after 30 days and the bonus monies are adjusted.

34. In general, the wagering requirements for bingo games are five times the bonus monies awarded and for casino games they are 40 times the bonus monies.

35. The example given by Mr Butler was that if a customer made a cash deposit of £10 for Casino of Dreams then s(he) would be awarded a matched deposit bonus of £10. The minimum wagering requirement is 40 times that deposit bonus and thus £400. Therefore the customer must wager £400 before being able to withdraw, as cash, any winnings from Freeplays.

36. In the Bundle we had numerous different T&Cs but HMRC referenced Casino of Dreams and in his evidence Mr Butler explained various conditions in the 12 October 2016 version of Rehab Bingo.

37. Looking firstly at the 1 November 2015 version of the Casino of Dreams T&Cs which extends to 16 pages of A4, the following facts are of note, namely:-

(1) All customers must have one online account and the balance in that is made up of the customer's cash balance and the casino bonus monies balance [4.8].

(2) The minimum cash deposit on first deposit is £10 and £20 on all re-deposits [5.1].

(3) No withdrawals can be made unless the customer has met the wagering requirements linked with any deposits made and any bonus monies awarded [6.1.4]. With the exception of Progressive Jackpot wins, the maximum that a player can withdraw in any seven day period is £5,000 or in any 30 day period £20,000 [6.6]. All remaining bonus monies are forfeited on a request for withdrawal [6.12]. Bonus monies cannot be transferred or withdrawn [6.17].

(4) By default the wagering requirement for any casino bonus awarded will be 40X the bonus amount [7.5]. Certain promotions or offers may carry an amended wagering requirement [7.6.1].

(5) Play-through requirements (ie wagering requirements) are achieved when any real money is wagered [7.9]. As the required play-through requirements are met, funds are transferred from the casino bonus monies balance to the cash balance in increments of £10 [7.8].

(6) If funds are available in the cash balance, wagers will be deducted from there and only when the cash balance is at zero will the bonus monies balance be used. Winnings from the bonus balance are first used to top up the bonus balance to the size of the original bonus awarded, with the balance added to the cash balance (excluding any transfers under 7.8 for the same wager). Winnings on wagers made from a customer's cash balance are credited as cash [7.11].

(7) In play using bonus monies the wager cannot exceed £6.25 until the full wagering requirement has been met.

(8) For Special Offers, VIPs and some mobile gaming Freeplays are valid for seven days from the date of issue and are forfeited if not used in that period [12.5]

38. As with Casino of Dreams, the Rehab Bingo T&Cs provide that as wagering requirements are met €10 will be transferred from the bonus monies to the cash balance ("the increment"). In games where the customer has received free bonus money without having to make a deposit (eg as a goodwill gesture) the maximum wager is expressed as being 25% of the bonus monies whilst the wagering requirement is being met. In addition a player can only withdraw a maximum of €100 from the cash balance.

39. In other games where there is a deposit, if the customer wishes to withdraw any part or all of a cash deposit, then the bonus monies will be forfeited. What Rehab Bingo describe as "real money winnings" from Bingo derived from Freeplay or a promotional award of cash can

only be withdrawn once a real money deposit of €10 or more has been made and the customer has bought real cash tickets with a minimum of 50% of the last real money deposit.

40. Rehab Bingo has many of the same conditions as Casino of Dreams but the Rehab Bingo T&Cs had a section at 8.17 describing what were viewed as abusive practices such as using a bonus to place high risk wagers or waiting for a bonus to expire. Mr Butler said that these were all examples of attempts to monetise the bonus monies.

41. He confirmed that normal play would not be guaranteed to convert bonuses to cash. Each player has his or her own betting pattern but Mr Butler's opinion was that provided they employed "certain strategies", unless they are very unlucky they should be able to convert 50% of Freeplay credits into withdrawable cash.

42. In that, and in his other explanations, Mr Butler's evidence was straightforward and very fair. He explained that the reason for the cap on the size of wager was that that meant that the customer would place more bets. As an example, if a customer bet £100 they would either win or lose. If they had 100 £1 bets there was a probable loss overall.

43. That chimed with the Tribunal's understanding of what is widely known as the "house edge" which is the odds advantage in a gaming provider's favour (whether remote gaming or a casino) being the mathematical advantage that the provider has over the player as they play over time. Basically, the longer someone plays, the greater the odds are that the result of the play will match up with the house edge but over a longer period the house edge will push the gamer into unprofitability.

44. Although the laws of probability are in the provider's favour the house edge varies amongst different games.

45. Mr Butler also explained that although the increment would be released to the cash balance on a gradual basis it could not be withdrawn by the customer if there was any credit in the bonus monies balance. If a bonus has been accepted the customer cannot withdraw cash; hence the description of abuse in waiting for a bonus to expire (see paragraph 40 above). The impact of that is that the typical customer then uses their own cash balance to meet the wagering requirement and if s(he) uses that cash to reduce the bonus monies to nil, s(he) has never had access to the winnings from Freeplay.

46. Whilst we do not know how much of the bonus monies met the wagering requirements and were converted into withdrawable cash during the claim period, we do know that in that period approximately 9% was forfeited.

47. Mr Butler gave an example of a customer paying a deposit of £100 and receiving a £100 bonus with a wagering requirement of 30 re-wagers. That customer would have to place a total of £3,000 worth of bets to convert the bonus of £100 into withdrawable cash. However, due to the provision for incremental payments, £10 would be paid into the cash balance after each £300 has been wagered but, of course, withdrawal would mean that the bonus monies would be re-adjusted to zero.

48. Although it varies across the games, the average customer would meet the wagering requirement, ranging between £400 and £2,500, in less than a week and in a number of cases it was in less than even a day or possibly two.

49. As we indicate at paragraph 5 above, HMRC had produced worked hypothetical examples based on Mr Butler's witness statement which demonstrated in simple terms the outcome if the non-withdrawable winnings are accounted for as prizes or if they are only accounted for once they can be withdrawn as cash. Two different scenarios were predicated and the betting patterns and odds simplified. There were five examples for each scenario.

50. The first scenario was on a worst case basis for the gaming provider. The details do not matter but in the first example the expenditure that could be claimed by the provider was exactly the same whether the prize was accounted for when withdrawable as cash or not, and it matched the economic reality. In the other four examples, the economic reality was the same as the expenditure that could be claimed if it was only a prize when it could be withdrawn. However, if it was a prize when awarded then the provider could claim much greater expenditure which had not actually been incurred.

51. In the second scenario, where the Player started with a nil cash balance but with a Freeplay credit, in every example the economic reality matched the expenditure if it was only a prize when it could be withdrawn. However, if it was a prize when awarded then the gaming provider could claim much greater expenditure which had not actually been incurred.

52. Broadway made profits throughout.

The Law on Claims

Repayment Claims

53. The Customs and Excise Management Act 1979 ("CEMA") governs claims for excise duty repayment. Section 137A provides as follows:

> "**137A Recovery of overpaid excise duty**
>
> (1) Where a person pays to the Commissioners an amount by way of excise duty which is not due to them, the Commissioners are liable to repay that amount.
>
> (2) The Commissioners shall not be required to make any such repayment unless a claim is made to them in such form, and supported by such documentary evidence, as may be prescribed by regulations; and regulations under this subsection may make different provision for different cases.
>
> (3) It is a defence to a claim for repayment that the repayment would unjustly enrich the claimant…."

54. The Revenue Traders (Accounts and Records) Regulations 1992 ("the 1992 Regulations") are made in accordance with the powers in Section 137A of CEMA. Regulation 9 of the 1992 Regulations provides:

> "Any claim under section 137A of the Customs and Excise Management Act 1979 shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."

55. Section 16 of the Finance Act 1994 ("FA 94") provides a right of appeal to the Tribunal in respect of relevant decisions. A claim under Section 137A of CEMA is a relevant decision under Section 13A of FA 94.

56. The decision in this appeal is not an ancillary decision for the purposes of Section 16 of FA 94. Accordingly the Tribunal's powers in relation to the appeal include a "… power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal." In terms of Section 16(6) FA 94 the burden of proof rests with the appellant and the standard of proof is the balance of probabilities.

57. Excise Notice 455a: Remote Gaming Duty was in force during the claim period and had the force of the law. It specifies the need for record keeping and sets out at some length what records must be kept. Furthermore, under the heading "Record keeping" at Section 8 it states explicitly that those requirements have "The force of law under Regulations 6 and 8 of the Revenue Traders (Accounts and Records) Regulations 1992 and the General Betting, Pool Betting and Remote Gaming Duties (Registration, Records and Agents) Regulations 2014 made under Section 168 of the Act". It goes on to set out an extensive list of the records that are required.

HMRC's case

58. We have set out a summary of HMRC's primary case at paragraph 4 above but it is appropriate to reiterate it here:

> "HMRC's primary case is that winnings from Freeplays that, in terms of the relevant T&Cs, cannot be withdrawn by a player ("non-withdrawable winnings") are not money prizes until the wagering requirements are exhausted and further and alternatively there is no deductible expenditure for the purposes of computing the RGD liability."

59. What Ms Wilson described as their "headline case" was that RGD should be charged on economic profits and losses or what should be described as "real world figures". Gaming payments, being the first limb of the calculation of RGD, deals with such real world figures which had to, and did, ignore Freeplays.

60. HMRC argue that the non-withdrawable winnings are not prizes provided within the meaning of Section 157(2) FA 14 and nor are they a money prize for the purposes of Sections 160(1) and (2) because it is only once a wagering requirement is exhausted that the credit in the account of the player can be withdrawn in cash. It is not enough for a prize to be awarded, Broadway must have spent money on that award.

61. Further, and alternatively, to the extent that the non-withdrawable winnings might be a voucher prize, which HMRC do not accept, Sections 160(5)(a) and (b) are not satisfied and/or Section 160(6)(b) is satisfied. Accordingly no expenditure is incurred.

62. Further, and alternatively, to the extent that non-withdrawable winnings fall within Section 160(7) as a prize which was neither money nor a voucher, the expenditure on any such prize (if it existed) is nil, since no amount could reasonably be determined as its valuation (Section 160(7)(b)).

63. Section 160 should be read as a whole and in the context of all of Part 3 of FA 14.

64. Any other result produces an incoherent statutory scheme open to abuse.

65. The claim forms on the spreadsheet attached to the repayment claim are predicated on huge notional losses which were never actually incurred.

66. In any event, even if they are wrong on all of those arguments, Broadway has failed to provide sufficient evidence to allow HMRC to calculate the value of any repayment that might be due. Accordingly, the appeal should fail on the basis that no such evidence has been adduced.

Broadway's case

67. Broadway's case is relatively straightforward in that it is argued that:

> (a) For the purposes of the RGD calculation, it is accepted that Broadway must disregard Freeplays as gaming payments. However, it can deduct expenditure on prizes each and every time a player is awarded a prize, whether or not withdrawable, with the result that

it has overpaid RGD and is thereby entitled to claim a repayment. The value of the prize is its nominal value.

(b) Ignoring subsection (4) which is not relevant, Section 160 FA 14 looks at various types of prizes including money, vouchers and non-money. Broadway's non-withdrawable winnings are money prizes falling within subsection (1).

(c) Section 160(1) is "critical" because of the use of the word "includes" which means that Section 160 does not provide a comprehensive definition of what constitutes a prize for the purposes of this legislation. Further, subsection (2) strengthens that argument because it provides that where a credit to an account does not fall within subsection (1) nevertheless it can still be a prize.

(d) Section 160 should not be read as a whole as it prescribes discrete valuation regimes for different types of prizes.

(e) There is no statutory definition of "money" and HMRC are wrong to conflate money with cash which has no place in remote gaming. Broadway credits the customer's account with deposits expressed in the currency in which that individual is playing at the time and the full nominal value is the value of the prize. Although conditions are attached, the credits can be used for the entertainment of gaming without using the individual's own money and the customer has the prospect of winning further monies.

(f) Broadway relied on the Consultation and Policy papers for the proposition that HMRC clearly believed that Freeplays were prizes within Section 160 FA 14. The amending legislation in FA 17 creating Sections 159(4) and 159A made Freeplays a gaming payment and by the deletion of Section 160(2) and the addition of Section 160A, the previous ability to treat Freeplay credits as prizes having a value was halted.

(g) Like HMRC they do not accept that the prizes are vouchers.

Discussion

68. Both parties were agreed that Section 159(4) FA 14, as originally enacted, meant that Freeplays used in place of a cash payment to participate in gaming were not gaming payments within the meaning of Section 159(1) FA 14. That is because the subsection reserved the right of the Treasury to make regulations treating such wagers as having been for the full amount and therefore gaming payments. No such regulations were promulgated. That is correct.

69. It was argued for the appellant that the decision maker in HMRC's decision letter of 19 September 2018 stated that "There is no dispute that any 'prizes' awarded as a result of a free play is a 'prize'…" and that meant that HMRC accepted that Freeplays were prizes, albeit the review decision letter did not say that. That does not assist the appellant because Section 16 FA 94 deals with appeals against decisions and not the reasons for the decision. The officer's choice of words is not relevant to us.

70. The primary question for the Tribunal is whether the non-withdrawable winnings are prizes within the meaning of Section 160 FA 14.

71. We agree with Ms Wilson that that section should be read as a coherent whole and in the context of all of Part 3 of FA 14. Clearly, Section 160 was intended to cover any type of prize and that is clear from subsection 7 which "sweeps up" anything that is not specified elsewhere.

72. Section 160(3) specifies that return of a gaming payment is a prize and, of course, it is common ground that in the relevant period Freeplays were not gaming payments. We agree with the parties that Freeplays are not vouchers.

73. HMRC argue that a prize is something won, which it is, but that it must have an economic value in respect of which there is a direct cost. It must have monetary substance. It was common ground that Section 160(4) does not apply to the facts here but we note that it states that in calculating expenditure one must look to the "cost". It is logical that there should be a cost of some sort, even if the economic value were to be negligible, as HMRC assert.

74. Mr de Haan argued that when a Freeplay is credited to a customer's account then although it might not be immediately accessible, it was nevertheless potentially at the player's disposal. We did not accept his analogy with being unable to withdraw more than 25% from a pension. People can, and do, but there is a tax cost because of the tax relief given when a payment is made to the pension scheme.

75. Broadway has consistently argued that Freeplays fall within Section 160(1). We disagree. We find that since they and the bonus monies arising from that are, in general, not withdrawable on demand, they do not fall within Section 160(1)(b) when awarded. Furthermore, even monies that are technically withdrawable because the wagering requirement has been met may not be capable of withdrawal on demand (see for example paragraph 37(3) above).

76. It was argued that the essential nature of the Freeplays as money never changed as the key characteristics of money are that it is a repository of value, a medium of exchange and a unit of account.

77. Value only becomes relevant if the Freeplays are prizes. Are they?

78. We heard much argument about HMRC policy and FA 17 and why it was promulgated, and Mr de Haan relied on both FA 17 and the Consultation and Policy papers.

79. Ms Wilson argued that FA 17 was promulgated whilst the decision in *HMRC v London Clubs Management Ltd*[1] ("LCM") was unknown and that, HMRC having lost that appeal, the amendments were not required. She urged us to note that the Consultation and Policy papers were simply HMRC's then view and that they were irrelevant.

80. We agree with HMRC that legislation is not interpreted by subsequent legislation. However, although it was not cited to us, we also agree with *Bennion On Statutory Interpretation* (8th Edition) where it states at 12.5 that "The reason for passing an Act is almost invariably to change the existing law so as to remedy a perceived defect in it". It is therefore entirely appropriate to have regard to paragraphs 14 and 15 of the Consultation paper, the relevant parts of which, under the Heading "The Current Position", stated:

> "14. Prizes. When making their RGD calculation, remote gaming operators can take account of both winnings in the form of money, and non-cash prizes. Non-cash prizes may be in the form of goods, vouchers or tokens that may be used in the place of money or exchanged for goods or money. Any freeplays that are given as winnings can be treated as a prize for RGD purposes. All non-cash prizes are given a fair value for duty purposes (see section 160).
>
> 15. In addition to winnings that are paid out or credited to successful customers' accounts as a result of participating in gaming, remote gaming operators also credit the accounts of customers with freeplays as an incentive to participate in remote gaming (for example sign-up offers, loyalty rewards). HMRC understands that there is some inconsistency in the way that operators are accounting for these latter credits. Some are treating these as prizes under section 160 of the Finance Act 2014 and using them to reduce their duty liability, while others are not. The current law only allows free plays to be treated as prizes when they are *given as winnings* to those participating in remote gaming, but not

[1] [2020] UKSC 49

when they are credited to an account as an incentive unconnected with participating in gaming." (emphasis added).

81. We have highlighted the words "given as winnings" because it is HMRC's argument that they are not given as winnings until such time as they are withdrawable winnings.

82. Under the Heading "The Changed Position", at paragraph 16, it is made clear that…

a. Freeplays will be deemed to have a value for duty purposes when used in place of a gaming payment by a customer;

b. Freeplays that are given as a prize, or as part of a prize, will have a nil value for duty purposes….

….

e. cash prizes paid to customers from the successful use of freeplays will continue to be deductible".

83. The Policy paper described the proposed measures as follows:-

"Changes are being made to amend the current legislation that offers remote gaming operators a more generous tax treatment for freeplays compared to free bets in General Betting Duty ("GBD").

This will mean that freeplays that are staked by a customer will, in *certain circumstances,* have a value for the purpose of calculating an operator's remote gaming profit. These changes will also mean that freeplays given out by an operator cannot be treated as prizes and will have no value for the purposes of calculating profits. The net effect of these changes is to broaden the tax base and increase the amount of duty payable by remote gaming operators." (emphasis added)

84. We have highlighted "certain circumstances" because when one reads the two papers together it is clear that the mischief was the fact that Freeplays were not accounted for as gaming payments but some gaming providers were deducting expenditure in providing them when computing RGD.

85. HMRC's primary argument is that Sections 160(1) and (2) deal with a crystallised right to the money and that is consistent with the rest of the section. It is. That is a good argument in the sense that when is a prize a prize? A figure is undoubtedly credited to the customer's account but is it at that time a prize? It cannot be accessed by the player.

86. The bonus monies have the characteristics of money in that they are stated in units of currency and, although they are not transferrable, they are a medium of exchange as between Broadway and the player and they are a repository of value, albeit subject to conditions.

87. HMRC relied heavily on *LCM* which considered the meaning of profits for Gaming Duty in the context of non-negotiable chips which HMRC equated to Freeplays. Firstly, whilst Ms Wilson accepted that it is different legislation she argued that *LCM* had a similar thrust to the issues in this appeal in that it looked at the economic importance of Non-Negs, as they were called in that Decision, and it is the economic value of Freeplays that is relevant here.

88. It is worthy of note that HMRC lost in *LCM* and their core argument, articulated at paragraph 51 was that Non-Negs were the equivalent of money, were as good as cash and bore their face value.

89. Mr de Haan argued that *LCM* was looking at a different gambling product and a different fiscal regime and should not be read into RGD. His key argument in that regard was that a

"land based" casino dealt with cash and that was clearly money but, in online gaming, money in terms of "cash" had no role to play.

90. Ms Wilson relied *inter alia* on Lord Kitchin at paragraphs 54 and 56 in *LCM* which she suggested was describing a very similar set of facts to those in this case:

> "54. A gambler … is placing his money at risk under the terms of an agreement he makes with a casino to play a game of chance. Similarly, when a gambler uses a Non-Neg to place a bet he is playing a game of chance in which the casino treats him as having put money to the value of the Non-Neg at risk. If the gambler loses the casino retains the Non-Neg. If the gambler wins, the Non-Neg is returned to him together with any other prize he has won.
>
> …
>
> 56 …if for example, a gambler, who places a bet as a Non-Neg with a face value of £100, wins three times in a row before losing, and each time wins his Non-Neg returned to him together with any other prize, the casino can say that, simply by returning the Non-Neg, it has incurred a cost of £300 in prizes and reduce its profits accordingly. That would produce an incoherent scheme which would be unduly favourable to casinos and in my view that cannot have been Parliament's intention."

91. Whilst we see the similarities, *LCM* was dealing with different legislation and different facts and does not assist us. We understand why HMRC relied on *LCM* but the remote gaming industry is quite different to a casino as also are the T&Cs.

92. Gaming payments are the player's own cash payments which is "real world" movement of money, in Ms Wilson's words. When a player is able to withdraw Freeplays, that too is real world money. When they are capable of being withdrawn we find that they are a monetary prize but not until then. We find that they do fall within Section 160(1)(b) once they are capable of being withdrawn on demand.

93. However, it is not that simple as there are a number of grey areas such as the caps on withdrawal.

94. One of the very grey areas is the incremental releases of bonus monies to the cash balance. Although technically released, as can be seen, a withdrawal could have significant consequences with the rest of the bonus monies reduced to zero. In order to withdraw money the customer has to balance the loss of anything in the bonus monies with what can be withdrawn. Not easy.

95. There is a further problem because, although capable of withdrawal, the issue is that the release is credited to the cash balance. What that means is that because the cash balance is increased any subsequent wager has to come first from that. It is a chicken and egg situation. The customer can wager all of the cash balance hoping to release the bonus monies but the release of the increments means that s(he) has difficulty in doing so.

96. The bonus monies in any of the games were subject to very considerable restrictions. It is undoubtedly the case that it was possible for any customer to win, whether on a cash wager or a Freeplay offer, however, those restrictions meant that, bearing in mind the house edge and the wagering requirements etc, comparatively few customers would make a profit overall. They would have had the enjoyment of gaming and that is an opportunity cost, but overall Broadway would have made profits.

97. We find that Freeplays converted into cash balances are certainly winnings and therefore prizes when withdrawn from the player's cash balance or used for play, which is the same as

withdrawn. They have a discernible value and they are capable of being withdrawn. They fall into Section 160(1) of FA 14.

98. However, what about the situation where the Freeplays have been "credited" as bonus monies? Is that a genuine credit of winnings? It is definitively contingent and may never be paid. Although he put a positive spin on it, in fact, as Mr Butler said, 50% may very well not be actually paid in the sense that the customer can access it (see paragraph 41 above). We find that those credits fall into Section 160(2) of FA 14.

99. As we explain under the heading "Quantum" we do not have evidence on which to base any assessment of how many Freeplays would fall into the category of what we would define as monetary prizes.

100. Although HMRC's alternative argument was that a Freeplay might be a voucher we find that subsections (5), (6) and (7) are not engaged since we have found that a Freeplay was a monetary prize.

Value and Expenditure

101. As we have indicated the actual cash derived from Freeplays and withdrawn or used for play is, or should be quantifiable. That would be qualifying expenditure. However, what about the other Freeplays credited as bonus monies?

102. Broadway argue that it is the nominal value of the Freeplay that should be treated as expenditure as, unlike in the provisions about vouchers at Section 160(6)(b), there is no qualification about prizes being valued differently if they were subject to a restriction as, for example, there is in the Betting and Gaming Duties Act 1981.

103. Further, a prize denominated in money should bear its nominal value because it can be used for entertainment or for the prospect of further winnings; searching for the proverbial pot of gold at the end of the rainbow.

104. Whilst we understand that the Freeplays offer the chance to play for longer, and that is presumably what is meant by entertainment, we consider that a tenuous argument in regard to value since, as we have stated at paragraph 42 above, the longer the player plays the greater the possibility that the House wins.

105. Although HMRC relied on *LCM* in this regard, we did not find that it assisted us since the legislation with which it was concerned did have provisions about restrictions.

106. Section 157 FA 14 states that in calculating the provider's profits the expenditure on prizes is deductible. We have highlighted the word profits since that is at the heart of the legislation and Section 155 FA 14, and in particular subsection (3), makes it clear the RGD is about profits which is an economic term. That is reinforced by subsection (5) which provides for the carry forward of losses.

107. Section 157 FA 14 provides for the expenditure on prizes to be deducted from the "gaming payments". We agree with Ms Wilson's analysis that Section 159(3) is a deeming provision about timing which reflects the fact that gaming payments are about "real money".

108. It does not seem logical that Broadway should be able to claim the cost of those prizes as a deduction when they can unilaterally remove the value of those prizes from the customer or the benefit would often not accrue to the player.

109. Has Broadway incurred expenditure?

110. HMRC's argument is that the amount credited might never be expended. The facts as found support that.

111. We had the unequivocal evidence of Mr Butler that at all times Broadway had been in profit and had not suffered economic loss. Bluntly put, the considerable number of restrictions in the T&Cs maximise the returns for Broadway and the popular expression "The House always wins", if not entirely accurate, is very largely accurate.

112. It cannot be the case that whilst the wagering requirements are extant that there has been any expenditure as the notional payment of the Freeplay is just that. It has no economic value and is inaccessible. It may be a prize under Section 160(2) but its value is not its nominal value. The value may be the proportion of the overall nominal value which ultimately is capable of being withdrawn by the player but we have no satisfactory evidence about that.

113. The onus of proof lies with the appellant and that has not been discharged in relation to the expenditure actually incurred.

Quantum

114. As long ago as a meeting on 26 July 2018, HMRC drew the appellant's representative's attention to the provisions of Section 137A CEMA, the 1992 Regulations and Excise Notice 455a. On 19 October 2018, HMRC wrote to the appellant referencing that meeting and stating explicitly "Your repayment claim does not contain any documentary evidence. A copy of the spreadsheet said to contain information derived from your client's computer system is not evidence".

115. The review conclusion letter from HMRC dated 13 November 2018 stated that the appellant had failed to provide any evidence to support the claim or to provide access to their systems. It was pointed out that "It is also a legal requirement and a condition of Broadway's registration that it provides access to its systems from a PC in the UK so that the claim can be verified". The officer went on to say that if access was not provided the ultimate consequence would be that HMRC would direct the Gambling Commission to revoke the remote operating licence.

116. Under the heading "What you must do now" the officer referred to Excise Notice 455a and the Regulations referred to therein (see paragraph 56 above). He made explicit what was required, namely, that within 14 days of receipt of the letter, Broadway should provide:

> (a) a detailed explanation of the total value of non-withdrawable prizes awarded from 01/12/2014 to 30/09/2017 that were included in the RGD calculations; and
>
> (b) access to their systems from a PC in the UK so that the non-withdrawable prizes and any other amount relating to remote gaming could be verified.

117. He pointed out that further information might be required in order to check the liability to RGD.

118. More recently at paragraph 13.7 of HMRC's Case Management application dated 16 August 2020, HMRC stated explicitly that the burden of proof lay with the appellant and that under Section 137A CEMA, any claim for repayment would have to be supported by evidence.

119. In the amended Statement of Case at paragraphs 42-46 under the heading "Lack of evidence", HMRC drew the appellant's attention, yet again, to the lack of any supporting evidence.

120. The major problem for Broadway is that it is trite law that HMRC are entitled to seek evidence to verify any repayment claim. Broadway's repayment claim enclosed what its agent described as a "…summary schedule of the calculations which show how Broadway has overpaid RGD". The claim includes statements explaining items in the schedule such as "The

average return to player ('RTP') (the average amount of prizes paid per amounts staked per game) has been applied on a straight line basis…".

121. There was attached to Mr Butler's witness statement not only the original schedule submitted with the repayment claim, but also what was described as an alternative spreadsheet which was also compiled from Broadway's "systems". The original schedule resulted in a repayment claim of £4,969,362.35 and the alternative schedule would have resulted in a repayment claim of £2,028,786.42.

122. It was explained that the alternative spreadsheet had been compiled in order to accommodate HMRC's arguments that the nominal value as expenditure could not be correct, so re-wagers had been excluded thereby reducing the value of the claim significantly. In the event that Broadway were successful in establishing that Freeplays were prizes then a value would have to be attributed to them.

123. There is not a nil cost to Broadway in that, at a bare minimum, there are the fees payable to Microgaming. We also accept the argument that if there was no cost to Broadway then the abuse of bonuses would not be an issue for gaming providers.

124. Unsurprisingly, in our view, Ms Wilson maintained HMRC's consistent argument that they had been unable to verify any part of the repayment claim, whether the larger or smaller figure.

125. HMRC are correct in arguing, as they do, that there is no evidence as to quantum. Mr de Haan's suggestion that the alternate schedule be adopted is not accepted. It is Broadway's statutory duty to maintain records and permit access to HMRC. The former may exist but access has not been provided and nor have the records been provided. Both schedules are predicated on unsupported assertions about average players etc. That does not suffice.

Decision

126. For all these reasons, we allow the appeal to the extent that we find that once the Freeplays are winnings and credited to the player's account they are prizes within the meaning of Section 160(2) of FA 14. Once capable of being withdrawn they fall within Section 160(1) of FA 14.

127. The appeal is dismissed in that the claims for repayment are not admitted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

128. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 04 APRIL 2022

Appendix 1

Finance Act 2014 as originally enacted

"154 Remote gaming

(1) For the purposes of this Part "remote gaming" is gaming in which persons participate by the use of—

(a) the internet,
(b) telephone,
(c) television,
(d) radio, or
(e) any other kind of electronic or other technology for facilitating communication.

(2) Remote gaming is "pooled prize gaming" for the purposes of this Part if all or any part of the gaming payment is assigned by or on behalf of the gaming provider to a fund (referred to in this Part as a "gaming prize fund") from which prizes are to be provided to participants in the gaming.

(3) Remote gaming is "ordinary gaming" for the purposes of this Part if it is not pooled prize gaming.

(4) The Treasury may by regulations—

(a) amend the definition of "remote gaming" in subsection (1), and
(b) make such consequential amendments of section 17(2A) of BGDA 1981 (cases in which bingo duty is not charged on bingo played by means of remote communication) as appear to the Treasury to be necessary.

(5) Nothing in subsection (4)(b) affects the generality of section 194(1)."

155 Remote gaming duty

(1) A duty of excise, to be known as remote gaming duty, is charged on a chargeable person's participation in remote gaming under arrangements (whether or not enforceable) between the chargeable person and another person (referred to in this Part as a "gaming provider").

(2) In this Part "chargeable person" means—

(a) any UK person, and
(b) any body corporate not legally constituted in the United Kingdom if the person with whom the arrangements mentioned in subsection (1) are made knows, or has reasonable cause to believe, that at least one potential beneficiary of any prizes from remote gaming under the arrangements is a UK person.

(3) Remote gaming duty is chargeable at the rate of 15% of the gaming provider's profits on remote gaming for an accounting period.

(4) The gaming provider's profits on remote gaming for an accounting period are the aggregate of—

(a) the amount of the provider's profits for the period in respect of pooled prize gaming (calculated in accordance with section 156), (b) the amount of the provider's profits for the period in respect of ordinary gaming (calculated in accordance with section 157), and (c) the amount of the provider's profits for the period in respect of retained prizes (calculated in accordance with section 158).

(5) Where the calculation for an accounting period under subsection (4) produces a negative amount—

(a) the gaming provider's profits on remote gaming for the accounting period are treated as nil, and
(b) the amount produced by the calculation may be carried forward in reduction of the gaming provider's profits on remote gaming for one or more later accounting periods."

157 Profits on ordinary gaming

(1) To calculate the amount of a gaming provider's profits for an accounting period in respect of ordinary gaming—

(a) take the aggregate of the gaming payments made to the provider in the accounting period in respect of ordinary gaming, and
(b) subtract the amount of the provider's expenditure for the period on prizes in respect of such gaming.

(2) The amount of the gaming provider's expenditure on prizes for an accounting period in respect of ordinary gaming is the aggregate of the value of prizes provided by or on behalf of the provider in that period which have been won (at any time) by chargeable persons participating in ordinary gaming."

159 Gaming payments

(1) Where a chargeable person participates in remote gaming, the "gaming payment" for the purposes of this Chapter is the aggregate of—

(a) any amount that entitles the person to participate in the gaming, and
(b) any other amount payable for or on account of or in connection with the person's participation in the gaming.

(2) If the gaming payment is made to a person other than the gaming provider, it is to be treated for the purposes of this Chapter as made to the gaming provider.

(3) If the gaming payment has not been made at the time when the chargeable person begins to participate in the remote gaming to which it relates, it is to be treated for the purposes of this Chapter as being made at that time.

(4) The Treasury may by regulations provide that where a person relies on an offer which waives a gaming payment or permits payment of less than the amount which would have been required to be paid without the offer, the person is to be treated for the purposes of this Chapter as having paid that amount.

160 Prizes

(1) A reference in section 156 or 157 to providing a prize to a person includes a reference to crediting money to an account if the person is notified that—

(a) the money is being held in the account, and
(b) the person is entitled to withdraw it on demand.

(2) Where the account of a person participating in gaming is credited otherwise than as described in subsection (1), the credit is to be treated for the purposes of sections 156 and 157 as the provision of a prize; but the Commissioners may direct that this subsection is not to apply in a specified case or class of cases.

(3) The return of all or part of a gaming payment is to be treated for the purposes of sections 156 and 157 as the provision of a prize.

(4) Where a prize is obtained by or on behalf of a gaming provider from a person not connected with the person who obtains the prize, the cost to the person who obtains the prize is to be treated as the expenditure on the prize for the purposes of sections 156 and 157.

(5) 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) does not fall within subsection (4),
the specified amount is the value of the voucher for the purposes of sections 156 and 157.

(6) Where a prize is a voucher (whether or not it falls within subsection (4)) no expenditure is to be treated as having been incurred on the prize for the purposes of sections 156 and 157 if—

(a) it does not satisfy subsection (5)(a) and (b), or
(b) its use as described in subsection (5)(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 (5)(b).

(7) In the case of a prize which is neither money nor a voucher and which does not fall within subsection (4), the expenditure on the prize for the purposes of sections 156 and 157 is—

(a) the amount which the prize would cost if obtained from a person not connected with the person who provides it, or
(b) where no amount can reasonably be determined in accordance with paragraph (a), nil.

(8) For the purposes of this section—

(a) a reference to connection between two persons is to be construed in accordance with section 1122 of CTA 2010 (connected persons), and
(b) an amount paid by way of value added tax on the acquisition of a thing is to be treated as part of its cost (irrespective of whether or not the amount is taken into account for the purpose of a credit or refund).

Finance Act 2014 as amended by Finance (No 2) Act 2017

159 Gaming payments

(1) Where a chargeable person participates in remote gaming, the "gaming payment" for the purposes of this Chapter is the aggregate of—

(a) any amount that entitles the person to participate in the gaming, and
(b) any other amount payable for or on account of or in connection with the person's participation in the gaming.

(2) If the gaming payment is made to a person other than the gaming provider, it is to be treated for the purposes of this Chapter as made to the gaming provider.

(3) If the gaming payment has not been made at the time when the chargeable person begins to participate in the remote gaming to which it relates, it is to be treated for the purposes of this Chapter as being made at that time.

(4) For the purposes of this Chapter—

(a) where the chargeable person participates in the remote gaming in reliance on an offer which waives all of a gaming payment, the person is to be treated as having made a gaming payment of the amount which would have been required to be paid without the offer ("the full amount"), and
(b) where the chargeable person participates in the remote gaming in reliance on an offer which waives part of a gaming payment, the person is to be treated as having made an additional gaming payment of the difference between the gaming payment actually made and the full amount.

(5) Where a person is treated by subsection (4) as having made a gaming payment, the payment is to be treated for the purposes of this Chapter—

(a) as having been made to the gaming provider at the time when the chargeable person begins to participate in the remote gaming to which it relates, and (b) as not having been—

(i) returned, or
(ii) assigned to a gaming prize fund.

(6) The Commissioners may by regulations make further provision about how a gaming payment which a person is treated as having made under subsection (4) is to be treated for the purposes of this Chapter.

(7) This section has effect subject to section 159A.

159A Play using the results of successful freeplay

(1) Where a chargeable person participates in remote gaming, an amount is not to be taken into account in determining the "gaming payment" (if any) under section 159 so far as the amount is paid out of money in relation to which the first and second conditions are met ("excluded winnings").

(2) The first condition is that the money has been won by participation in the gaming either—

(a) in reliance on an offer which waives all or part of a gaming payment, or
(b) in a case where the gaming payment was paid out of money in relation to which this condition and the second condition were met.

(3) The second condition is that the chargeable person is not entitled to use the money otherwise than for the purpose of participation in the gaming.

(4) Subsection (5) applies where—

(a) a chargeable person participates in remote gaming in reliance on an offer which waives all or part of a gaming payment, and (b) that offer has been won in the course of the person's participation in the gaming (and the person was not given the choice of receiving a different benefit instead of the offer).

(5) The amount which would, apart from this subsection, be treated by section 159(4)(a) or (b) as a gaming payment (or additional gaming payment) is not to be so treated.

(6) For the purposes of this section, where a payment is made out of moneys which include both excluded winnings and money which is not excluded winnings (the "other funds"), the payment is not taken to be made out of excluded winnings except so far as the amount of the payment exceeds the amount of those other funds.

(7) In this section "money" includes any amount credited and any other money's worth."

160 Prizes

A reference in section 156 or 157 to providing a prize to a person includes a reference to crediting money to an account **only** if the person is notified that—

(a) the money is being held in the account, and
(b) the person is entitled to withdraw it on demand.

[(2) Removed]

(3) The return of all or part of a gaming payment is to be treated for the purposes of sections 156 and 157 as the provision of a prize (but where a gaming payment is returned by being credited to an account this subsection has effect subject to subsection (1)).

(4) Where a prize is obtained by or on behalf of a gaming provider from a person not connected with the person who obtains the prize, the cost to the person who obtains the prize is to be treated as the expenditure on the prize for the purposes of sections 156 and 157.

(5) 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) does not fall within subsection (4),

the specified amount is the value of the voucher for the purposes of sections 156 and 157.

(6) Where a prize is a voucher (whether or not it falls within subsection (4)) no expenditure is to be treated as having been incurred on the prize for the purposes of sections 156 and 157 if—

(a) it does not satisfy subsection (5)(a) and (b), or
(b) its use as described in subsection (5)(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 (5)(b).

(7) In the case of a prize which is neither money nor a voucher and which does not fall within subsection (4), the expenditure on the prize for the purposes of sections 156 and 157 is—

(a) the amount which the prize would cost if obtained from a person not connected with the person who provides it, or

(b) where no amount can reasonably be determined in accordance with paragraph (a), nil.

(8) For the purposes of this section—

(a) a reference to connection between two persons is to be construed in accordance with section 1122 of CTA 2010 (connected persons), and

(b) an amount paid by way of value added tax on the acquisition of a thing is to be treated as part of its cost (irrespective of whether or not the amount is taken into account for the purpose of a credit or refund).

(9) This section has effect subject to section 160A."

160A Prizes: freeplay

(1) Where a prize is a freeplay offer (whether or not in the form of a voucher) which does not fall within section 160(4)—

(a) for the purposes of sections 156 and 157, the expenditure on the prize is nil, and

(b) subsections (5) to (7) of section 160 do not apply in relation to the prize.

(2) Where a prize is a voucher which gives the recipient a choice of using it in place of money for freeplay or as whole or partial payment for another benefit, section 160(5)(b) has effect as if after "used" there were inserted "if it is used as payment for a benefit other than freeplay.

(3) In this section—

"freeplay" means participation, in reliance on a freeplay offer, in—

(a) remote gaming, or

(b) an activity in respect of which a gambling tax listed in section 161(4) is charged;

"freeplay offer" means an offer which waives all or part of—

(a) a gaming payment, or

(b) a payment in connection with participation in an activity in respect of which a gambling tax listed in section 161(4) is charged."