



[2014] UKFTT *** (TC)

TC0*****

Appeal number: TC/2013/02728

GAMING DUTY – section 11 Finance Act 1997- value for gaming duty purposes of Non-Negotiable Chips and Free Bet Vouchers provided free to players and used for gaming - whether value nil or face value - face value - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LONDON CLUBS MANAGEMENT LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public at 45 Bedford Square, London WC1 on 16 September 2014

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

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

DECISION

Introduction

1. This appeal raises a short point, namely what is the value for gaming duty purposes of “Non-Negotiable Chips” and “Free Bet Vouchers” (together referred to as “Non-Negs”) provided free of charge to players and used for gaming. London Clubs Management Limited (“LCM”) contends that the Non-Negs have no value in money or money’s worth and no liability to gaming duty arises in respect of them. The Respondents (“HMRC”) take the view that the Non-Negs have a value equal to their face value and should be taken into account, at that value, when calculating the banker’s profits from gaming for the purposes of gaming duty.

2. For the reasons set out below, I have decided that the value of the Non-Negs, in money or money’s worth, for gaming duty purposes is their face value and that value should be included as stakes staked and prizes provided in calculating LCM’s banker’s profits under section 11(10) Finance Act 1997 (“FA97”). Accordingly, LCM’s appeal is dismissed.

Facts

3. There was no dispute about the facts. Mr Michael Rothwell, the managing director of London Clubs International Limited, the parent of LCM, provided a witness statement. Mr Rothwell attended the hearing to give evidence but Ms Elizabeth Wilson, who appeared for HMRC, indicated that she did not wish to ask him any questions. The narrative that follows is drawn from Mr Rothwell’s witness statement and the documents provided by the parties.

4. LCM introduced Non-Negs to its operations in 2008 after the Gambling Act 2005 came into force in September 2007. LCM provides Non-Negs free of charge to selected customers as a promotional tool to encourage them to visit its casinos and play casino games. The customers can only use the Non-Negs to place bets at the gaming tables. Non-Negs take two forms, namely “Non-Negotiable Chips” and “Free Bet Vouchers”. I was shown images of the Non-Negotiable Chips and copies of the Free Bet Vouchers.

5. LCM provides Non-Negs to certain customers to encourage them to visit LCM’s casinos, rather than a competitor’s casino. In order to use the Non-Negs, a customer must visit the casino and play on the gaming tables. It is frequently the case that a player, once on the casino premises, will continue playing with cash bets once the Non-Negs have been used. In addition, players will frequently use other facilities at the premises (such as the bars and restaurants).

Non-Negotiable Chips

6. Normal cash gaming chips are either purchased for cash at the gaming tables or won by customers on a winning bet. Non-Negotiable Chips are similar to normal cash gaming chips with some important differences. Unlike cash chips, Non-Negotiable Chips are given free to customers (usually high net-worth customers with

a known propensity to gamble). The face of the chip is clearly marked “non-negotiable”. Non-Negotiable Chips can only be used to place a bet at the gaming tables and, unlike normal cash chips, cannot be encashed or used to pay for goods and services.

- 5 7. Like normal cash chips, Non-Negotiable Chips are replayable until lost. If a player wins a bet, the banker pays out the winnings in cash chips and the player retains the Non-Negotiable Chips, to place further free bets if they so wish. This means that players can continue to use the Non-Negotiable Chips to place bets until they make a losing bet. When a player loses a bet, the banker takes the Non-
- 10 Negotiable Chips and places them in the table’s “drop box”. The drop box is a secure box under a gaming table into which cash and plaques are dropped when players exchange their cash for chips at the gaming table. With the exception of tips, cash chips are not dropped in the drop box. Where a player loses cash chips, they are placed in the chip float.

15 *Free Bet Vouchers*

8. Free Bet Vouchers are printed paper vouchers which LCM gives to customers to encourage them to place bets at the gaming tables in LCM’s casinos. Free bet vouchers can take four general forms:

- 20 (1) “One-hit” vouchers which can only be used to place a single bet, regardless of whether the player’s bet wins or loses. Once the hand is played and the result declared, the dealer takes the voucher and drops it into the drop box – irrespective of whether the player has won or lost the bet. If a player wins the bet, his winnings are paid out in the form of cash chips. If he loses the bet, he receives nothing.

- 25 (2) “Cash match” vouchers operate in a similar way to one-hit vouchers, except that a player must first place a bet with cash chips in order to use a cash match voucher of the same value.

- 30 (3) “Free play vouchers” or “replayable vouchers” are vouchers that are replayable until lost, in the same way as Non-Negotiable Chips. If the player loses the bet, the voucher is placed in the drop box. If the player wins a bet, winnings would be paid to the customer in cash chips and the voucher returned to the player.

- 35 (4) “Free gaming chips vouchers” may be exchanged for Non-Negotiable Chips at the casino’s cash desk without charge. The Non-Negotiable Chips may then be used as described in above.

9. In contrast to Non-Negotiable Chips, where there are no printed terms and conditions, Free Bet Vouchers will either include full terms and conditions printed on the voucher itself, or will state that terms and conditions apply and the customer should enquire at the casino for further details. Free Bet Vouchers may state what
- 40 game or games can be played, what types of bet are permitted and what prizes can be won. For example, a voucher might state that it can only be used to place an “even money” bet (such as betting on red or black) at a roulette table. There is no change to

- the game or the odds at which it is played when a Free Bet Voucher is staked. If a bet wins, the prize is calculated by reference to the value stated on the Free Bet Voucher and the normal odds associated with the bet. For example, a £5 Free Bet Voucher used for an even money bet would return, if the bet won, £5 in cash gaming chips.
- 5 There is one exception to that treatment. The terms and conditions for the free roulette straight bet provides that the value of the voucher is £0.01p but a winning voucher pays enhanced odds of 5,000 to 1, ie a winning 1p bet would pay £50.
- 10 10. Since it introduced Non-Negs in 2008, LCM included the face value of Non-Negs played by customers and retained by the casino in the drop box in the calculation of its banker's profits. Following a review of its treatment of Non-Negs for gaming duty purposes, LCM considered that the face value of Non-Negs should not have been included in its banker's profits and, as a result of that error, it had over-declared gaming duty. On 19 October 2012, LCM's representative, BDO LLP, wrote to HMRC and requested repayment of £1,973,376.97 gaming duty over-paid in the
- 15 period 1 October 2008 to 30 September 2012. In a decision dated 13 March 2013, HMRC rejected the claim. LCM appealed against that decision.

Legislation

11. Section 10(1) FA97 provides:

20 “(1) ... 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].”

12. Until 27 April 2009, section 10(2) FA97 provided:

25 “(2)... this section applies to gaming by way of any of the following games, that is to say ... punto banco ... American roulette ... three card poker”

With effect from 27 April 2009, instead of listing the approved games by name, a new subsection (2) provides:

- 30 “(2) Subject as follows, this section applies to (a) casino games ...”
13. “Casino games” are defined by section 15(3) as “games of chance which are not equal chance gaming” where “equal chance gaming” means “gaming which does not involve playing or staking against a bank (however described, and whether or not controlled or administered by a player) and in which the chances are equally favourable to all players”. The claim period spans the change in the legislation but
- 35 nothing turns on the changed terms in this case.

14. Section 11(1) and (2) FA97 specify the accounting period in which a charge arises on a premises, the amount to be charged on the premises in that period, and the rate of charge on that amount currently in force for that period. Section 15(3) FA97 defines “accounting period” as “a period of six months beginning with the 1st April or
- 40 1st October”.

15. The definition of “gross gaming yield” is contained in section 11(8) FA97 which is as follows:

“(8) For the purposes of this section the gross gaming yield from any premises in any accounting period shall consist of the aggregate of –

- 5 (a) [not relevant in this appeal]; and
- (b) where a provider of the premises (or a person acting on his behalf) is a 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 16. The phrase “the banker’s profits” in section 11(8)(b) is defined by section 11(10) FA97 as:

“... 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

- 15 (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.”

20 17. Under section 11(11) FA97, the Treasury can amend section 11(10) by statutory instrument.

Issue and summary of submissions

18. Mr Andrew Hitchmough QC, who appeared with Ms Barbara Belgrano, for LCM accepted that the Non-Negs were “stakes staked with the banker in ... gaming” for the purposes of section 11(10)(a) FA97. Accordingly, the only issue in this appeal is what is the value, in money or money’s worth, of the Non-Negs? Mr Hitchmough submitted that Non-Negs do not have any value in money or money’s worth 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.

19. Ms Wilson contended that Non-Negs should be treated in the same way as any other stakes. When they used in a game, Non-Negs are “stakes staked with the banker in gaming”. When they are returned to a player on a winning bet, Non-Negs are “prizes provided by the banker” within the meaning of section 11(10)(b) FA97. Ms Wilson submitted that the value of the Non-Negs, in money or money’s worth, is their face value just the same as any other stakes.

Discussion

20. I start by considering the value of a cash chip for the purposes of section 11(10)(a) FA97. In relation to that question, and LCM’s claim, Mr Hitchmough submitted that the comments of Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (“*Lipkin Gorman*”) were key. Lord Goff stated, at 575, as follows:

“In common sense terms, those who gambled at the club were not gambling for chips: they were gambling for money. As Davies LJ said in *C.H.T. Ltd. v. Ward* [1965] 2 Q.B. 63, 79:

5 ‘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.’

10 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.”

15 21. Both parties referred to the decisions of the Upper Tribunal and Court of Appeal in appeals by *Aspinalls Club Limited* (“the Club”). The Club paid certain wealthy players, whom the Club wished to encourage, a commission calculated by reference to the amount of chips staked by those players during a limited period. The Club contended that the commission should be treated as reducing the value of the stakes
20 staked and thus its banker’s profits for gaming duty. HMRC did not accept that the commission payments reduced the banker’s profits and *Aspinalls* appealed. The appeal was dismissed by the First Tier Tribunal, see [2011] UKFTT 325 (TC), and the Club appealed to the Upper Tribunal.

25 22. In *Aspinalls Club Limited v HMRC* [2012] UKUT 242, [2012] STC 2124 (“*Aspinalls UT*”) Briggs J, as he was then, stated at [35]:

30 “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
35 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
40 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 section 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
45 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.”

23. Briggs J dismissed the appeal and the Club appealed to the Court of Appeal. In the Court of Appeal, Mr Hitchmough, who appeared for Aspinalls, submitted that the value in money or money's worth of the stake staked was the value which the player risked. It was not, accordingly, necessarily the face value of the chip. In *Aspinalls Club Limited v HMRC* [2013] EWCA Civ 1464, [2014] STC 602 ("*Aspinalls CA*"), Moses LJ, with whom the other members of the Court agreed, rejected that argument at [8] as follows:

10 "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* [1965] 2 QB 63, 79 and Lord Goff of Chieveley in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 575 ...). 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. In *Aspinalls CA*, Mr Hitchmough also submitted that "banker's profits" in section 11(8) implied a deduction of the costs of earning those profits which, in that case, was the commission. Moses LJ rejected that submission in clear terms at [11]:

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

25. Before me, Mr Hitchmough submitted that *Lipkin Gorman* showed that cash chips were merely convenient symbols for the cash deposited by the player with the casino and put at risk (or staked) by him at the gaming table. Normal cash chips are worthless in themselves and their value is the money deposited with the casino that they represent. Mr Hitchmough contended that Briggs J in *Aspinalls UT* and Moses LJ in *Aspinalls CA* both recognised that the chip was merely a representation of the money deposited by the customer. He submitted that this was clear from the emphasis placed by Moses LJ's in *Aspinalls CA* on the value put at risk in the game. Mr Hitchmough stated that the same approach leads to the conclusion that the Non-Negs have no value because the player staking a Non-Neg has not deposited any money with the casino in respect of it and is not risking anything of value in the game. A player staking a No-Neg cannot be said to be gambling with money or anything of value. Mr Hitchmough accepted, as he had in *Aspinalls UT*, that if one player gave a cash chip to another player (say a £50 cash chip), the use of the £50 cash chip by the donee in a game would be a stake of £50 for the purposes of gaming duty: see *Aspinalls UT* at [31]. He said that was because the cash chip represented the money deposited by the other player and it was that money that was risked in the game.

40 26. Ms Wilson submitted that *Aspinalls UT* and *Aspinalls CA* did not assist LCM. She contended that, by his reference, at [35], to section 11(10)(a) assuming an "objective ascertainment of value", Briggs J meant that the value in money or money's worth of a stake staked is given by the "stake staked" itself. If a £20 Non-Neg is staked as a stake in a casino game, the value in money of the stake is £20. She submitted that using any other value would be using a value derived from a perception

of value to the player or the banker, which Briggs J had rejected. Ms Wilson also contended that, at [8] of *Aspinalls CA*, Moses LJ distinguished between the stake as the amount risked in connection with the game (the stake staked) and the cost to the player of that stake (the amount risked after payment of commission). Moses LJ
5 stated clearly that amounts paid by way of commission do not alter the value put at risk in the game, i.e., the stake staked, although such commission reduced the value risked by the player.

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
10 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
15 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
20 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
25 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
30 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
35 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."

40 29. In my view, the objectively ascertained value for the purposes of section 11(10)(a) FA97 of a chip staked as a stake in a casino game is the face value of the chip. I consider that it is irrelevant whether a stake staked by a player is given to him or her free of charge. It must follow (and this was part of Ms Wilson's analysis) that the same value is to be used for the prizes provided by the banker for the purposes of
45 section 11(10)(b). I have concluded that the value of the Non-Negs, in money or

money's worth, for gaming duty purposes is their face value and that value should be included as stakes staked and prizes provided in calculating LCM's banker's profits under section 11(10). In the case of a £5 Non-Negotiable Chip that value would be £5. In the case of the roulette straight bet voucher with the stated value of £0.01p and the enhanced odds of 5,000 to 1, the value of the stake staked would be £0.01p.

30. I do not think that there is any distinction for these purposes between those Non-Negs (the one-hit free bet vouchers) that can only be used to make one bet and the other types of Non-Negs. In both cases, the amount of the stake staked with the banker is the monetary amount stated on the Non-Neg.

31. Until now, I have only considered Mr Hitchmough's submissions on the provisions of the FA97. Mr Hitchmough's skeleton also sought to draw support from some VAT cases in relation to free gifts and promotions but, at the hearing, he acknowledged that they did not provide any great assistance beyond indicating that if a customer obtains something for free then it is treated as free for the purposes of VAT. I think that Mr Hitchmough was right not to rely on the VAT cases as VAT is a different tax to gaming duty and has its own rules about value for VAT purposes.

32. Mr Hitchmough also referred to the way in which free bets are dealt with for the purposes of other profits-based taxes on betting and gaming. In particular, Mr Hitchmough relied on the fact that free bets are expressly excluded for the purposes of calculating remote gaming duty under the Betting and Gaming Duties Act 1981 ("BGDA 1981"). Section 26C(1) of the BGDA 1981 charges duty on the promoter's "remote gaming profits", which are defined by section 26C(2) as his "remote gaming receipts" minus his "expenditure ... on remote gaming winnings". Section 26E(1)(b) defines remote gaming receipts as "amounts staked, or falling due to be paid ... by a user of facilities for remote gaming". Section 26E(3) BGDA 1981 provides that:

"The Treasury may by order provide that where a person who uses facilities (U) relies on an offer which waives payment or permits payment of less than the amount which would have been required to be paid without the offer, U is to be treated for the purposes of this section as having paid that amount."

33. Mr Hitchmough submitted that the remote gaming duty legislation is materially similar in structure to the gaming duty legislation. In relation to remote gaming duty, the draftsman has recognised, in express terms, that free bets should not ordinarily be included within the charge to tax. Ms Wilson submitted that the remote gaming legislation provides for a different and separate regime to gaming duty on terrestrial casino games and it is not possible to use the former to interpret the latter from the point of view of construction or policy.

34. In relation to various other duties (general betting duty, bingo duty and machine games duty), Mr Hitchmough's submission was essentially that where they taxed fictitious profit, they did so explicitly. Gaming duty did not do so and should not be interpreted as if it had. Ms Wilson submitted that the other duties should be construed in their own statutory context and it is not possible to read across from one provision to another in the absence of an express provision.

35. I accept Ms Wilson's submissions in relation to remote gaming duty and the other duties. In my view, it is not possible to interpret section 11(10) FA97 relating to gaming duty by reference to provisions in other statutes relating to other duties without an express provision authorising such a cross-referencing.

- 5 36. Mr Hitchmough also submitted that section 11(11) FA97 gives the Treasury the power to amend the definition of banker's profits so as to include free bets such as Non-Negs, but that it had chosen not to do so. Ms Wilson's response to this point was that the existence of a general power to amend legislation does not tell us what the current legislation means. I agree with Ms Wilson on this point and draw no
10 assistance from section 11(11) FA97 in determining the value of the Non-Negs, in money or money's worth, for gaming duty purposes.

Decision

37. For the reasons set out above, LCM's appeal is dismissed.

Right to apply for permission to appeal

- 15 38. 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
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 27 November 2014