



TC06607

Appeal number: LON/2006/0875

VAT – exemption - betting and gaming – whether taxation of supplies of gambling made through certain slot machines when supplies through fixed odds betting terminals were exempt breach of EU principle of fiscal neutrality - whether other slot machines and fixed odds betting terminals were similar - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BETWEEN

THE RANK GROUP PLC

Appellant

- and -

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

Respondents

**Tribunal: Judge Greg Sinfeld
Mr Ian Abrams**

**Sitting in public at Taylor House, 80 Rosebery Avenue, London on 15, 16, and 17
May 2018**

Valentina Sloane, counsel, instructed by Deloitte LLP, for the Appellant

**George Peretz QC and Eric Metcalfe, counsel, instructed by the General Counsel
and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

Introduction

1. This appeal concerns the VAT liability of supplies of gambling made using certain slot machines during the period from 1 October 2002 to 5 December 2005 (the ‘Claim Period’). The relevant slot machines were known as section 16/21 machines and section 31/34 machines by reference to the provisions of the Gaming Act 1968 and the Lotteries and Amusements Act 1976 that applied to them.

2. Article 13B(f) of Directive 77/388 (‘Sixth VAT Directive’) required Member States to exempt from VAT “betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State”. The exemption was implemented in the United Kingdom by section 31 and Group 4 of Schedule 9 to the VAT Act 1994 (‘VATA94’).

3. During the Claim Period, supplies of gambling made through section 16/21 machines and fixed odds betting terminals (‘FOBTs’) were treated as exempt under item 1 of Group 4 of Schedule 9 to VATA94. Section 31/34 machines were regarded as ‘gaming machines’ and supplies of such machines for gambling were excluded from exemption by Notes (1) and (3) to Group 4 and were thus chargeable to VAT at the standard rate. The Appellant (‘Rank’) accounted for VAT on supplies of gambling by means of section 31/34 machines during the Claim Period. With effect from 6 December 2005, the definition of ‘gaming machine’ was extended to include FOBTs so that supplies of gambling on FOBTs became subject to VAT at the standard rate.

4. On 21 December 2005, Rank made a claim for repayment of the VAT that it had charged and accounted for in relation to the section 31/34 machines on the ground that supplies of gambling made by those machines and by FOBTs were similar and treating similar supplies differently for VAT purposes during the Claim Period was contrary to the EU law principle of fiscal neutrality. The Respondents (‘HMRC’) rejected Rank’s claim in a decision dated 31 July 2006. Rank appealed against that decision. HMRC subsequently issued assessments in relation to supplies made by Rank using section 16/21 machines on the ground that they were also gaming machines excluded from exemption by Notes (1) and (3) to Group 4. Rank appealed against those assessments and that appeal was stayed behind this one.

5. Rank’s appeal in relation to the section 31/34 machines was the subject of two hearings and decisions. The first, by the VAT and Duties Tribunal in 2008, considered whether the treatment of supplies made by section 31/34 machines as taxable while supplies made using section 16/21 machines were exempt infringed the principle of fiscal neutrality. In a decision issued on 19 August 2008 and reported at [2008] V&DR 304 (‘*Slots I*’), the Tribunal held that, from November 2003 at the latest, United Kingdom law and practice were prima facie in breach of the principle of fiscal neutrality in that similar products were taxed differently. HMRC appealed that decision to the High Court, which dismissed the appeal, and to the Court of Appeal which referred some questions to the Court of Justice of the European Union (‘CJEU’).

6. The second hearing of Rank’s section 31/34 machines appeal came before the First-tier Tribunal in 2009. At that hearing, the Tribunal considered, among other points that are no longer in issue, whether FOBTs and section 31/34 machines were similar so that differences in the VAT liability of supplies made using them infringed the principle of

fiscal neutrality. In a decision issued on 11 December 2009 with neutral citation [2009] UKFTT 363 (TC) (*Slots II*), the Tribunal held that FOBTs and section 31/34 machines were similar from the viewpoint of the generality of players.

7. *Slots II* was appealed to the Upper Tribunal which referred certain questions to the CJEU which considered them together with the Court of Appeal's questions in *Slots I*. Following the CJEU's decision, see Joined Cases C-259/10 and C-260/10 *HMRC v The Rank Group plc* [2012] STC 420 (*Rank CJEU*), the Upper Tribunal allowed HMRC's appeal against *Slots II* on the ground that it contained errors of law – see *Rank Group plc v HMRC* [2012] UKUT 347 (TCC) (*Rank UT*). The Upper Tribunal set *Slots II* aside and remitted the case to this Tribunal for re-determination in the light of the ruling in *Rank CJEU*. The remitted proceedings were stayed pending determination of the *Slots I* appeal. *Slots I* was ultimately determined by the Supreme Court which held that supplies made using section 16/21 machines were taxable – see *HMRC v The Rank Group Plc* [2015] UKSC 48.

Issue

8. The principle of fiscal neutrality precludes treating similar goods and supplies of services differently for VAT purposes. *Rank CJEU* showed that a Member State cannot rely on conditions or limitations imposed by that Member State to make games of chance or gambling that are exempt under the Sixth VAT Directive subject to VAT if those conditions or limitations are contrary to the principle of fiscal neutrality. It was common ground that, during the Claim Period, there was a difference in the VAT treatment of gambling on FOBTs, which was exempt, and gambling on section 16/21 and section 31/34 machines, which was subject to VAT. The parties agreed that if the FOBTs and the section 16/21 and/or section 31/34 machines were similar, giving that word the meaning given it by the CJEU in *Rank CJEU*, treating supplies of gambling made through them differently for VAT purposes would be contrary to the principle of fiscal neutrality. The only issue for determination by us in this remitted appeal is whether, during the Claim Period, FOBTs and the section 31/34 machines and/or section 16/21 machines were similar.

Principle of fiscal neutrality

9. Before considering the evidence and determining the issue of similarity, it is necessary to refer to the case law to determine what is meant by 'similarity' and how to assess it for the purposes of the principle of fiscal neutrality. The description of the case law on the principle of fiscal neutrality that follows is substantially the same as that in our decision in *Done Brothers (Cash Betting) Limited and others v HMRC*, released at the same time as this decision, which is repeated here for the convenience of the reader.

10. The CJEU has considered the application of the principle of fiscal neutrality in the field of gambling in a number of cases. Some of those cases concern betting, lotteries and other forms of gambling and they are, obviously, of particular relevance to this appeal.

11. In Case C-283/95 *Fischer v Finanzamt Donaueschingen* [1998] STC 708, the CJEU considered whether a Member State was required to exempt unlawful supplies of roulette games when the provision of roulette by licensed public casinos in that Member State was exempt from VAT. Under German law at the time, the game of roulette could only be provided commercially by licensed public casinos. Mr Fischer was not licensed to run a casino and therefore to operate games of roulette but had a permit to operate a game of

skill using a machine called a 'Roulette Opta II'. However, he departed from the terms of the permit in such a way that the game amounted to a game of roulette. The game was described as follows by Advocate General Jacobs in paragraph 8 of his Opinion:

“The equipment used by Mr Fischer consisted of a wheel bearing the numbers 1 to 24 and also the ‘numbers’ O and X. Numbers 1 to 12 were black and numbers 13 to 24 red. The object of the game was to predict, by placing chips on the appropriate squares of the gaming table, where the ball thrown by a croupier would come to rest. The players purchased the chips for DM 5 each. In each game they could place one or more chips on the squares for one of the numbers 1 to 24, O and X (en plein), on the line between the two numbers (à cheval) and/or on the red and/or black numbers square. A player received 24 times the value of his stake where he placed his stake on the square for the number on which the ball came to rest, 12 times his stake where the ball came to rest on one of the two numbers between whose squares he had placed his stake and 2 times his stake where he correctly predicted that the ball would come to rest on red or black.”

12. As Advocate General Jacobs noted (see paragraph 25 of the Opinion), it appeared from the order for reference that Roulette Opta II was substantially identical to roulette but the similarity does not seem to have been at issue in the proceedings. The only issue considered by the Advocate General and the CJEU was whether taxing unlawful roulette games provided by Mr Fischer while exempting roulette provided lawfully by licensed casinos breached the principle of fiscal neutrality. The similarity of the two games was a term of the reference and the Advocate General and CJEU clearly dealt with the case on that basis. Accordingly, *Fischer* does not establish, although it may suggest, that classic roulette in a casino and games based on roulette offered on machines were similar for the purposes of the principle of fiscal neutrality.

13. The CJEU in *Fischer* held (see paragraph 31) that the principle of fiscal neutrality precluded the taxation of unlawful roulette when the corresponding activity carried on by a licensed public casino was exempted. It is therefore quite clear that whether a game is lawful or unlawful is not a relevant factor in determining whether the two games are similar for the purposes of the principle of fiscal neutrality.

14. The CJEU considered the application of the principle of fiscal neutrality to supplies of gambling again in Joined Cases C-453/02 and C-462/02 *Finanzamt Gladbeck v Linneweber and Finanzamt Herne-West v Akritidis* [2008] STC 1069 ('*Linneweber*'). Mrs Linneweber operated gaming machines in restaurants and amusement arcades. German law at the time provided that supplies through gaming machines in licensed public casinos were exempt from VAT while supplies through such machines in other places were taxable. Mrs Linneweber contended that the exemption should apply generally to supplies made through all gaming machines and not just those located in licensed public casinos. The tax authority argued that the principle of fiscal neutrality did not require gaming machines situated in casinos and those not in casinos to be taxed in the same way because the stakes and winnings in the case of gaming machines installed in casinos were significantly higher than those in other establishments so that there was no competition between the two types of machine. Mr Akritidis ran a casino in which he organised card games which did not comply with the rules laid down by the authorities who assessed him to VAT on the income from the card games. Mr Akritidis appealed on the ground that income from organising lawful card games was exempt and distinguishing between lawful and unlawful card games was contrary to the principle of fiscal neutrality.

15. The CJEU stated, in paragraphs 23 and 24 of *Linneweber*, that, while Member States have the power to lay down the conditions and limitations in relation to the exemption for gambling, they must comply with the principle of fiscal neutrality which precludes treating similar goods and supplies of services differently for VAT purposes. The CJEU ruled in paragraph 25, that the identity of the manufacturer or the provider of the services and the legal form by means of which they exercise their activities are, as a rule, irrelevant in assessing the comparability of the products or services. The CJEU then addressed the issue of whether a distinction based on whether the games of chance were provided in licensed public casinos or other establishments breached the principle of fiscal neutrality. In paragraph 26, the CJEU stated:

“26 As the Advocate General pointed out in points 37 and 38 of her Opinion, in order to determine whether the activities at issue in the case leading to the judgment in *Fischer* were comparable, the Court only examined the comparability of the activities at issue and took no account of the argument that the games of chance differed for the purposes of the principle of fiscal neutrality, for the simple reason that they are organised by or in public casinos”.

16. The CJEU accordingly ruled that treating games of chance and gaming machines operated by licensed public casinos and those operated by traders other than such casinos differently for VAT purposes was unlawful.

17. The comments of the Advocate General (Stix-Hackl) in paragraphs 37 and 38 of her Opinion in *Linneweber* referred to by the CJEU in paragraph 26 were as follows:

“37. ... the proposition that games of chance differ for the purposes of the principle of fiscal neutrality for the simple reason that they are organised by or in public casinos must, however, also be refuted on the basis of the *Fischer* judgment. For the court ruled in that judgment that a member state may not impose VAT on a game of chance - albeit one that is organised outside a licensed public casino - if the organisation of such a game of chance by a licensed public casino is exempt ...

38. The court could not have given this ruling if it were indeed true that the games of chance offered by public casinos already differed significantly from those offered by commercial operators because of the difference in accessibility, the gambling environment, the ‘gambling culture’ or the different circle of user.”

18. We do not read what the CJEU said in paragraph 26 of *Linneweber* as specifically endorsing the Advocate General’s view on the CJEU’s reasons for its ruling in *Fischer*, especially as the CJEU did not give those reasons in that case. However, we find the view of the Advocate General to be persuasive. What we must consider is whether the supplies of gambling on FOBTs and supplies of gambling on section 16/21 machines and/or section 31/34 machines during the Claim Period were similar. It is clear from *Fischer* that, in assessing the similarities, we must disregard where the machine is located. That, it seems to us, is because the focus is on the nature or character of the supply, ie the gambling activity, and not the environment in which it takes place. Accordingly, we disregard factors such as accessibility, the gambling environment, the gambling culture and the different circle of user unless they affect the nature or character of the gambling activity itself.

19. The leading CJEU authority on the application of the principle of fiscal neutrality in the context of gambling is now *Rank CJEU*. The CJEU gave its judgment, which was

released in 2011, without an Advocate General's Opinion. In paragraph 32, the CJEU confirmed that the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes. The CJEU then set out some principles for national courts to apply when assessing whether two supplies are similar for the purpose of the principle of fiscal neutrality.

20. In paragraphs 33 to 36, the CJEU observed that, when invoking the principle of fiscal neutrality, it is not necessary to establish the existence of competition between two supplies of services or that there is distortion of that competition as independent and additional conditions. This is because it follows from the fact that the supplies are identical or similar from the consumer's point of view that they are in competition and differential tax treatment generally gives rise to distortion of that competition.

21. The CJEU set out how the national court should assess whether the two supplies of services are similar in paragraphs 43 – 44 and how that should be applied in relation to games of chance in paragraphs 53 – 57.

22. Paragraphs 43 – 44 of the CJEU's judgment in *Rank CJEU* are as follows:

“43. In order to determine whether two supplies of services are similar within the meaning of the case-law cited in that paragraph, account must be taken of the point of view of a typical consumer ... avoiding artificial distinctions based on insignificant differences ...

44. Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other ...”

23. The CJEU also set out, in paragraphs 45 – 49 and 55, a number of factors that are irrelevant in considering whether two games of chance are similar for the purpose of the principle of fiscal neutrality. The factors that should not be taken into account are:

- (1) the lawful or unlawful nature of the operation of a game of chance (paragraph 45);
- (2) the identity of the operators of the games and the legal form by means of which they exercise their activities (paragraph 45);
- (3) differences in the setting in which games of chance are made available and, in particular, accessibility in terms of location and opening times and atmosphere (paragraph 47);
- (4) differences in the application of other taxes (paragraph 48);
- (5) the legal regimes relating to control and regulation of the games (paragraph 49); and
- (6) differences in the details of the structure, the arrangements or the rules of games which fall within a single category of game, such as slot machines (paragraph 55).

24. The CJEU held, in paragraph 53, that betting, lotteries and other games of chance cannot be considered to be similar services for the purposes of the principle of fiscal neutrality. It follows that a Member State can treat certain types of game of chance

differently from other types without infringing fiscal neutrality. In paragraph 54, the CJEU held that taxing slot machines differently from horse-race betting, fixed-odds bets, lotteries and draws did not infringe the principle of fiscal neutrality.

25. We have already noted that, in paragraph 55, the CJEU made the point that differences in the details of the structure, the arrangements or the rules of the games which fall within a single category of game, such as slot machines, should not be taken into account. The CJEU said that such differences cannot justify treating supplies in the same category of game differently for VAT purposes as that would deprive the principle of fiscal neutrality of meaning and allow distortions in the VAT system. We consider that two important points emerge from paragraph 55. First, it is clear that FOBTs, section 16/21 machines and section 31/34 machines are a single category of game notwithstanding the fact that they differ in the details of their structure, their arrangements and the rules of the individual games. This is because the CJEU regarded FOBTs as a type of slot machine, as can be seen from paragraphs 20 and 22, and slot machines as a single category – see paragraph 55. The second point that we consider worth noting is that, in paragraph 55, the CJEU did not rule out treating machines that fell into the same category differently for VAT purposes where they were distinguished by differences other than details of the structure, the arrangements or the rules of the games concerned.

26. In paragraphs 56 and 57 of *Rank*, the CJEU described the factors that should be taken into account when assessing whether two games of chance are similar for the purpose of the principle of fiscal neutrality. Mr Justice Norris in *Rank UT* pointed out that the French, Spanish and German texts showed that the word “evidence” in paragraph 56 of the English language version of the CJEU’s judgment in *Rank CJEU* must mean “elements” or “circumstances”. Also, it is clear from paragraph 22 of the judgment that, when it used the word “formats”, the CJEU meant an event or a virtual game on the machines. Accordingly, the CJEU’s guidance in paragraphs 56 and 57 should be read as follows:

“56. It is apparent from paragraphs 43 and 44 of the present judgment that the determination whether games of chance which are taxed differently are similar, which it is for the national court to make in the light of the circumstances of the case ... must be made from the point of view of the average consumer and take account of the relevant or significant [elements or circumstances] liable to have a considerable influence on his decision to play one game or the other.

57. In that regard, differences relating to the minimum and maximum stakes and prizes, the chances of winning, the [events or games] available and the possibility of interaction between the player and the slot machine are liable to have a considerable influence on the decision of the average consumer, as the attraction of games of chance lies chiefly in the possibility of winning.”

27. The CJEU’s guidance in *Rank CJEU* on assessing the similarity of games of chance for the purposes of the principle of fiscal neutrality may be summarised as follows. The national court should consider whether gambling games, which are taxed differently, are similar from the point of view of a typical or average consumer. Supplies of services are similar where they have similar characteristics, which we interpret as meaning that they fall within the same category, and meet the same needs from the point of view of a typical consumer. The fact that gambling games can be described as betting, lotteries or other games of chance does not, by itself, mean that they have similar characteristics or fall

within the same category. Two supplies meet the same needs where their use is comparable and the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other. In relation to gambling games, the national court must take account of the relevant or significant elements or circumstances that are liable to have a considerable influence on the consumer's decision to play one game rather than the other, avoiding artificial distinctions based on insignificant differences. As the attraction of gambling games lies chiefly in the possibility of winning, the matters that are liable to have a considerable influence on the decision of the average consumer to play one game rather than another are differences in the minimum and maximum stakes and prizes, the chances of winning, the events or games available and the possibility of interaction between the player and the machine.

Our approach to the principle of fiscal neutrality in this appeal

28. In determining whether the different VAT treatment of the supplies of gambling on FOBTs and supplies of gambling on section 16/21 machines and/or section 31/34 machines during the Claim Period was contrary to the principle of fiscal neutrality, we must consider whether the games were similar from the point of view of a typical or average consumer.

29. We do not need to decide whether FOBTs, section 16/21 machines and section 31/34 machines fall within the same category. As we explain above, the CJEU has already decided, in paragraph 55 of *Rank CJEU*, that the machines in this case are a single category of game, namely slot machines. That is so notwithstanding the fact that there may be differences in the details of the structure, the arrangements or the rules of the games available for play on those machines.

30. In assessing similarity for the purposes of the principle of fiscal neutrality, we must decide, taking account of the relevant elements or circumstances, whether the use of the FOBTs, section 16/21 machines and section 31/34 machines was comparable from the point of view of the typical or average consumer and met the same needs of that consumer. Both Ms Sloane and Mr Peretz agreed that we should consider the comparability of the different types of machine and not of specific games on the machines (although Ms Sloane said that the position of roulette was particularly stark, being the same game on different machines). We consider that must be right as it might otherwise lead to the absurd result that different games on the same machine might be taxed differently. Further, in paragraph 58 of *Rank CJEU*, the CJEU refers to the comparability of “types of slot machine” and “the use of those types of machine” rather than the separate games on those machines. It follows that the fact that the machines offered a range of different games does not mean that they could not be regarded as comparable if, notwithstanding the different games, the machines met the same needs of the typical or average consumer.

31. Accordingly, in determining whether the use of FOBTs, section 16/21 machines and section 31/34 machines were comparable and met the same needs from the point of view of the typical consumer, we take account of the following elements and consider at the level of the machines and not by reference to individual games offered whether they were liable to have a significant influence on the typical consumer's decision to use one machine rather than another:

- (1) minimum and maximum stakes and prizes;
- (2) chances of winning;

- (3) events or games available; and
- (4) possibility of interaction between the player and the machine, including the ability of the player to influence the outcome of the game by their play.

32. In the absence of any direct evidence as to the needs of the average consumer and whether those needs were met by all or any of the machines under consideration, we approach the question of whether any particular element had a significant influence on the decision of the average customer to use one machine rather than another as a question of fact. Our evaluation is based on the evidence that was available to us which we discuss below.

Evidence

33. On remitting the case, the Upper Tribunal in *Rank UT* directed that all evidence at the first hearing (including the transcript of the oral evidence) should stand as evidence at the rehearing and that, subject to any further direction of this Tribunal, the evidence at the rehearing would be limited to the original evidence.

34. We considered the witness statements of five witnesses for Rank:

(1) Mr John Appleton, director of Electronic Leisure at Mitchells & Butlers, provided a witness statement dated 5 May 2009 with attached exhibits. He gave evidence about the history of the gaming industry and its regulation during the Claim Period as well as the development of FOBTs.

(2) Mr Anthony Boulton, managing director of Project Coin, a developer of gaming machines and games, provided a witness statement dated 8 May 2009. He gave evidence about the introduction of section 16/21 machine and how players used those machines, section 31/34 machines and FOBTs interchangeably.

(3) Mr David Lees, Head of Machines Business at Ladbrokes Betting and Gaming Limited, provided a witness statement dated 8 May 2009. He described FOBTs in the UK market, the interchangeability of FOBTs and section 34 machines and the effect of section 16 machines on FOBTs operated by Ladbrokes in the period 2004 - 2007.

(4) Mr James Thomas, founder of Thomas Automatics Company Limited, later sold to Rank, and a shareholder of Hippodrome Casino Limited, provided a witness statement dated 5 May 2009. Mr James Thomas described the introduction of the Gaming Act 1968 and the early development of section 16/21 machines (Green Shield Stamp machines).

(5) Mr Simon Thomas, Director of Hippodrome Casino Limited, provided a witness statement dated 5 May 2009. Mr Simon Thomas described the introduction of section 16/21 machines and their development between 2000 and 2005.

35. We also considered the witness statements of four witnesses for HMRC but principally those of:

(1) Mr Bernard Cunningham, of the Department for Culture, Media and Sport, provided a witness statement dated 19 August 2009 with attached exhibits. He gave evidence about the history of the gaming industry and its regulation during the Claim Period as well as the development of FOBTs and section 16/21 machines.

(2) Mr Tom Kavanagh, Deputy Chief Executive of the Gambling Commission, provided a witness statement dated 8 August 2009. He gave evidence about the

regulation of FOBTs and section 31/34 machines, a player's experience of FOBTs, the impact of FOBTs on the gaming industry and the context in which section 16/21 machines developed.

Mr Brian O'Kane and Mr Philip Sears, both officers of HMRC, provided witness statements but they said nothing of relevance to the issue of whether the machines met the same needs of the average customer or whether any elements had a significant influence on the decision of such a customer to use one machine rather than another.

36. We also read the transcript of the oral evidence given by the following witnesses at the hearing in 2009:

- (1) Mr David Lees
- (2) Mr Simon Thomas
- (3) Mr John Appleton
- (4) Mr Anthony Boulton
- (5) Mr Tom Kavanagh

37. Although we had the transcript, we did not have the benefit of seeing the witnesses give evidence and answer questions but, in our view, nothing turns on that. Both counsel made extensive submissions on the significance of the evidence and the weight that we should attach to different parts of it. We also take account of the fact that the original tribunal accepted the evidence of the witnesses, stating at paragraph 33 of *Slots II*:

“33. We are satisfied that all the witnesses gave evidence to the best of their knowledge and belief. Their knowledge of the primary facts varied. A considerable amount of the evidence was opinion, particularly as to the perception of players. Since the witnesses for the Appellant had been concerned with marketing the machines or rather their use, they had clearly more reason to consider the perception of players than those witnesses who had been concerned with regulation.”

38. Like the original tribunal, we accept the evidence of all the witnesses but give more weight to the views of those for Rank in relation to what elements were liable to have had a significant influence on the decision of the average customer to use one machine rather than another. Although it is clear that Mr Kavanagh had extensive experience, which included playing FOBTs himself during the Claim Period, we consider that the views of the Rank witnesses, who were concerned as providers or operators of the machines, were more likely to reflect the average customer's experience and needs. On the basis of the witness and other evidence, we find the facts to be as set out below in our discussion of the machines and games.

Comparability of FOBTs, section 16/21 machines and section 31/34 machines

39. In summary, Ms Sloane submitted that, insofar as there were any differences between FOBTs and section 16/21 machines and/or section 31/34 machines relating to the minimum and maximum stakes and prizes, the chances of winning and return ratios, the formats available and the possibility of interaction between the player and the slot machine, those differences were not material because that did not have a significant influence on the decision of the average consumer to use one machine or the other. Mr Peretz contended that Rank, which bears the burden of proof, had not shown that FOBTs were sufficiently similar to section 16/21 machines and/or section 31/34 machines to engage the principle of fiscal neutrality.

Maximum stakes and prizes

40. Given the obvious link between stakes and prizes, it is sensible to consider them together for the purposes of considering whether any differences had a significant influence on the decision of the average consumer to use one such machine or another.

41. There were considerable variations between the maximum stakes and prizes available on the different machines. For FOBTs, there was no maximum stake or prize until the coming into force of a code of practice agreed between the Gaming Board and the Association of British Bookmakers in May 2004. Under that Code, a stake limit of £15 (with a £100 maximum per transaction) and a prize limit of £500 were introduced.

42. The stake limits for section 34 machines (the only machines permitted in pubs and arcades and the most popular of the machines) were 30p with a maximum prize in some cases of £5 in cash/£8 non-cash or, in other cases, £25. For section 31 machines (permitted in clubs, bingo halls and casinos), the maximum stake was 50p with maximum prizes of up to £2,000 in casinos. For section 16/21 machines in bingo halls and casinos, the maximum stake was 50p per chance with a maximum prize of £25 per chance or £500 in aggregate.

43. The average bet on a FOBT was nothing like the maximum stake of £15, much less the maximum of £100 per transaction. The evidence of the witnesses, including Mr Kavanagh for HMRC, was that, for both section 16/21 roulette and FOBT roulette, players tended to spread their money around with lots of small stakes rather than bet all their money on one number. This meant that players put relatively small amounts of money on a number or combination of numbers. This evidence was consistent with figures produced by Ladbrokes for August 2003, ie prior to the introduction of the Code of Practice for FOBTs, which showed that the majority of individual stakes on a FOBT were 25p and that over 90% of stakes were £1 or less. The actual figures were 57.82% of stakes were 25p; 15.73% of stakes were 50p and 18.48% of stakes were 51p-£1.

44. Mr Kavanagh said that the effect of these stake limits was that a game of roulette on a section 16/21 machine was a “watered down” version of roulette on a FOBT. He accepted, however, that the average total stake on a FOBT was in the range £10 to £15, “not up at the maximum”. Mr Simon Thomas agreed that a typical stake on a FOBT was between £10 and £15 or around £12 on average. Figures provided by Ladbrokes showed that, in 69.44% of plays on a FOBT, the total stakes amounted to £10 or less. The average total bet on a section 16 roulette machine was between £8 and £12.

45. On a FOBT roulette game, a player could win the maximum £500 prize only if they bet £13.88, ie the total of an average stake, on one number. In practice, over 90% of wins on FOBTs were £25 or less. Similarly, most of the wins on section 16/21 machines were smaller wins to keep players enthused. Mr Kavanagh agreed that the maximum possible prizes were similar on FOBTs and section 31 machines.

46. As to whether the differences in stake and prize limits influenced the typical customer’s choice of machine, Mr Simon Thomas said that the same customers played both section 16/21 machines, which were developed to compete with FOBTs and did so effectively, and section 31/34 machines. His evidence was that customers moved between different types of machine which were interchangeable, irrespective of the differences in stakes and prizes. He also said that customers would play both high

stake/prize machines and low stake/prize machines according to the amount of money that they had available to them.

47. We were addressed on the different ways that different machines accepted bets, eg in cash, whether in notes or coins or by credit loaded at the counter, and paid out prizes, eg cash or printed ticket. There was, however, no evidence that customers were influenced in their choice of machine by the method of placing a bet or being paid a prize. It seemed to us that the payment method would be unlikely to have a significant influence on the average customer's decision whether to play a particular machine unless a method was particularly cumbersome and there was no evidence to suggest that.

48. We find that the difference in upper limits for stakes and prizes did not have a significant influence on the decision of the average customer to play on one machine or another. We accept that higher stakes and prizes available on FOBTs compared to some other machines made the FOBTs more attractive to certain customers, namely those who wished to play for higher stakes, but they were a minority and not typical of customers.

Chances of winning

49. As the CJEU pointed out in *Rank CJEU*, the attraction of games of chance lies chiefly in the possibility of winning and we consider that differences in the chance of winning on one machine as opposed to another are likely to have had a significant influence on which machine the customer chose to play. By chances of winning, we mean the odds that are available, whether the result is random and the pay-out ratios, ie total prizes awarded as a percentage of total stakes.

50. In response to a question, Mr Simon Thomas stated that all machines are required to tell the player what they will win for the amount they staked. The FOBTs, as the name implies, offered fixed odds and were fully random, ie not compensated. The section 16/21 machines also offered fixed odds, eg roulette and bingo, and were fully random. Some section 34 machines offered roulette at fixed odds. Mr Kavanagh explained that machines were compensated by means of software which ensured that pay-outs made by the machine remained within certain parameters. For example, a machine could be set up by its operator to have a specified pay-out ratio, eg 80%. The software would then constantly check to see how much had been paid out in winnings in the recent past and vary either the odds of winning or the value of any given win on subsequent games to ensure a constant pay-out ratio. A machine which is compensated is not fully random. Mr Simon Thomas said that section 31 machines could not have a compensator: they had to be random. Some of the section 34 machines were random but the majority were compensated.

51. The evidence was that there was a range of pay-out ratios on both FOBTs and gaming machines. The pay-out ratio for roulette games on FOBTs and section 16/21 machines was the same at 97.3%. A variant of roulette (double 00 roulette) available on some section 16/21 machines had a pay-out ratio of 94%. The pay-out ratio for a virtual horse or dog racing game on a FOBT could be 80%. The pay-out ratio for a section 31 machine would vary depending on the site. It might be 80 – 89% in a working men's club and would be around 90% or 92% in a bingo hall. The pay-out ratio on a section 34 machine would vary even more widely, from 70% to 96% according to its location. Motorway service stations had the lowest pay-out ratio at 70% while it could be 75 - 80% in pubs and between 85% and 90% elsewhere. Mr Simon Thomas said that some section 34 machines operated by his company had pay-out ratios of 95% or 96%.

52. The issue for us is whether the differences between random and compensated machines or in the pay-out ratios had a significant influence on which machine the average customer chose to play. Our view is that these factors did not significantly influence the typical customer. The evidence of Mr Simon Thomas, which we accept, was that the majority of players know what they have staked and how much they might win but they will not know the actual chance of winning. We also accept the evidence of Mr Simon Thomas that whether a machine is random or not may make a difference to some players but generally it does not because the customer plays the machine without knowing if it is fully random or not. He also said that even where a player is told that a machine is fully random, they would not necessarily believe it. His observation was that gamblers were superstitious; for example, they tended to believe that a machine or event that had just paid out was unlikely to do so on the next play even if the result was random. We consider that, to the average consumer, the distinction between fully random and compensated machines was not a significant influence on their choice of machine because the typical customer either did not know that the machines were random or did not believe it.

53. We also consider that the difference in pay-out ratios did not influence customer choice because it would not generally be obvious to customers unless the difference was particularly extreme. This is because the evidence showed that the pay-out ratio was calculated (and, therefore, could only be detected) over a long cycle of 8,000 to 10,000 games, which represents around ten consecutive hours of playing. Mr Kavanagh accepted that while, in his opinion, players would differentiate between a section 34 pub machine with a pay-out of 75-80% and a FOBT roulette game with a pay-out of 97.3%, where the difference was a lot smaller it would not be noticeable to players. Even in the former case, the player would have to play hundreds, perhaps thousands, of games on each machine to detect the difference. Further, many of the section 31/34 machines operated with pay-out ratios that were much closer to those of the FOBTs. Mr Boulton said that it would be very difficult to differentiate between machines where the pay-out ratio varied by, for example, 4 per cent. The variation in pay-out ratios in FOBTs was between 97.3% for roulette and 80% for virtual racing games. Most of the comparator machines had pay-out ratios that fell within that range or had a variation no greater than 4%. In those cases, the difference would not be detected by, much less influence, the average consumer.

54. Mr Peretz submitted that the evidence showed that operators varied pay-out ratios in order to attract and retain customers. For example, motorway service stations had low pay-out ratios because they did not need nor attempt to keep the customers on the premises because of the nature of their business whereas other premises, eg bingo halls and some pubs, wanted to keep customers on the premises and playing the machines. We do not consider that this shows, as Mr Peretz contended, that pay-out ratios influence customer choice. In our view, it demonstrates that certain suppliers are able to increase the profitability of the machines by reducing the pay-out ratios because the location offers little in the way of competing gambling opportunities or other attractions and those suppliers are not concerned with retaining customers on the premises or repeat business.

Events or games available

55. FOBTs offered roulette, card-style games (but only prior to the introduction of the code of practice in May 2004), virtual horse and dog racing, numbers games such as keno and 49s, and reels-based games. Section 16/21 machines offered roulette, virtual horse and dog racing, numbers games such as keno and 49s and reels. They did not offer card games. Section 31 machines only offered reels-based games. Section 34 machines

offered roulette-type games (some being ‘seaside’ games with ten colours and an effective 90% pay-out ratio or as secondary games), card-style games, numbers games, reels and some virtual horse and dog racing games.

56. As we have already observed at [31] above, we are looking at the comparability of “types of slot machine” and “the use of those types of machine” rather than the separate games on those machines. We are not concerned with artificial distinctions based on insignificant differences in the rules of games concerned. The same or similar games or events were available on FOBTs, section 16/21 machines and/or section 34 machines during all or part of the Claim Period. Section 31 machines only offered reels-based games. At the ‘machine level’, that appears to be sufficient to conclude that FOBTs, section 16/21 machines and section 34 machines all met the same needs of the typical customer in relation to the events of games available.

57. Mr Peretz took a different view. Roulette was the game predominantly played on FOBTs whereas section 31/34 machines were predominantly reels (‘fruit machines’). He pointed out that the evidence showed that even when other games were available on FOBTs customers tended to stick with roulette. Mr Peretz also submitted that the fact that Ladbrokes and other bookmakers chose to develop FOBTs and remove their existing section 34 machines showed that the different games or events available on FOBTs mattered to customers. We consider that the explanation is more likely to be that FOBTs offered customers the chance to play roulette in a way that was closer to the experience in a casino (the only realistic alternative when FOBTs were first developed) and that drew customers away from the section 31/34 machines. The section 16/21 machines, which offered roulette and other games in more direct competition with FOBTs, competed effectively with FOBTs. Where a particular game is available on one machine but not on another then we accept that may influence the typical customer to play the former machine in preference to the other. Where the same or materially similar games are available on different machines then the fact that one game is played more frequently on one machine than on another does not, by itself, indicate that the machines do not meet the same needs of the customer. There may be other explanations why roulette is played more frequently on a FOBT than on a section 34 machine. Whether two machines meet the same needs of the typical consumer is not determined by the frequency with which a particular game is played. Accordingly, we do not accept Mr Peretz’s submissions on this point and hold that that, at least in relation to the events or games available, FOBTs, section 16/21 machines and section 34 machines all met the same needs of the typical customer.

Interaction between the player and the machine

58. In the case of machines for gambling, the interaction that is most likely to have a significant influence on the typical customer’s decision to play one machine rather than another is the ability of the player to influence the outcome of the game by their play. Mr Kavanagh accepted in cross-examination at the hearing in 2009 that there was no difference in player machine interaction between FOBTs, section 16/21 machines and section 31/34 machines in the sense that, in all cases, players made their bets and set the machine to work. We consider that it is necessary to look at how the customers could play the machine in more detail than that.

59. FOBTs offered a wide range of bets at different odds and customers could bet on any possible outcome. In the case of roulette, for example, players were able to affect the level of risk by making a range of bets on a number or combination of numbers or ‘red or

black'. Mr Lees accepted that the opportunity to make a variable stake gave the customer greater choice and greater control of their betting patterns. Section 16/21 machines offered roulette which had as many price of play options (ie denominations of virtual chips) as FOBTs and offered 90% of the betting options that were available on FOBTs. Neither FOBTs nor section 16/21 machines allowed any player interaction once the bet had been placed. We consider that FOBTs and section 16/21 machines offered the same or materially identical interaction with the players.

60. Some section 31/34 machines offered the ability to vary stakes. At the hearing in 2009, Mr Boulton said that many of his machines had 'multi-tiered' games and that type of interaction was important to players. His evidence was that the interaction on the section 34 machines that he operated "was quite extensive ... as much interaction as, for example, a game of roulette, possibly more decision-making than a game of roulette." On many section 31/34 machines it was possible for the player to interact with the machine after the button had been pressed.

61. The evidence shows that there was a range of interaction available on FOBTs, section 16/21 machines and section 31/34 machines. A number of Rank's witnesses stated (and we accept) that player interaction was an important and relevant feature for players. However, we find that the possibility of interaction on all the machines was broadly similar and, therefore, the interaction available on a particular machine did not have a significant influence on the decision of the average customer to play on one machine or another.

Conclusion on issue of similarity

62. Two supplies meet the same needs where their use is comparable and the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other. In our view, the evidence shows that none of the factors identified by the CJEU as relevant considerations in *Rank CJEU* exerted a significant influence on the average consumer's decision to play a FOBT or a section 16/21 machine and/or a section 31/34 machine. We have found that the machines all offered similar games and that such differences as there were in stakes and prizes, pay-out ratios, whether machines were fully random or compensated and the ability of players to interact with the machines did not have a significant influence on the decision of the average customer to use play on one machine or another.

63. We have not only considered the matters identified by the CJEU in *Rank CJEU* but have also considered the wider evidence of the witnesses about how players viewed FOBTs and the other slot machines. Taking all the evidence together, we consider that the attitude of the typical consumer was accurately summed up by Mr Simon Thomas when he said that

"From the player's point of view, ... they are gambling on a gambling machine. Whatever the technical description of that machine is, they are putting their money in, watching a game, getting a result. That's their interest."

He also said:

"The importance to the player is value for money, and the players will move between different games within an arcade within the gaming space, move from the arcade to the bookies next door, to the bingo hall, dependent on what they want at the time. I suppose in the same way if you like

sweets, you don't always want to eat chocolate. You sometimes want jellies or dark chocolate or your taste of the moment”

64. In conclusion, we consider that the evidence shows that the typical or average consumer viewed FOBTs, section 16/21 machines and section 31/34 machines as similar and interchangeable because they all met the same need from the point of view of that customer which was to gamble on a machine by playing a game of chance for money. That is consistent with the statement of the CJEU in *Rank CJEU* that “the attraction of games of chance lies chiefly in the possibility of winning”. That is also consistent with the view of the original tribunal in 2009 which stated at paragraph 38:

“On the evidence before us to the generality of players they were all just gambling machines.”

65. The tribunal reached its conclusion having undertaken a comparison of the machines at a high level of abstraction which was subsequently shown to be an incorrect approach by the CJEU in *Rank CJEU* (see paragraph 19 of *Rank UT*). We have reached the same conclusion having compared the different machines by reference to the elements identified as relevant by the CJEU. Having done so, we find that the differences between the machines were not liable to have a considerable or significant influence on the average consumer's decision to use one machine rather than another and all the machines met the same needs from the point of view of the typical customer. Accordingly, treating FOBTs, section 16/21 machines and section 31/34 machines differently for VAT purposes during the Claim Period breached the principle of fiscal neutrality.

Disposition

66. For the reasons given above, Rank's appeal is allowed.

Right to apply for permission to appeal

67. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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.

**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 24 JULY 2018