Neutral Citation: [2024] UKFTT 00144 (TC)

Case Number: TC09079

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/12395

REMOTE GAMING DUTY – whether "cashback" payments meet the terms of section 160 Finance Act 2014 and are thereby "prizes" – yes – whether such payments are deductible for the purposes of the profits' calculation in section 157 Finance Act 2014 – yes – appeal allowed

Heard on: 20 – 22 November 2023
Judgment date: 13 February 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC
DUNCAN McBRIDE

Between

L & L EUROPE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Valentina Sloane KC and Max Schofield of Counsel instructed by Steptoe International (UK) LLP

For the Respondents: Michael Paulin of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns the basis of calculation of remote gaming duty (**RGD**) as prescribed in Part 3 Chapter 3 Finance Act 2014 (as amended with effect from 1 April 2018 by Finance Act 2017) (**FA14**) and in particular whether payments made by way of "cashback" paid by L&L Europe Limited (**Appellant**) are deductible in the calculation of profits on ordinary gaming (**Profits Calculation**) prescribed in section 157 FA14 on the basis that they meet the definition of a prize as prescribed in section 160 FA14.

PROCEDURAL BACKGROUND

2. The Appellant operates online casinos and is licenced with the Malta Gaming Authority, the Swedish Gambling Authority and the UK's Gambling Commission. The Appellant operates through a number of different website domains (or brands). The websites host software programmes designed, developed and operated by software providers. The programmes provide the facility for customers to gamble by way of games simulating slot machines and live dealer games (roulette/blackjack etc.). The Appellant operates a profit share arrangement with the software providers in the provision of these games to customers.

3. HM Revenue and Customs (**HMRC**) originated a project looking at incentives offered by operators registered for RGD in the UK. As part of that project, on 7 October 2021, HMRC sent the Appellant a generic enquiry letter regarding the incentives offered by the Appellant and a breakdown of the calculation of RGD in respect of two RGD returns rendered by the Appellant.

4. The Appellant responded to the enquiry on 6 December 2021. It is accepted by the Appellant that the response so provided was, at best, confusing because the nomenclature chosen to describe the cashback payments implied that they were "freeplays". Freeplays have specific treatment for RGD purposes. All parties accept in this appeal that the cashback payments provided by the Appellant are not freeplays and do not therefore fall within the scope of the discrete RGD treatment for freeplays.

5. Subsequent correspondence ensued in which the Appellant explained the nature of cashback payments. In summary, it was explained that payments were made to customers who, over a "session" (see below for fuller explanation), had lost all of the deposits made in that session. Customers in this situation were (and we understand on a continuing basis are) entitled to activate (and thereby claim) a cashback payment calculated as 10% of the lost deposits. No conditions were attached to the use of the cashback payment which, in real and economic terms, is cash belonging to the customer. By reference to the nature of the payment the Appellant considered it was entitled to deduct the payment from the RGD Profits Calculation thereby reducing the total RGD payable and justifying the sums returned as due to HMRC.

6. HMRC formed the view that the cashback payments were not so deductible. On 17 March 2022 HMRC communicated their conclusion as to the correct treatment of the payments for RGD purposes. The reason articulated was, in summary, that as the payments were made to losing players and they could not be said, by reference to the Oxford English Dictionary, to have been "won" by such players the payments were not expenditure on prizes for the purposes of the Profits Calculation. Further, the payments were too far removed from the original gaming payment to properly be considered a return of such gaming payments.

7. Subsequently, on 20 June 2022, HMRC assessed the Appellant to under declared RGD for the period 1 April 2018 to 31 March 2022 in the sum of £807,284. The assessment was upheld on review. The reasons given on review were:

(1) That section 160 envisaged repayments of the whole or part of the gaming payment only when such payments were an inherent feature of a player winning a game of chance and/or where there was no game of chance played at all;

(2) The cashback payments were simply a return of the customer's deposit and/or a separate payment which did not represent expenditure on prizes won and thus outside the gaming profit equation.

8. The Appellant ultimately appealed the assessment.

EVIDENCE AND FACTUAL FINDINGS

9. We were provided with a bundle of documents of 308 pages. We were also initially provided with three witness statements: two from HMRC (Ms Jacqueline LeFevre and Ms Ruth Ryan) and one from Dr Christopher Dalli, Chief Executive Officer of the Appellant. The Appellant raised certain objections to the statements of both HMRC witnesses. With regard to that of Ms LeFevre the Appellant contended that the statement was unnecessary because it simply annexed the correspondence which could and should be read without any gloss or opinion of Ms LeFevre. With regard to Ms Ryan's statement the Appellant's objection was that it was principally submission and opinion regarding HMRC's policy with regard to RGD. In light of these objections, which we indicated we considered to represent sound concerns, HMRC withdrew the statement of Ms Ryan and sought to rely on that of Ms LeFevre only to a limited extent and not on the opinion expressed. The statement thereby merely introduced the correspondence which it annexed. Ms LeFevre was not therefore called to give oral evidence and was not cross examined.

10. Mr Dalli gave sworn evidence and was cross examined at some length. We found him to be truthful and facilitative providing us with a helpful understanding of the Appellant's business. We unreservedly accept his evidence.

11. From the evidence we find the following facts relevant to the determination of this appeal. Our findings are made by reference only to cash transactions and not to participation through bonuses or freeplays which were agreed not to be in issue in this appeal.

(1) The Appellant operates four websites: Fun Casino, Hyper Casino, Yako Casino and All British Casino.

(2) The Appellant is a reputable online operator committed to providing a compliant, safe and fair gaming environment for customers with responsible gambling measures in place. It is registered with the UK Gaming Commission.

(3) In order to participate in gaming through any one of these websites a customer must be registered with that particular website. Only customers over 18 may register and must provide their name, address and date of birth in order to create an account. Upon registration and prior to being accepted as a customer, the customer is assessed by reference to all applicable regulatory and licencing requirements and in accordance with the detailed account rules, as set out in the general terms and conditions. A customer may only have one account per website and, if a customer wants to participate through more than one of the websites, they must be duly registered with each website.

Upon acceptance the customer receives a welcome email and access to their online account for that website. The account home page provides "tile" links to: the customer's profile, a record of their cashback entitlement; bonus wallet, password reset, cash wallet, gaming history, promotions, tournaments, a facility to set limits and access to games. For the purposes of this appeal the cashback, transactions and gaming history tiles are primarily relevant though the limits tab was also referred to in evidence. On the top right-hand side of every screen the customer can see their total balance available for gaming.

That balance will be the sum of their cash and bonus wallets. There is a small drop-down arrow next to the total figure which, when clicked, shows the breakdown of the total balance between cash and bonus wallets.

(4) As indicated above we are not concerned in this appeal with the bonus wallet. However, in brief summary, that wallet will include a customer's entitlement to play without having to use money from the cash wallet. Sums in that wallet may only be used for gaming, the value shown cannot be transferred to the cash wallet and may not be withdrawn.

(5) The cash wallet comprises sums deposited by the customer, cashbacks which have been activated and cash winnings. Sums in the cash wallet may be withdrawn by the customer at any time subject only to certain administrative requirements.

(6) Where a customer is registered with more than one of the website brands they are registered on the understanding and proviso that the Appellant will "take a single customer view in order to assess the collective activity of the customer with the group". We were told and accept that this approach is for regulatory purposes helping to ensure responsible gambling. The Appellant reserves the right to close any account where the customer is in breach of regulatory obligations and/or breach of the Appellant's terms and conditions. In general where an account is closed for regulatory reasons all transactions on the account are reversed and the parties restored to their ab initio position.

(7) Upon registration, or at any time, the customer can set deposit, loss and bet limits which may be daily, weekly or monthly limits. Once set, the deposit limit can be changed only after a 24-hour cooling off period and changing the limit requires positive action by the customer after the end of the cooling off period. The limits set are applied by reference to the single customer view where a customer has registrations under multiple brands.

(8) Absent the receipt of a welcome bonus (not relevant to this appeal) the first step for a new customer will be to make an initial deposit. Deposits can be made by debit card, online wallets, vouchers and bank transfers but may not be made by credit card. The minimum deposit is £10 for all deposit methods other than bank transfer for which there is a £30 minimum deposit. The maximum deposit will be fixed at the lower of the limit fixed by the customer for their account or the payment provider (i.e. limit on a debit card).

(9) We were provided with a screen shot of the games access page. Games are grouped into categories. On the screenshot provided to us the following are shown: "pubslots", "sportsbook" "videoslots", "live casino", "slingo", "slots", "table games", "casual games", and "jackpots". Further categories may be shown on the live screen. Each of these categories can be accessed through a dedicated tab or through scrolling on the "all categories" page. We understand that within each category are a number of alternative games. For example, and by reference to the screenshots available to use within "pubslots" there are games named "Big Horsey", "Cops 'n' Robbers", "Big Fishing". After the initial draft was circulated to the parties, we were informed that differing RGD treatment may apply to some of the categories. This appeal concerns all those to which cashback applies.

(10) We understand that the customer will choose a game via one of these pages. Once they have entered the game they are able to participate in the game by placing a "bet" or "spin" (we note that the terms and conditions refer to participation as "placing a bet"; however, Mr Dalli told us that the on-screen button through which to participate within the Appellant's website was labelled "spin" but that different operators would use

different terms). We do not consider it material what nomenclature is used but we will refer to a "spin". The customer will click the "spin" button and is thereby committed to a determined payment for participation in that game, the payment will be taken from the customer's cash wallet and may not exceed the amount in the cash wallet at the time. Plainly, on the first occasion that will be limited to the amount deposited. In accordance with the terms and conditions once the spin button is clicked there is an individual contract between the customer and the Appellant for the individual incidence of participation.

(11) Whether the customer wins or loses is a matter of chance. Each gaming operator, including the Appellant, will set what is known as the RTP (return to player) ratio. For the Appellant, the RTP is usually set collaboratively with the games provider as each will take a share of the profit on the game. Once the RTP is set the game will pay out according to the RTP but not uniformly. Thus over time and across players if an RTP is set at 96%, 96% of the payments made by customers will be paid out as prizes leaving the operator (and in this case the operator and the games provider) with a profit of 4%. Due to the random nature of the games (and the requirement that there be a risk of loss thereby meeting the definition of a game of chance) some customers will lose their initial payment, others might receive a payment smaller than the initial payment and others again a sum exceeding it. The RTP is therefore not shared equally by all players.

(12) When the game is completed the customer will be informed of the outcome of that game. The Appellant's websites refer only to two outcomes: a win or a lose. As such if a customer were to play a game with an initial spend requirement of £1 and receive 20p that would be notified as a 20p win. Similarly, if the initial spend were £1 and the customer received £2 that would be notified as a £2 win. We were told and accept that for games hosted by the Appellant wins less than the initial gaming payment are more common than wins exceeding the initial payment. Unlike the situation more common in bricks and mortar table games there is no real sense of a return of the customer's stake/bet plus a prize. We find that the Appellant treats all payments made by it to a customer on the outcome of each game as winnings whether or not the payment is greater or less than the payment to participate. We also find that in an ordinary sense the return of any sum as a result of having participated in a game of chance would be considered to be a win, that is so even where the amount so won is less than the initial payment to participate and, applying a pessimist's perspective, it might be said that the customer has lost a portion of the initial payment to participate rather than won the sum paid out.

(13) All such winnings are credited to the customer's cash wallet and represent a real cost to the Appellant. Crediting will often be instantaneous but may not always be so. The customer can discern how much they have won in respect of an individual game and over time through the gaming history tab. However, within the cash wallet there is no differentiation of the sources of the cash. Thus a customer who deposits £100, uses £50 to play a game or games and wins £40 will see a single cash balance of £90 at the point at which the winnings have been credited. Similarly, if that same customer rather than winning £40 had won £60, would see a single balance of £110. A customer losing the £50 spent to participate would, at that point, see £50 as his balance in his cash wallet.

(14) The Appellant operates cashback ubiquitously with all customers. Customers do not need to register or opt in to receive it. However, as discussed below, they must, activate it in order for the cashback sum to be credited to their cash wallet.

(15) We were told by Mr Dalli and accept that cashback is offered as a way of giving customers a sense of satisfaction that they never have to walk away having lost

everything. He told us and we accept that cashback has the effect of ensuring every player is allocated a proportion of the RTP in a way which cannot be achieved by varying the RTP itself. We accept that this was the reason for the introduction and continued offer of cashback. As such, we do not consider the cashback payments to be paid by way of incentive to participate, either initially or further once they are paid.

(16) The cashback terms are available on the websites. So far as material, they provide:

> "1. Cashback offers are available to all registered players …
>
> 2. Cashback is calculated from the first competed deposit; all future deposits will be added to the counter and all future withdrawals will be deducted from the cashback total.
>
> 3. Cashback is available for activation 24 hours after the first completed deposit, given that all deposits have been lost and there is no pending withdrawal.
>
> 4. Cashback can be claimed if the players balance is below £10.
>
> …"

(17) The cashback offer/banner on the website states "Always 10% cashback".

(18) In the simplest example of depositing £100, playing one game for £100 and losing, cashback works as follows:

(a) The customer makes a £100 deposit and immediately a 24-hour countdown begins. The countdown timer can be seen at any time by the customer clicking the "cashback" tab from their account home page.

(b) The customer proceeds to participate. Immediately when they press the spin button on a game for which a £100 payment is required the balance in the cash wallet will be reduced to £nil.

(c) The player loses.

(d) Until the countdown has reached zero the potential cashback is shown on the cashback tab. However, the potential cashback entitlement cannot be used to participate in gaming until the customer is entitled to activate it.

(e) After 24 hours the countdown will reach zero and the customer can choose to activate the cashback as the two conditions for activation are met (countdown has reached zero and there is less than £10 in the cash wallet).

(f) Once activated, £10 (being 10% of the lost deposit) is credited to the customers cash wallet. At the point at which it is credited it represents a real financial cost to the Appellant.

(g) When the cashback is activated the current session comes to an end.

(h) The cash so credited can be withdrawn in accordance with the terms and conditions (which set a minimum withdrawal value) in the same way as a withdrawal of an unused deposit or withdrawal of winnings.

(i) As with a deposit or a cash win there is no means of telling within the cash wallet what the source of the credit was.

(19) Taking a slightly more complicated example of the customer depositing £100 and playing 10 x £10 games:

(a) The customer makes a £100 deposit and immediately a 24-hour countdown begins. The countdown timer can be seen at any time by the customer clicking the "cashback" tab from their account home page.

(b) The customer proceeds to participate, on each occasion he participates by pressing the spin button on a game and the balance in the cash wallet will be reduced by £10.

(c) The player loses every one of the 10 games.

(d) After 24 hours from the initial deposit the countdown will reach zero. If, in this example we assume that all 10 games are played within 24 hours the customer can activate the cashback immediately that the countdown reaches zero as the two conditions for activation are met (countdown has reached zero and there is less than £10 in the cash wallet).

(e) If however, the customer played 5 games in the first 24 hours and 5 in the second 24 hours, continuing to lose on each occasion, the customer would not be able to activate the cashback when the countdown reached zero as they would still have £50 in their cash wallet.

(f) On the second day the customer will be entitled to activate the cashback as soon as he loses the deposit and thereby has less than £10 in their cash wallet. At the point at which it is credited it represents a real financial cost to the Appellant.

(g) When the cashback is activated the current session comes to an end.

(h) As previously, the cash so credited can be withdrawn in accordance with the terms and conditions (which set a minimum withdrawal value) in the same way as a withdrawal of an unused deposit or withdrawal of winnings.

(20) The position is more complicated but follows the same philosophy where the customer, rather than losing on every game, wins some. For these purposes we assume that the customer deposits £100 and plays 5 games. Games 1 and 2 are played in the first 24 hours, game 3 is played on day 2 and games 4 and 5 are played on day 3 with the following results,:

- game 1: £10 paid to participate, customer loses;
- game 2: £10 paid to participate, customer wins £100;
- game 3: £20 paid to participate, customer loses;
- game 4: £10 paid to participate, customer wins £10
- game 5: £160 paid to participate, customer loses.

In such a circumstance cashback operates as follows:

(a) The customer makes a £100 deposit and immediately a 24-hour countdown begins. The countdown timer can be seen at any time by the customer clicking the "cashback" tab from their account home page.

(b) The customer proceeds to participate; on each occasion he participates by pressing the spin button on a game and the balance in the cash wallet will be reduced by the payment to participate.

(c) After 24 hours from the initial deposit the countdown will reach zero. At the end of that period the customer cannot activate the cashback; whilst the countdown is at zero, the customer's balance exceeds £10, and they have not lost all of their deposit.

(d) At the end of day 2 the customer still cannot activate the cashback. Their cash wallet balance at the end of day 2 is £160 (and therefore above £10) and they have not lost the full deposit.

(e) At the end of day 3 the net position is that the customer has lost the full amount of the deposit (and the winnings) their balance is below £10, and the cashback may be activated. The cashback amount is 10% of the initial deposit and is not calculated on the lost winnings i.e. £10.

(f) When the cashback is activated the current session comes to an end.

(g) As previously, the cash so credited can be withdrawn in accordance with the terms and conditions (which set a minimum withdrawal value) in the same way as a withdrawal of an unused deposit or withdrawal of winnings. At the point at which it is credited it represents a real financial cost to the Appellant.

(21) If the example in (20) were amended such that the customer made a further deposit of £50 on day 3 and rather than pay £160 to participate in game 5 they pay £200 and loses the cashback which can be activated will be 10% of the total £150 deposited i.e. £15. The cashback can be activated at the end of day 3 after the loss on day 3 as the countdown is at zero despite the further deposit.

(22) By way of final example, if the example in (20) were adapted such that the customer withdraws their £100 winnings on day 2 the 24-hour countdown would be reset and the withdrawn amount would be deducted from the accumulated deposit to which the cashback would then apply however, the session would not end. Cashback will continue to accumulate on future deposits made (including if redeposited a sum equivalent to the withdrawn winnings) and will be available for activation once the clock is down at zero and provided the balance is below £10.

(23) Whilst the various permutations are complicated we find that the conditions imposed for the activation of cashback require that: (a) the customer has made a deposit, (b) used all of that deposit in order to actively participate in a game and (c) has not only lost the full value of their deposits but also lost any winnings not withdrawn over a minimum period of 24 hours whilst the timer is counting down and then on a continuing basis until cashback is activated. However, the amount of cashback paid is determined by reference only to deposits which have been used to participate in gaming and not in respect of either winnings or withdrawn deposits as all withdrawals are treated the same and reduce the entitlement to cashback (as per the terms and conditions).

(24) The Appellant's ability to refuse to make a cashback payment is limited to a situation in which the customer is in breach of their contract with the Appellant. The cashback terms are available to the customer prior to any decision being taken to make a participation payment. We consider it reasonable to conclude that it is an expectation for customers that in the event that the requirements for activation are met that the cashback will be paid. We therefore find that the right to cashback is an inherent feature of the game of chance offered by the Appellant. Customers participate on the basis that they may win (a sum greater or less than the initial payment to participate) or, in the event of losing have the right to activate and be paid the relevant cashback amount determined in accordance with the terms and conditions.

(25) We find that all sums held in a customer's cash wallet (whether that be sums deposited, winnings or cashback) are undistinguished and available to the customer to be withdrawn. They represent real money/money's worth to the customer. All sums held

in the cash wallet are within the control of the customer who is free to use them as they wish.

(26) No interest is paid on positive balances in a customer's cash wallet. All sums in a customer's cash wallet are protected in the event of the Appellant's insolvency. As the Appellant incurs costs associated with such protection, positive balances in an account which is inactive for more than 12 months will be charged £10 per month by way of an administration fee. This fee will act as an encouragement for the customer to remove the cash value from their wallet in prolonged periods of inactivity.

(27) Where an account is closed the customer will be refunded all positive cash wallet balances upon providing the Appellant with the account details into which the refunded sums are to be paid. If no details are provided the account remains open but inactive and, as at paragraph (26) above the administration charge will apply after 12 months.

(28) In accordance with paragraph (7) above if an account is closed for regulatory reasons or in consequence of a breach of the Appellant's terms and conditions the Appellant will void the crediting of both cashback and winnings. We find that such treatment is consistent with our conclusion at paragraph (24) that the cashback credit is an integral feature of the Appellant's offer to customers to participate in a game of chance which includes, as a potential outcome, that a cashback payment will be made.

(29) When undertaking the RGD Profits Calculation (gaming payments less expenditure on prizes) the Appellant enters all payments made to participate from either the cash or bonus wallet as gaming payments in the accounting period in which the customer participates in the game. It treats all winnings and cashback as expenditure on prizes when credited to the cash wallet.

(30) Where an account is closed for regulatory reasons (as per paragraph (28) above) and the account is voided ab initio, the Appellant effectively reverses all entries in the RGD account for both gaming payment and expenditure on prizes.

THE LEGISLATION

12. The legislation relevant to this appeal is contained in Part 3 Chapter 3 FA14 which provides the framework for the charge to RGD.

13. For the purposes of the present appeal the following provisions are relevant:

> **Section 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.
>
> **Section 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.

…

(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.

…

Section 160 Prizes

(1) A reference in section … 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) …

(3) The return of all or part of a gaming payment is to be treated for the purposes of … 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)).

…

Section 188 Gaming

(1) In this Part—

(a) "gaming" means playing a game of chance for a prize, and

(b) "game of chance" has the meaning given by section 6(2) of the Gambling Act 2005.

(2) For the purposes of subsection (1)—

(a) "playing a game of chance" is to be read in accordance with section 6(3) of the Gambling Act 2005, and

(b) "prize" does not include the opportunity to play the game again.

(3) But a game is not a "game of chance" for the purposes of this Part if—

(a) it can only be played with the participation of two or more persons, and

(b) no amounts are paid or required to be paid—

(i) in respect of entitlement to participate in the game, or

(ii) otherwise for, on account of or in connection with participation in the game.

14. Also relevant are sub-section 6(2) – (4) Gambling Act 2005 (**GA05**) which provide:

(2) In this Act "game of chance" –

(a) includes –

(i) a game that involves both an element of chance and an element of skill,

(ii) a game that involves an element of chance that can be eliminated by superlative skill, and

(iii) a game that is presented as involving an element of chance, but

(b) does not include a sport.

(3) For the purposes of this Act a person plays a game of chance if he participates in a game of chance –

(a) whether or not there are other participants in the game, and

(b) whether or not a computer generates images or data taken to represent the actions of other participants in the game.

(4) For the purposes of this Act a person plays a game of chance for a prize –

(a) if he plays a game of chance and thereby acquires a chance of winning a prize, and

PARTIES SUBMISSIONS

15. We are grateful to the parties for their detailed skeleton arguments, comprehensive oral submissions and responses to the additional questions raised by the Tribunal during the hearing which we have sought to summarise below. In reaching our decision on this appeal we have considered everything drawn to our attention by way of submission and evidence. It is, however, inevitable, given the detail of the arguments and the quantity of material before us, that not everything in the appeal is given specific mention in this judgment.

Appellants submissions

16. It is relevant to note at the outset that, in the main, the Appellant's submissions were (entirely expectedly) made to meet the case as articulated by HMRC in their letter of 17 March 2022, the review conclusion letter of 22 July 2022, their statement of case and in the case of the Appellant's oral submissions HMRC's skeleton argument. As it turned out, HMRC's case as presented to us bore little resemblance to the reasons given as the basis for the decision or even to their skeleton argument.

17. The Appellant's primary position is that the cashback payment is a prize won by the customer for the purposes of section 157. In the alternative, it is contended that the cashback

payment is a return of part of the money wagered by the customer which is deemed to be a prize won by virtue of section 160(3).

Prize under section 160(1)

18. The Appellant summarises the Profits Calculation as the difference between gaming payments and expenditure on prizes as framed (rather than formally defined) by FA14. Section 160(1) expands the scope of what is included within the provision of prizes so as to expressly include prizes not physically paid but given by way of credit. Given the non-exhaustive nature of the definition, and because the cashback payments meet the criteria prescribed in relation to credits, the Appellant contends that the cashback payments are properly treated as prizes and the expenditure associated with them is deductible.

19. The Appellant contends that a forensic consideration of the dictionary definitions of the words "prize" and "won" are unnecessary as the context of the legislative provision as its legislative purpose drives the relevant ordinary meaning to be placed on the language chosen.

20. Addressing specifically HMRC's reliance on dictionary definitions for prize and won/win the Appellant submits that HMRC's conclusion misfires for two reasons:

(1) The dictionary definitions of "prize" and "win" are not confined to a specific outcome of a game as HMRC assert; and

(2) In any event, the ordinary meaning of "prize" and "won/win" if relevant at all, is to be fixed by the statutory context. This is apparent from the Court of Appeal judgment in *Aspinalls Club Ltd v HMRC* [2013] EWCA Civ 1464 (***Aspinalls CA***).

21. In the context of the first of these points the Appellant refers to the Cambridge Dictionary which defines "win" as: "to receive something positive, such as approval, loyalty or love because you have earned it" and the Oxford English Dictionary: "to gain by effort or competition, as a prize or reward, or in gaining or betting, as a wager" or "to regain, recover (something lost); hence to make up for (loss, waste)." These meanings, also taken from a dictionary, it is said, amply bring within scope the cashback payments which are paid to recognise a sustained period of loss by the customer who has participated in gaming.

22. Further, in establishing the relevant meaning of "prize" and "won" we were invited to consider and, where appropriate, contrast the observations of various courts and tribunals on the meaning of those words in a number of different statutory contexts:

(1) *Doyle v White City Stadium* [1953] 1 K.B. 110 (***Doyle***) concerned a licenced boxer who agreed to box at White City Stadium on terms that he would receive £3000 "win, lose or draw". During the contest he was disqualified for hitting below the belt. The promoters paid the £3000 to the Board of Control who subsequently refused to pay Mr Doyle. Proceedings ensued as Mr Doyle sought payment. The majority of the dispute is not relevant to the Appellant's appeal (HMRC contend that the case is entirely irrelevant to the Appellant's appeal); however, the Appellant relies on the judge's analysis on the question as to whether Mr Doyle was entering a competition for a prize which had been withheld by the Board and to which he claimed he had a vested right. The court observed:

> "I object to the use of that expression 'a vested right'. I think 'prize' is not to be read in the rules as only meaning something in respect of which there has been a competition or context. The word 'prize' does not necessarily mean that. I take the second definition as given in an old copy of Johnson's Dictionary of the meaning of the word 'prize': 'A reward gained by any performance'. He would have gained the £3000 if he had not by his conduct been disqualified, but he was disqualified."

(2) In *Bretherton v United Kingdom Totalisator Company Limited* [1945] KB 555 (***Bretherton***) the issue under consideration was whether a football pool offered by a bookmaker through a local newspaper was unlawful conduct contrary to section 26(1) Betting and Lotteries Act 1934. That section made it unlawful for a newspaper to run a competition in which prizes were offered for forecasts of results of future events or any other competition which did not depend to a substantial extent on the exercise of skill. The High Court determined, in that context, that prize was "used in the Act to indicate the reward to be given to successful competitors".

(3) *McCollom v Wrightson* [1967] 3 All ER 257 (***McCollom***) concerned the provision of free bingo with free prizes offered in a pub and whether it was an offence contrary to section 177 Licencing Act 1964 and s34(1) Betting, Gaming and Lotteries Act 1963 (the former being an offence by the landlord and the latter by the participants). The offences required the provision of gaming as defined in section 55 of the Betting, Gaming and Lotteries Act 1963 i.e. "playing a game of chance for winnings in money or money's worth". The focus of the Court was on whether the introduction of a requirement that a game of chance required winnings altered the meaning of this provision as compared to the previous articulation of the offence. The Court held that winnings referenced "the money or money's worth which comes to a player over and above what he has staked."

23. The Appellant contends that these cases demonstrated that there was a range of potential meaning for both "prize" and "won" but the critical exercise for us to undertake is to consider the foundation and purpose of the Profits Calculation for RGD and the entire factual matrix to determine whether the cashback payments should be deductible as expenditure on prizes won.

24. It is the Appellant's position that the economic substance of the cashback payments is that they were prizes, and the expenditure should therefore be deductible as, without deduction, the Appellant is subject to a higher net effective rate of RGD.

25. In this regard they refer to the First-tier Tribunal decision in *Broadway Gaming limited v HMRC* [2022] UKFTT 120 (TC) (***Broadway***). In that case what constituted expenditure on prizes for RGD purposes was considered in the context of the award of freeplays. The case concerned statutory provisions which have now been amended and which preclude the outcome for which Broadway contended. However, Broadway sought to contend that the nominal value of the freeplays should be deductible expenditure. HMRC objected to such treatment on the basis that the freeplay did not represent "real-world" expenditure with the provisions underpinning the Profits Calculation needing to be read as a coherent whole. The Tribunal agreed that the provisions were to be read as a coherent whole (see [73]) and (at [92] and [97]) that, on the facts of that case, when freeplays were credited to the customer's account and withdrawn or used in substitution of cash, they also represented a real-world cost to the taxpayer such that the freeplays were properly treated as expenditure on prizes.

26. Relying on the Tribunal's acceptance of HMRC's submission in *Broadway* that the legislation should be applied as a coherent whole to the real-world effect of the cashback payments the Appellant contends that cashback is paid as a direct consequence of participation in gaming and the crediting of the payments in those circumstances fall within the natural meaning of those customers having recovered, in part, a sum which was lost, or a reward gained, through performance. Given the purpose of the Profits Calculation to determine the basis of assessment for RGD and thereby the real-world difference between the amount received and the amount paid out for games of chance it was plain that the cashback payments are prizes won by customers.

27. Thus, it is not appropriate to transpose the conclusion of the Upper Tribunal in *Aspinalls* ([2012] UKUT 242 (TCC) (***Aspinalls UT***) which concerned the calculation of bankers' profits

in the specific context of the tax regime for bricks and mortar gaming and which is differently (though similarly) framed.

28. For these reasons, the Appellant contends that the correct interpretation of section 157(1) and (2) leads to the conclusion that the cashback payments are "prizes … won" in the activity of gaming offered by the Appellant the expenditure of which thereby meets the ordinary meaning of the statutory language so as to permit the deduction of cashbacks in the Profits Calculation.

Return of the gaming payment

29. If their argument that a cashback payment represents expenditure on "a prize … won" for the purposes of section 157(2) (interpreted in accordance with section 160(1)) is not accepted the Appellant contends that the expenditure on cashbacks represents a return of part of the gaming payment received and, in accordance with section 160(3), is treated as expenditure on prizes for the purposes of section 157(2).

30. The Appellant highlights that the deeming provisions of section 160(3) are mandatory, when they are met the associated expenditure "is treated" as distinct from "may be treated".

31. As to the question whether the cashback payments are a return of the gaming payment the Appellant points to the wide definition of gaming payment within section 159: "any amount that entitles the person to participate" and "any amount payable … in connection with … participation". Cashback payments are, it is said, by their nature, sums in fact paid to those who have participated in gaming on the understanding that the Appellant has contractually undertaken to repay or return the cashback entitlement in the event that the customer loses all their deposits within a gaming session. The customer is aware of the entitlement to have the sums repaid to them from the outset and the cashback tab provides real time information as to that entitlement. The cashback payments (representing a return of part of the gaming payment) is one of the chance outcomes available when participating over a session.

32. In this regard, an analogy (and no more) is drawn to the line of VAT cases concerning cashbacks. Reference was made to *Elida Gibbs v HMRC* C-317/94 (***Elida***) and *Everest Ltd v HMRC* [2010] UKFTT 621 (TC) (***Everest***). In each of these cases the court and tribunal in question examined the contractual arrangements between the various parties and all the relevant circumstances in order to determine the economic nature of the payment. In each case determining that the payment made represented a reduction in the consideration payable for the goods by way of retrospective reimbursement of the price paid. Applying the same sense and approach in those cases the Appellant contends that it is clear that, in substance, the cashback payments made by it also reduced the value of the gaming payment received for each event of participation. As such the effect of the section 160(3) deeming was that the value of the payments made are to be treated as prizes won within the Profits Calculation.

33. The Appellant also submits that its case in this regard was consistent with the explanatory note for section 160(3) which reads:

> "Section 160 provides that the calculation of expenditure on prizes shall include the payment of winnings to a customer's account, and also allows for the return of any part of customers' gaming payments to be regarded as an expenditure on prizes."

34. Finally, further support for their case was said to be derived from the language chosen by HMRC in Excise Notice 455a: Remote Gaming Duty at paragraph 3 in which it is stated:

> "3 RGD calculation
>
> …

Your profit for each accounting period is the difference between the:

- Total amounts of money due to you (gaming payments) from you UK customers for taking part in ordinary gaming …
- Amounts that you have paid out separately for prizes for ordinary gaming …

3.2 Prizes

When calculating your profit you can deduct as prizes:

- Any prize which you've credited to your customer's accounts …
- Any gaming payment, or part of a gaming payment, that you've returned to customers."

35. Given the basis of the Profits Calculation and the absence of a mechanism for adjusting the gaming payment element of the calculation the Appellant claims that in order to reflect the economic reality that all activated cashback payments represent expenditure in the nature of the return of part of the gaming payment the cashback credited meets the statutory purpose prescribed in section 157(2). In this regard the interpretation invited by the Appellant, meets the test for a statutory deeming as explained by the Court of Appeal in *Marshall (Inspector of Taxes) v Kerr* [1993] STC 3608 and more recently by the Supreme Court in *Fowler v HMRC* [2020] UKSC 22 (***Fowler***).

36. The Appellant contends that the effect of the statutory deeming is that a returned gaming payment is deemed to be "a prize … won" as a composite term and that there is no absurdity in so treating what is a real cost of business, the economic reality of which is that part of the gaming payment is paid back to the customer as expenditure.

37. The Appellant contends that HMRC's bifurcation of prize and won and their proposed interpretation of the word "won" in the context of the section 160(3) deeming would render section 160(3) meaningless and preclude the application of that provision even in the scenario in which HMRC accept it applies i.e. where the gaming payment is returned in the event of a technical failure (see further explanation in paragraphs 52 and 69 below). Further, if HMRC's interpretation is correct RGD is collected at 23.33% and not the statutory 21%.

38. The Appellant also contend that if HMRC are correct that to represent a prize an amount must exceed the stake then the necessary and logical conclusion must be that every "prize" which is less than the stake is thereby a return of part of the gaming payment and indistinguishable in substance and reality from a cashback payment.

Payment is not too far removed from the gaming payment or for something else

39. One of the bases for HMRC concluding that the cashback payments may not be deducted was that the cashback payment was too far removed from the gaming payment to represent a return of part of it and/or it was a payment for something else.

40. On the facts, the Appellant denies that there is any basis to conclude that the payments are made as an incentive to play or that the customer is being paid to do anything (including for having participated) or as a loyalty payment.

41. The Appellant contends that as the payment represents 10% of gaming payments made from deposited amounts there is a sufficient nexus between the gaming payment and the cashback. The fact that the cashback is calculated by reference to lost deposits does not break that nexus. Cashback payments are a return of part of the gaming payments having their source as a deposit but that does not in any way preclude the payment being a return of part of gaming payments. The Appellant asserts that HMRC is looking to artificially dissect the basis of the

calculation of the payment from the entitlement to receive it. Customers are entitled to receive 10% of certain gaming payments made (i.e. those made from cash deposits rather than winnings) but only after they have been used to participate in gaming. There is no sense in which the Appellant is returning a proportion of the customer's deposits.

42. The Appellant refutes HMRC's position that section 160(3) stipulates that a returned gaming payment must identify the original payment on a game by game/stake by stake basis. They contend that there is nothing in the language of the provision on which such a contention could be made and that the nature of the aggregated calculation of RGD indicates that it is permissible to return a part of some or all gaming payments over a period (or session) in precisely the same way as would occur in respect of the payment of prizes paid in respect of accumulators, progressive jackpots and tournaments.

43. Further the statute does not provide for any temporal proximity between the payment of the gaming payment and the return of such a payment within the context of section 157(2) which simply requires that the prizes be won (or gaming payments returned and thereby deemed as prizes won) at any time in the accounting period for which the calculation was being undertaken.

HMRC's submissions

44. We had some difficulty with the case advanced by HMRC before us. As presented the case was different to the basis on which HMRC had justified their decision on making it and subsequently (including in their skeleton argument).

45. Nevertheless we discern that Mr Paulin had three headline arguments:

(1) There is a clear statutory structure and a framework for interpretation which must be applied in the present case. That statutory structure gives a clear meaning to the words "prize" and "won" by reference to syntax, context and previous case law. Therefore it is inappropriate to start, as the Appellant does, with the deeming provision and work backwards.

(2) The deeming provision in section 160(3) does not have the effect that the Appellant contends.

(3) It is inappropriate for the Appellant to rely on a VAT construction to support an assertion that part of the gaming payment is returned.

Statutory infrastructure and interpretation

46. Mr Paulin urges us to focus on the overarching statutory purpose of RGD as a specific tax on individual acts of participation in gaming. He particularly emphasises that the duty, albeit aggregated for the purposes of reporting, is to tax the net effect of each individual act of participation which has a statutorily defined beginning and a natural end in the shape of the outcome of the act of participation in a singular sense. Once the game is over there was no longer an element of chance outstanding and hence no further participation in that or any other game of chance. He contends that there was an entirely coherent statutory structure which precludes the Appellant's proposed interpretation of sections 157 and 160 FA14.

47. We were invited to start with the definition of gaming contained in section 188 FA14 as the "playing of a game of chance for a prize" which, pursuant to section 188(3) FA14, requires there to be an amount to be paid in respect of an entitlement to participate in the game.

48. From this definition, and by reference to section 159 FA14, it is contended that a gaming payment becomes due at the point at which a player's participation in a game of chance for a prize begins. The Profits Calculation prescribed in section 157 FA14 requires the operator to identify and aggregate all payments received in respect of gaming the participation of which

began in the accounting period. From that sum, it is contended, that an operator is entitled to deduct only amounts expended in the accounting period in connection with "win" outcomes and not ones associated with "lose" outcomes. In this context a "lose" outcome is where there is no return to the customer. We are unclear on Mr Paulin's position as regards a "win" where the amount returned was less than the original sum paid for the spin. At points Mr Paulin contended that such a "win" represented a return of part of the gaming payment and is therefore a deemed "prize … won" under section 160(3) FA14. However, such a submission would be contrary to his submission that section 160(3) FA14 is limited to addressing the scenario where a gaming payment is made (and thus required to be included in the Profits Calculation) but there has, in fact, been no game of chance liable to be taxed (see paragraphs 52 and 69 below).

49. It is contended that the nature of the expenditure which could be deducted is determined by reference to RGD being a tax on participation in a (singular) game of chance for prizes on an accounting period by accounting period basis.

50. During the hearing Mr Paulin's submission (as both we and the Appellant understood it) was that "at any time" had to be interpreted by reference to the syntax and context of "in that period" which was a reference back to "the accounting period" in respect of which the Profit Calculation was being undertaken. As such "at any time" is to be interpreted as permitting a deduction only in respect of expenditure on prizes (or the return of a gaming payment) made by the Appellant in an accounting period and associated with gaming payments received in that same period. Mr Paulin indicated that the Appellant (and consequently we) had misunderstood his submission.

51. Having carefully considered and reviewed the submissions as a whole we understand Mr Paulin to actually be saying that, "at any time" permits a deduction in respect of expenditure on a prize (or the return of a gaming payment) made in the accounting period for which the Profits Calculation was being undertaken but that such expenditure might relate to win outcomes (actual or deemed) in earlier accounting periods. Thus, for instance, in the case of an accumulator where the ultimate win outcome is not known for a period but is reliant on a series of intermediate wins the first win does not bring active participation to an end and there is, at that point no expenditure by the operator. That is the same for all intermediate wins until the final outcome. The final outcome brings the period of active participation to an end and gives rise to actual expenditure which may be deducted in the Profits Calculation. As such, the expenditure in question is incurred in the relevant accounting period even though it relates to the intermediate win outcomes along the way. Similarly, if there were a win outcome and, for some reason, the prize was not paid coterminous with the outcome the ability to deduct the associated expenditure within the Profits Calculation would not arise until the expenditure was actually incurred.

52. Thus, the bookends for a participation event, in HMRC's submission, are the point at which the game begins (when the spin button is clicked) and the ultimate outcome event of winning or losing. HMRC accept that any amount paid in connection with a win event is to be included in the profits' calculation however, no sum paid in connection with a lose event is expenditure which may be deducted. As set out below, the only exception being that HMRC accept that where for any reason (most likely a technical glitch), and despite payment having been made and participation commenced, there is, in fact, no actual participation the refund of the gaming payment will be deductible.

53. HMRC submit that that this is the correct approach and interpretation of sections 157 and 160 FA14 in accordance with the approach confirmed as appropriate by the High Court in *R (oao Shropshire and Wrekin Fire Authority and others) b Secretary of State for the Home department and the Police and Crime Commissioners for Cambridgeshire and West Mercia*

[2019] EWHC 1967 (Admin) which directs that the natural meaning of ordinary words be determined by reference to the syntax of the expression used, its context and proper understanding of any technical expressions.

54. It is contended that such an interpretation is entirely consistent not only with both the ordinary meaning of the words "prize" and "won" but what is also contended to be the "common law" meaning of the phrase "prizes … which have been won".

55. In the context of the ordinary meaning we are referred to the House of Lords judgment in *Pinner v Everett* [1969] 1 WLR 1266 (***Pinner***) in which the Lords directed that:

> "In determining the meaning of any word or phrase in a statute the first question to ask is always is what is the natural or ordinary meaning of the word of [sic] phrase in this context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase."

56. As regards the ordinary meaning of the words "prize" and "won" in the context of FA14 Mr Paulin contended the meaning was clear: "a prize is received as a consequence of chance falling in a player's favour when participating in a game of chance". He did not, either in his skeleton or oral submissions, refer to a dictionary definition though the decision on which the assessments were based, and the review decision, relied on a definition of prize provided in the Oxford English Dictionary. That definition reflects what Mr Paulin contends is the contextual ordinary meaning:

> "a reward as a symbol of victory or contest. Also, a reward given in recognition of some non-competitive achievement. 2. Something (as a sum of money or valuable object) that can be won in a lottery or other game of chance."

57. As regards the relevance of the "common law" meaning of the words "prize" and "won" we were taken to the Supreme Court judgment in *Lachaux v Independent Print Ltd* [2019] UKSC 27 (***Lachaux***). We are invited to place particular store by what is asserted to be the common law definition of a prize, requiring it to be won. This is on the basis that it is asserted that there is a rule of statutory interpretation which presumes Parliament to have adopted, without alteration, judicial consideration and determination of the meaning of relevant words. This is so particularly where such words carry an ordinary meaning or where a statutory definition is inclusive or expansive having a foundation of interpretation from the historically adopted meaning.

58. HMRC accept that there are limits to the application of *Lachaux* such that the judicial or common law interpretation on the meaning of relevant words does require the words to have been used in a relevant or similar context. In this regard we are referred to the Court of Appeal judgment in *Barras v Aberdeen Steam Trawling & Fishing Co Ltd* [1933] AC 402. That case concerned the interpretation of the word "wreck" in section 1 Merchant Shipping (International Labour Conventions) Act 1925 which provided for the payment of wages to seamen who became unemployed "by reason of wreck or loss" of the ship on which they were employed. The House of Lords (Scotland) were asked to determine that a prior case regarding the term "wreck" for the purposes of the Merchant Shipping Act 1894 had been wrongly decided. Their Lordships determined it was not open to them to do so and that "where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

59. We are thus urged to ensure that we confine any consideration of case law concerning the meaning of the words "prizes" and "won" only to cases concerning betting and gaming in a general sense. It is contended that it would be inappropriate to consider the meaning of "prize" as articulated in *Doyle* as the case considered the entitlement of a boxer to be paid for his services and not betting and gaming. It is contended that the label applied to the payment (a prize) does not assist us.

60. It is at least inferred that we could and should consider only the judgments in *Bretherton, McCollum* and *Aspinalls.* Regarding *Bretherton* HMRC emphasised the importance of being successful in order for a payment to represent a prize. On *McCollom* HMRC emphasised the conclusion that winnings were limited to the payment of sums exceeding the stake. And, it is said, that there could be no meaningful distinction between the conclusion in *Aspinalls* that commissions and rebates could not be said to be prizes.

61. HMRC assert that these cases represented the relevant common law which Parliament should be taken to have understood and adopted when FA14 was passed. From these judgments it is contended that we are required to assume that a prize in the present context is a sum only paid to those who are successful over and above the initial stake paid to participate in a game of chance. It is contended that it is plain that Parliament meant no change to the previous meaning of prize as articulated in these cases which are, as a matter of fact and degree, sufficiently similar in context to be applied by us.

62. When the cashback payment is analysed in these terms, it is contended to be plain, and a matter of common sense, that the customer had made a gaming payment to the Appellant, that payment entered the Profit Calculation at the point at which the customer hit spin and participation commenced. When the customer lost, active participation ended and there was no associated expenditure by the Appellant and thereby nothing to deduct from the gaming payment as part of the Profit Calculation.

63. It is contended that there is no place for the concept of a "session" over which a series of games may (or may not) be played in order to then bring the cashback payment into account. The equation is determined by reference to an aggregate of individual payments to begin a discrete act of participation and the associated expenditure incurred where that act of participation resulted in a win.

64. As the cashback payments are not sums won in consequence of having participated in a game of chance over and above the gaming payment itself it cannot be a prize in the ordinary or common law sense of the word. In this regard it is contended that the Appellant's position is no different to that in *Aspinalls* and therefore properly excluded from the Profit Calculation.

65. It appears that HMRC might have accepted that if the customer had paid a further sum (thereby representing a gaming payment) in order to have a chance of winning cashback the payment of the cashback would then have met the definition of expenditure on prizes as, in that circumstance, there would have been a new and independent act of participation for a prize. But in the present circumstances there was no associated gaming payment and, on the basis that the loss outcome was a fact and not an element of risk, there was simply a certain and ex gratia payment made to the customer.

The meaning and effect of the section 160(3) deeming provision

66. This headline point followed on very much from the first. It is contended that in order to understand and make sense of the confines of the deeming provision, as required in *Fowler*, we need to go back to the genus of the duty as a tax on participation in a game of chance for a prize (as per section 188 FA14 itself reflecting the taxation of gaming since 1968).

67. In doing so we are reminded of the first two features of the *Fowler* analysis that the extent of the fiction created by a deeming provision is primarily a matter of statutory construction and a requirement when determining the extent of the provision is to ascertain "the purposes for which and the persons between whom the statutory fiction is to be resorted".

68. The statutory purpose, so far as relevant in this appeal, of section 160(3) FA14 is stated to be for the purposes of the calculation of the Profit Calculation i.e. to determine what sums should be included as expenditure on prizes where the customer has actively participated in a game of chance and won a prize. In light of the accepted judicial interpretation of a prize being that which is over and above the return of the stake it is submitted that section 160(3) FA14 is required so that the operator can adjust the gaming equation in respect of the return of a gaming payment either because there was no game of chance at all or to reflect that all or part of the gaming payment has been returned as part of a winning outcome. In each case the provisions of section 160(1) FA14 simply reflect that in connection with remote gaming the expenditure may not be in the form of a physical cash payment and may be by way of crediting of an account but, in the latter case, the crediting must be definite and not conditional (such that it is akin to the return of cash).

69. With regard to the situation in which there was no participation because (most commonly) of technical failure the deeming provision is necessary. Unlike in a physical gaming context, and by virtue of section 159 FA14, participation in "a game" is deemed to have begun when the spin button is pressed and, pursuant to the contract terms, the contract for participation in that individual game is then made. However, where the operator is then in breach of their obligation under the contract to provide a (or that) game of chance there is no statutory mechanism by reference to which the gaming payment side of the Profit Calculation can be adjusted. As there has ultimately been no participation in the game and hence no gaming under the contract there can be no charge to tax and an adjustment is required to be made. Parliament chose to provide for an adjustment to the Profit Calculation by deeming the return of the gaming payment in that situation as a prize which has been won (thereby meeting the requirements of section 157(2) FA14.

70. In the context of the return of a gaming payment where there has been participation it is contended that the provisions of section 160(3) FA14 were the corollary of the provisions contained in section 159(3) FA14 as part of identifying the bookends of participation. In this regard we understand HMRC's argument to be that where the amount won in an individual game exceeded the initial payment to participate only that portion over the initial payment was a prize and that the balance would be a return of the gaming payment. So, for example, if the player paid £100 and won £300 only £200 would be a prize, £100 would be the return of the gaming payment. We thereby understand that where, again by way of example, the player made an initial payment of £100 and won £80 in statutory terms there would be no prize but the £80 would be treated as a prize as it would be the return of part of the gaming payment consequent on a win outcome. As indicated above we cannot see how this interpretation fits with the remainder of HMRC's argument on s160(3).

71. We are invited to contrast the limited approach to s160(3) invited by HMRC with the factual scenario of a cashback payment. HMRC assert that it is inherent in the very nature of a cashback payment that the player had actively participated in one or more games of chance but in the past tense. The outcome of those games was that the player had lost. The individual act of participation was completed and there could therefore be no return of the gaming payment as the Appellant had fulfilled the contract for the provision of a game and received the payment for it. It cannot therefore be said in any material way relevant to the Profit Calculation that the player has won back any portion of the gaming payment because they have not won and the contract for participation had been completed.

72. Despite it being expressly agreed that the complex provisions regarding freeplays and bonuses are not relevant in this appeal HMRC also submit that the limited deeming for which they contend is consistent with the provisions of section 159(4) FA14. That provision requires that where a gaming payment is waived in whole or in part the gaming payment is nevertheless treated as being the full amount which would, but for the waiver, have been required to be paid. This, it is said, support a conclusion that the cashback be properly considered to be either a discount (waiver) or rebate (post gaming outcome) and treated in the same way as a freeplay such that the gaming payment for the game in question be the price of a spin (whether collected in full or otherwise) and the definition of prizes be restricted to the amounts expended in the case of a win event (whether greater than or less than the original gaming payment).

73. It is contended that there is no place within the scope of the deeming provision to take a wider or "in effect" perspective of the cashback arrangement. HMRC assert that the cashback payment is a fixed percentage payable when certain conditions are met and thereby not expenditure on prizes for a game of chance (and not a series of games). Reliance in this regard is placed on the very short Court of Appeal judgment in *Wilfred Sherman v CEC* [1971] EWCA Civ J0524-3. The Court in that case stated that the appellant taxpayer could not escape the clear terms of the legislation by reference to a label applied as the law considered the realities. The reality of this payment is not, in HMRC's view, the return of a gaming payment nor is it won. The gaming payment has fulfilled its function as permitting participation in a game of chance which has taken place resulting in a loss outcome.

74. HMRC also submitted that the Appellant's argument introduces unpredictability and circularity of reasoning, a result which was an impermissible outcome in statutory interpretation as confirmed in the judgment of the Court of Appeal in *Kellogg Brown and Root Holdings (UK) Ltd v HMRC* [2010] EWCA Civ 118 (***Kellogg***). In Kellogg, the Court gave particular attention to the syntax of the relevant provisions which stated (in an entirely unrelated context) that the tense of the language used dictated the taxing outcome. Reinforcing his earlier point Mr Paulin emphasised that the present continuous of "participating" in section 157 FA14 precludes a conclusion that the return of a gaming payment could occur as a result of events occurring after the gaming outcome rather than directly in consequence of them by reference to single acts of participation.

75. It is asserted that if the Appellant were correct the effect would be that operators (rather than statute) would determine on what gaming payments duty would be paid which would lack the necessary certainty for an effective taxing statute. Mr Paulin denied that such "decisions" could be assimilated with the setting of the RTP which he submitted was an inherent feature of the risk associated with a game of chance.

Parallel to the VAT cases

76. We are warned that were we to apply any analytical parallel between the cashbacks which are at the heart of this appeal and a cashback for VAT purposes we would be making an error of law. This was on the basis that RGD is excluded from the VAT regime by way of the exemption provisions contained in section 31 and Group 4 to Schedule 9 Value Added Taxes Act 1994.

77. In the context of the differing tax regimes, and the premise on which each of the taxes are charged, it is submitted that there was no place for a retrospective reduction in the price paid for participation in respect of the cashback. RGD is charged on payments made to participate in a game of chance for a prize net of the prizes won as a direct consequence of an individual act of participation.

DISCUSSION

78. Our task in this appeal is to consider the statutory language provided in section 157 and 160, and in particular what is and is not included as expenditure on prizes. We do so by reference to our findings of fact as set out in paragraph 11 above and in the context of the case law to which we have been referred.

79. At the outset we note that in considering the dispute before us we have taken no account of the analogy with VAT cases which the Appellant invited. Accordingly, despite having recorded the parties' submissions regarding it we make no comment on it.

Are the cashback payments expenditure on prizes without recourse to the section 160(3) deeming?

80. Section 157(1) FA 14 requires that RGD be applied to the Appellant's profits on ordinary gaming. The profit is calculated as the difference between the aggregate of gaming payments made to the Appellant by its customers in the relevant accounting period and the Appellant's actual or deemed expenditure on prizes in the same period. Section 157(2) FA 14 prescribes that expenditure on prizes is the aggregate of the value of prizes provided by the Appellant which have been won at any time by the Appellant's customers. What represents the provision of a prize in section 157 FA 14 (and thereby a prize won at any time) includes amounts credited to a customer's account provided that the customer has been notified that it has been so credited and can withdraw the sum on demand (as per section 160(1) FA14).

81. We consider that it is clear that the Profits Calculation is undertaken on a "cash basis" (as distinct from an accruals basis). The reference to "an accounting period", "in the accounting period" and "for the period" all confirm that it is gaming payments treated as received (i.e. on each and every spin) in the relevant period and prizes which are actually credited to the customers cash account in that same period. Prizes to which a customer may have become entitled (i.e. that attributed to the first stage of an accumulator) but which are not actually credited in accordance with section 160(1) will not be aggregated until they are so credited and hence the reference to prizes being won at any time.

82. For present purposes we assume that HMRC are correct that the deeming in section 160(3) FA14 is limited to a technical failure (as, at times, asserted by HMRC) but we must then also assume that in the scenario where a customer pays £1 to spin and "wins" 20p the 20p is a "prize provided … which has been won" (contrary to HMRC's position on *McCollom*). Were that not to be the case the Appellant would not be entitled to deduct the 20p in its Profits Calculation and plainly (and as accepted by HMRC) it must be entitled to do so.

83. On this hypothesis we must determine whether there is then a distinction between crediting 20p where the screen at the end of the spin shows 20p won and the crediting of a cashback.

84. In the end we have concluded that there is no relevant distinction to be drawn. We do so on the basis that "prize provided … which has been won" requires the payment made to be one of the potential outcomes upon participation in a game of chance.

85. RGD is the tax which Parliament has decided to levy on remote gaming and on its terms it accepts that expenditure is deductible where that expenditure is inherent in the risk to both provider and customer associated with a game of chance. Any amount credited (and which may be withdrawn or otherwise treated as cash – as required by section 160(1) FA14) as a feature of the game is, by reference to the purpose of the tax and the context in which the language is used, an amount which represents a "prize … won".

86. As set out at paragraph 11(24) we have concluded that a customer is made aware of the circumstances in which they will be entitled to cashback and that it is an inherent feature of the

gaming offered by the Appellant. As such every time a customer makes a gaming payment they do so knowing that they might win a sum greater or less than the amount staked on the spin but in the event that they lose they will be entitled to activate their entitlement to cashback and thereby receive a sum calculated as 10% of their lost deposits. We cannot see the cashback outcome as anything other than a potential to be paid 10p in every £1 deposited, staked and lost in a game of chance. There is therefore no relevant difference between 10p won immediately as a consequence of the spin, 10p as part of an accumulated series of games and 10p cashback. Each outcome simply depends on a different potential outcome or chance in the game.

87. We consider that the conclusion we have reached is consistent with the statutory language and the approach of the Court of Appeal and tribunals in *Aspinalls* despite the final decision in that case on superficially similar payments. In *Aspinalls* the Court and tribunals were concerned with the "identification of the precise meaning of the defined phrase 'banker's profits' in s11(8)(b) of the Finance Act 1997 (**FA97**), as explained in s11(10) (as amended by the Finance Act 2007 …)" (as per [2] of the *Aspinalls UT*). In that case the taxpayer made commission and rebate payments to some customers which were proportional to the chips staked. Section 11(10) FA97 (as amended) provided for the deduction of the value of "prizes provided by the banker" when undertaking the banker's profit calculation. The First-tier Tribunal determined that the commissions and rebates were not prizes within the dictionary definition of prize because they were not paid contingent upon the customer winning in a game of chance. The UT did not consider the dictionary definition of prize to be particularly helpful but considered that the requirement (as prescribed in section 6(1) Gambling Act 2005) that "gaming" mean "playing a game of chance for a prize" confirmed that prize for the purposes of the purposes of calculating the banker's profit was to be taken to be only those amounts for which the participant had played and did not include "a consolation for having played and failed, or for merely having participated" (see [47] of *Aspinalls UT*).

88. The Court of Appeal in refusing the taxpayer's appeal confirmed:

> (1) Where there is no ambiguity as to the scope of the provision being interpreted so as to justify an exploration of potential meaning of the statutory language used (see [10] – [11] *Aspinalls CA*).
>
> (2) When interpreting section 11(10) FA97 it was not appropriate to consider the similar but different provisions for the Profits Calculation for RGD purposes as Parliament had chosen to enact specific provisions (in particular as regards the crediting of sums to an account rather than physical payment) for RGD purposes but not for bankers' profits purposes (see [19] *Aspinalls CA*).

89. On the basis of *Aspinalls* (in both the UT and CA) we consider that there is a game of chance offered by the Appellant in which customers wishing to participate make gaming payments; participation carries a range of possible, chance dependant outcomes, one of which is that <u>if</u> for a single game or a series/session the customer loses all of their deposited cash <u>then</u> they will have the right to activate the cashback.

90. In the statutory context of RGD the interpretation we place on "prize … won" is that it is any sum paid out directly as a consequence of the inherent features of the game of chance contractually offered and delivered by the provider whether that be by way of cashback or RTP.

91. We also consider that our conclusion is consistent with HMRC's submission based on section 188 FA14 by reference to section 6 GA05. In this regard we note the definitions are not identical in particular, we note that Parliament chose to reference section 6(3) GA05 in the section 188 FA14 definition but not explicitly reference section 6(2) or (4) GA05. However, were it the case that the section 188 FA14 definition were to incorporate sections 6(2) and (4)

GA05 (the position adopted by HMRC), it is our view that they support our conclusion. Section 6(2) GA05 defines game of chance to include a game that is presented as involving an element of chance and 6(4) GA05 defines playing a game of chance for a prize as requiring that the person playing such game acquires a chance of winning a prize whether or not he risks losing anything at the game. Customers participate in gaming offered by the Appellant on the contractual basis that if they lose all of the gaming payments made over a session (whether that be one game or multiple games) their maximum loss is capped at 90% of the sums deposited and, as previously stated, that outcome is simply one of the potential outcomes which result in a payment back from the Appellant to the customer and thereby a win.

92. We have specifically considered HMRC's submission based on the *Lachaux* case. *Lachaux* concerned an action in defamation, described by the Supreme Court as "an ancient construct of the common law" but which had more latterly been the subject of piecemeal statutory reform. Mr Lachaux had been embroiled in acrimonious divorce and custody proceedings. Two British newspapers had published articles about him, and his conduct, and he bought a libel action against them. That part of the dispute which ended up in the Supreme Court centred on whether the statements which were accepted to have caused serious harm met the threshold test for deformation under Deformation Act 2013. The Court summarised the common law background and the parties' differing positions on the relevance of and relationship between the common law and the requirements of the Defamation Act. The Court proceeded to note that as the relevant background to the statute was the common law position Parliament was to have taken to have known what the law was prior to enactment and that there was therefore a presumption that a statute which does not alter the common law either expressly or by necessary implication was to be interpreted so as having adopted that earlier common law. However, the presumption does not permit a strained interpretation of the statute. On the basis that the provisions of the Defamation Act "unquestionably" amended the common law the Court expressed the task before as limited to determining the extent of the intended change.

93. We do not see how this authority is relevant to the matter we have to determine. The levying of excise duty on gaming of any sort has never been a question of common law. It is uncontroversial that the state may only tax by reference to statutory provisions considered and passed by Parliament. The cases to which each of the parties referred us (other than *Aspinalls* and *Broadway*) did not concern the taxation of gaming and cannot therefore represent any view on even the common law meaning of prize and/or win for taxing purposes. For the reasons stated in paragraph 89 we consider the view we have reached to be consistent with the approach adopted in *Aspinalls* albeit that we have reached a different conclusion regarding what might, on first impressions, appear to be similar payments (we consider *Broadway* in paragraph 99 below).

94. We therefore allow the appeal on the basis that cashback payments represent expenditure on prizes won by customers who have participated in a game of chance in which one of the possible outcomes is the right to activate cashback and thereby receive a credit valued at 10% of deposits staked and lost.

Do cashbacks represent the return of gaming payments?

95. It is not necessary for us to determine this question in light of our conclusion at paragraph 94 above. However, we do so for the sake of completeness and as an alternative basis on which we would have allowed the appeal.

96. For the purposes of this analysis we consider the rationale for and terms of section 160(3) FA14 in context and as a critical feature of the overall scheme of the RGD Profits Calculation. In our view, section 160(3) FA14 operates so as to ensure that RGD is only charged on the net operation of gaming.

97. Section 159 FA14 provides that the gaming payment is the aggregate of any amount that entitles the customer to participate and any other amount payable on account or in connection with participation. All sums are deemed to be received at the point at which the customer begins to participate. Thus, the front end of the calculation captures all sums payable albeit that there are circumstances in which the gaming payment may be returned to the customer.

98. HMRC accept that where a gaming payment is returned because, as a consequence of a technical error, there is no participation in a game of chance at all, section 160(3) FA14 applies and that because there can be no adjustment to gaming payments received the return is treated as a "prize … won". As indicated above, they also, at times, appeared to accept that section 160(3) FA14 might also include the payment/credit in the scenario where a customer pays £1 for a spin with a "win" outcome of 20p with the 20p representing a return of part of the gaming payment.

99. In accordance with the approach advocated by HMRC and adopted by the Tribunal in *Broadway* (which we acknowledge is not binding on us but with which we respectfully agree) the only coherent reading of section 160(3) FA14 within the context and purpose of RGD is that it provides a mechanism of ensuring that RGD is charged on the real-world difference between gaming receipts and sums paid out to customers as an inherent part of gaming.

100. If therefore there is a restricted interpretation of "prizes … won" for the purposes of section 157(2) FA14, that restricted interpretation is deliberately expanded not only through section 160(1) (as accepted by the Court of Appeal in Aspinalls) but also through the deeming in section 160(3) FA14 to include any amount of the gaming payment returned to the customer under the contract for gaming. Thus if a prize less than the stake is not a "prize … won" in a pure sense it must be treated as such by section 160(3) FA14 and similarly for a cashback. For the reasons already stated in connection with the provision of a prize, the cashback is a potential outcome inherent within the provision of gaming contractually offered by the Appellant. The Appellant is required to make the payment where the customer activates their entitlement and once activated the amount is credited and available as cash. It represents a real cost to the Appellant and the sum repaid is contractually and economically the return of part of a gaming payment. The part is calculated and credited by reference to the terms and conditions but we cannot see that the basis of calculation can denature the payment – it is a return of part of the gaming payments from the customer.

DECISION

101. For the reasons given we consider that the cashback credits provided by the Appellant are "prizes … won" for the purposes of section 157 FA14 within the terms of section 157(2) FA14 directly or are treated as such by virtue of section 160(3). Accordingly, we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

102. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 13th FEBRUARY 2024