[2017] UKUT 0328 (TCC)

Appeal Number: UT/2016/0203

VAT – Taxable amount – Taxpayer charging fee for participation in bingo sessions – Tax payer recalculating liability to tax in accordance with business brief and Notice published by HMRC – Taxpayer giving effect to recalculation by issuing an internal credit note – Taxpayer making retrospective claim for over payment of tax – whether recalculation resulted in a 'decrease in consideration for a supply which includes an amount of VAT' within the meaning of Regulation 38 – yes – Value Added Tax Regulations 1995, SI 1995/2518 regs. 24 and 38 – Appeal refused.

Upper Tribunal
(Tax and Chancery Chamber)
ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

K E ENTERTAINMENTS LIMITED

Respondent

TRIBUNAL: THE HONOURABLE LORD ERICHT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)

Sitting in public at The Tribunal Centre,
George Street, Edinburgh
On 25 and 26 April 2017

Representation:

For the Appellants:	**Peter Mantle, instructed by Solicitor to the Commissioners for Her Majesty's Revenue and Customs**
For the Respondent:	**Roderick Cordara, QC, Mitchell Moss instructed by Ernst & Young**

DETERMINATION AND REASONS

DECISION

The appeal is refused.

REASONS

Introduction

1. On 1 February 2007 the Appellants issued HMRC Brief 07/07 Cash Bingo; Accounting for VAT on Participation and Session Fees. The Brief stated that the amount of VAT due on participation and session charges should properly be calculated on the session basis. The Respondent, in line with previous HMRC guidance, had prior to then been calculating the VAT on a game-by-game basis. The session basis is more favourable to the bingo promoter in respect of VAT than the game-by-game basis. The Brief invited bingo promoters, such as the Respondent, who had calculated the VAT due on a game-by-game basis, to make a claim for repayment of any resulting over-declarations. The Respondent made a successful claim for repayment under section 80 of the Value Added Tax Act 1994. However, there is a four year time limit on section 80 claims (section 80(4)). In respect of years prior to the four year time limit, the Respondent made a claim under regulation 38 of the Value Added Tax Regulations 1995. Accordingly, the principal issue in this appeal, set out in the direction of the tribunal of 16 June 2014 is:

> "Whether or not a recalculation of the value of the participation fees paid by K E's customers on a session-by-session basis rather than game-by-game basis, as stated by the Commissioners to be the correct approach in their business brief 07/07, results in a 'decrease in consideration for a supply, which includes an amount of VAT', which occurred after the end of the prescribed accounting period in which the original supply took place, within the meaning of Regulation 38 of the Value Added Tax Regulations 1995"

2. This is an issue which affects more than just the current Respondent, and the current case is proceeding as the Lead Case. I was advised by counsel for HMRC that 14 cases lie behind the current case, with a value of around £40,000,000, and that most of these related to the bingo sector, but matters raised in the appeal were also relevant to the telecommunications sector.

Session Basis and Game-by-Game Basis

3. The difference between a game-by-game basis and the session basis was explained by Judge Reid in Carlton Clubs v Revenue and Customs Commissioners [2011] UKFTT 542 (TC) at paras [4]-[15]. That explanation was adopted by the First-tier Tribunal in this case (para [12]), subject to some minor factual differences between the particular operations of the Respondent and Carlton Clubs. There was no challenge to this finding in the current appeal, accordingly, the factual background to the issue in question may be summarised as follows.

4. Cash prizes are paid to those who participate in games of bingo and win. A customer who wishes to participate pays a fixed sum to participate in a session of bingo. This is known as the session fee. Payment entitles the customer to participate in a session which may last for about two hours and consists of a number of games of bingo.

5. The session fee has two components. The first is the participation fee. This is the consideration received by the bingo promoter for the supply to its customer of the right to play bingo for cash prizes. VAT is payable on this component. The second component is the stake. This is the contribution which each customer makes towards the cash prizes paid out to the winner of each game in the session. This second component is outside the scope of the VAT regime.

6. While the session fee will, so far as the customer is concerned, generally be the same fixed sum, the split between the participation fee and the stake for each game will vary depending on the number of customers participating in a session and the amount of prize money to be paid out for each game. The manager decides what the prize money will be after the sale of tickets and before the start of the game. The fewer the number of customers for a session, the lower the amount of total stake available for the winner. In such circumstances, the promoter will top up the stake money to enable any guaranteed cash prize for a game to be paid out.

7. The amount of VAT due is different depending whether it is calculated on the game-by-game basis or the session basis.

8. On the game-by-game basis the participation fee for the session is arrived at by simply adding up the participation fee for each game within the session.

9. On the session basis, on the other hand, the total participation fee is calculated by adding up the ticket prices for all the games within the session, and then deducting all the prizes within the session.

10. The effect is as set out by the First-tier Tribunal (and not challenged in this appeal) as follows:

"22. … Calculation of VAT due on a game basis means that the sum originally allocated as the participation fee would be subject to VAT in full. This would be the case even although, in reality, this participation fee may have been reduced to 'top up' prize-money in games where there was either guaranteed prize money or it had been decided to offer additional prize money, even to the extent that the 'top up' payment could even exceed the participation fee, making such a game loss making.

23. Calculation on a session basis means that the total prizes paid out in a session are deducted from the total session fee; that is, the participation fee is the sum left after all of the prizes have been deducted….

24. KE's claim, of £460,626.36, represents the VAT fraction of the total of the "top up" and additional payments made by KE in the period between 1996 and September 2004."

11. In summary, under the session basis the customers contribute a higher proportion of the winnings than they do under the game-by-game basis.

Treaty and Legislative Provisions

Council Directive 2006/112/AC of 20 November 2006 on the Common System of Value Added Tax (the "Principal VAT Directive" or "PVD")

12. The Principal VAT Directive includes the following articles (emphasis added):

"**TITLE VII**

TAXABLE AMOUNT

…

CHAPTER 2

Supply of goods or services

Article 73

In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, **the taxable amount shall include everything which constitutes consideration obtained** or to be obtained **by the supplier, in return for the supply, from the customer** or a third party, including subsidies directly linked to the price of the supply.

Article 74

Where a taxable person applies or disposes of goods forming part of his business assets, or where goods are retained by a taxable person, or by his successors, when his taxable economic activity ceases, as referred to in

Articles 16 and 18, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.

Article 75

In respect of the supply of services, as referred to in Article 26, where goods forming part of the assets of a business are used for private purposes or services are carried out free of charge, the taxable amount shall be the full cost to the taxable person of providing the services.

Article 76

In respect of the supply of goods consisting in transfer to another Member State, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time the transfer takes place.

Article 77

In respect of the supply by a taxable person of a service for the purposes of his business, as referred to in Article 27, the taxable amount shall be the open market value of the service supplied.

Article 78

The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

(b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier to the customer.

For the purposes of point (b) of the first paragraph, Member States may regard expenses covered by a separate agreement as incidental expenses.

Article 79

The taxable amount shall not include the following factors:

(a) price reductions by way of discount for early payment;

(b) price discounts and rebates granted to the customer and obtained by him at the time of the supply;

(c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.

The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged.

…

CHAPTER 5

Miscellaneous provisions

Article 90

1. In the case of cancellation, refusal or total or partial non-payment, or **where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States**.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1."

13. The United Kingdom has provided for Article 90 by regulation 38 of the Value Added Tax Regulations 1995 which is as follows:

"**38 Adjustments in the course of business**

(1) This regulation applies where—

(a) there is an increase in consideration for a supply, or

(b) **there is a decrease in consideration for a supply**,

which includes an amount of VAT and the increase or decrease occurs after the end of the prescribed accounting period in which the original supply took place.

…

(3) The maker of the supply shall—

(a) in the case of an increase in consideration, make a positive entry; or

(b) in the case of a decrease in consideration, make a negative entry, for the relevant amount of VAT in the VAT payable portion of his VAT account.

(3A) Where an increase or decrease in consideration relates to a supply on which the VAT has been accounted for and paid by the recipient of the supply, any entry required to be made under paragraph (3) shall be made in the recipient's VAT account and not that of the supplier.

(4) The recipient of the supply, if he is a taxable person, shall—

(a) in the case of an increase in consideration, make a positive entry; or

(b) in the case of a decrease in consideration, make a negative entry, for the relevant amount of VAT in the VAT allowable portion of his VAT account.

(5) Every entry required by this regulation shall, except where paragraph (6) below applies, be made in that part of the VAT account which relates to the prescribed accounting period in which the increase or decrease is given effect in the business accounts of the taxable person."

14. Regulation 24 of the 1995 Regulations provides:

"24 Interpretation of Part V

In this part –
"increase in consideration" means an increase in the consideration due on a supply made by a taxable person **which is evidenced by a credit or debit note or any other document having the same effect** and "decrease in consideration" is to be interpreted accordingly;..."

15. Section 19 of the Value Added Tax Act 1994 provides as follows:

"19 Value of supply of goods or services

(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.

(2) **If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration**.

(3) If the supply is for a consideration not consisting or not wholly consisting of money, its value shall be taken to be such amount in money as, with the addition of the VAT chargeable, is equivalent to the consideration.

(4) **Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.**

(5) For the purposes of this Act the open market value of a supply of goods or services shall be taken to be the amount that would fall to be taken as its value under subsection (2) above if the supply were for such consideration in

money as would be payable by a person standing in no such relationship with any person as would affect that consideration."

Factual Circumstances of this Case

16. HMRC Brief 07/07, dated 1 February 2007 is in the following terms:

"**CASH BINGO: ACCOUNTING FOR VAT**

This brief is about participation and session fees paid by cash bingo players. It clarifies HM Revenue & Customs' policy on how to calculate those fees for VAT purposes.

BACKGROUND

Participation and session fees charged for taking part in bingo played for cash prizes on premises licensed or registered under Part II of the Gaming Act 1968 (sometimes termed 'mainstage' cash bingo) are consideration for standard-rated supplies. Stake money - the amount risked by the player, all of which must be returned as winnings - is not payment for a supply and so is outside the scope of VAT.

Where participation and session fees and stake money are received together in one composite amount charged to players, bingo promoters must work out how much of the payment is stake and how much is the participation and session fee in order to determine how much VAT is due. Section 3.2 of Notice 701/27 Bingo explains how to do this.

We have received enquiries from some bingo promoters performing the VAT calculation on a game-by-game basis, asking whether they are acting correctly and these have prompted the issue of this clarification.

CALCULATING THE VAT DUE

When a player pays to participate in all or part of a bingo session, the supply made by the promoter is the right to participate in the number of games during that session for which they have received payment. As a player cannot participate in further sessions unless they make further payment, the supply to the player is completed when the session ends. In these circumstances the amount of VAT due on participation and session charges should properly be calculated on a session-by-session basis by deducting the stake money arising in each individual session from the total amount (less any admission fees) paid by players to participate in that same session. Where money from other sources is added to the stake money received in the session in order to meet guaranteed prizes, that additional money cannot be used to reduce the value for VAT of the participation and session charges paid for taking part in that session.

Where a player pays to take part in an additional game ("flyer") that does not form part of the session charge, this is a separate supply of the right to participate in that further game. The VAT due on fees charged for participating in additional games should be calculated on a game-by-game basis.

Where a promoter provides facilities for participating in linked games or a national game, in which players located at more than one venue all participate in the same game, charges received at all the promoter's participating venues should be aggregated in order to calculate the amount of VAT due on par fees relating to the linked game or national game.

Promoters should not perform a single calculation for the whole of each VAT return period, aggregating stake money and receipts taken for all bingo played during that time.

MAKING CLAIMS OR ADJUSTMENTS

Bingo promoters that have calculated the VAT due on participation and session charges on a game-by-game basis, and who now find that they have done so incorrectly, may make a claim to HMRC for a repayment of any resulting over declaration, subject to the conditions set out in Notice 700/45 *How to correct VAT errors or make adjustments or claims*. In particular, businesses should note that:

- where the total of previous errors does not exceed £2000 net tax, an adjustment may be made to your current VAT return but

- where the total of previous errors exceeds £2000 net tax a separate claim should be submitted to HMRC (in these cases the errors must not be correct through your VAT returns).

HMRC may reject all or part of a claim if repayment would unjustly enrich the claimant. More information about unjust enrichment can be found at part 14 of Notice 700/45."

17. On 9 August 2011, the First-tier Tribunal released its decision in the Carlton Clubs case. The Tribunal found as follows:

"94. The proper interpretation of the notices and leaflets issued prior to the Business Brief 07/07 issued in February 2007 is that these notices required VAT to be calculated on a *game by game* basis.

95. There is no dispute that the 2007 Business Brief and subsequent Notice required VAT payable to be calculated on a *session basis*. On our interpretation of the earlier Notices, that is a change of policy rather than a clarification of existing policy.

96. Drawing the line at session level means that there is or at least may be a change in the consideration for the right to participate in each game and

each session and a consequent and equal change in the stake money. The Appellant has, in accordance with the administrative directions of HMRC, changed the consideration for the supply of the right to participate in cash bingo sessions over the period between 1996 and 2003. Such a change falls within the scope of regulation 38 and is not an error. This is consistent with the general principle that a trader should not pay VAT on a sum which is greater than the consideration ultimately received for the supply in question.

97. The internal credit note either on its own or read along with the letter dated 24 December 2009 referred to above, constitutes sufficient compliance with regulation 24 and 38 construed in the light of and having regard to the purpose of Article 11C.1 of the EC Sixth Directive."

18. The Appellants did not appeal that decision.

19. The Respondent sought to apply the Carlton Clubs decision to themselves. On 29 January 2013 their accountants wrote on their behalf to the Appellants as follows:

"We are writing on behalf of our above client in respect of the VAT return 12/12 which was submitted by our client on 29 January 2013.

As you will be aware the VAT return is a repayment of £425,630.40 and the reason for this letter is to provide the Commissioners with some background and explanation to this repayment.

Background

KE Entertainments LTD operates a number of bingo clubs which historically accounted for output tax on participation fees on a 'game-by-game' basis. This was in line with HMRC's published guidance at the time. However, it later transpired that output tax should correctly have been accounted for on a 'session-by-session' basis, as per HMRC Brief 07/07. The session basis allows businesses to reduce the value of the participation fees (on which VAT was payable) where the participation fees within the session were added to the stake money (which was outside the scope of VAT) received from customers to guarantee a certain level of prize. This is commonly known as 'additional prize money'.

The recent Carlton Clubs case (TC 1389) has made it clear that in these circumstances a taxpayer is entitled to reduce the consideration paid for participation fees. Our client has therefore reduced the consideration received for participation fees and calculated output tax due thereon on a session basis for the period from 1996 to September 2004 and this has resulted in a reduction of £460,626.36 in output tax due.

In line with the decision in the Carlton Clubs case, Regulation 38 and 24 of the VAT Regulations 1995 and HMRC's guidance VR 7120 the correct method to adjust for change in the consideration for a supply where the value has

decreased is to issue a credit note. Regulation 24 of the VAT Regulations 1995 requires and increase or decrease in consideration to be evidence by a credit or debit note to reflect the change. As per VR7120 'there is no limit in Regulation 38 itself because there can be no limit imposed on the time that passes between the date on which a supply is made and the date on which consideration for it can be changed'. Therefore, while VAT was originally declared more than four years ago the credit not has only just been issued and will only now be reflected in the business' accounts.

Our client therefore issues an internal credit note (as deemed appropriate in the Carlton Clubs case) to adjust the VAT, copy enclosed, and as a result of this credit note the 12/12 return has become a repayment return."

20. The internal credit note was attached to the letter and bore to be "adjustment of consideration for the supply of rights to participate in bingo sessions between 1996 and 2004".

21. By letter dated 21 March 2013, the Appellants rejected the Respondent's claim. On the same date they made an assessment by Notice of Appeal dated 17 April 2013. The Respondent appealed against the decision contained in the letter dated 21 March and the assessment of the same date.

22. By decision released on 18 July 2016, the First-tier Tribunal allowed the Respondent's appeal. On 16 September 2016, the First-tier Tribunal granted permission to appeal.

Grounds of Appeal

23. The grounds of appeal were as follows:

" **Ground 1**

1.1. The FTT erred, most particularly in §§105-109, in its interpretation of the concept of 'decrease in consideration' in Regulation 38 of the VAT Regulations 1995, and interpreted it and the concept of a 'price reduction' in Article 90 PVD too widely. It should have been construed both concepts as requiring a reduction in the amount obtained, or to be obtained by, the supplier from the customer (or, in cases where relevant, a third party) in return for the supply.

1.2. The FTT erred, given the facts found, in allowing the appeal as there has been no reduction, after the date of supply, in the amount the Appellant had obtained from its customers in return for the relevant supplies, or in the amount that the Appellant was entitled to obtain from its customers in return for relevant supplies.

1.3. In particular, the FTT erred in concluding, most particularly at §98, §§105-107, §111 and §120, that there had been a price reduction within

the meaning of Article 90 PVD and a decrease in consideration within the meaning of Regulation 38 in circumstances where the FTT accepted that there had been no change in the total fixed payment made by customers (see §107) and, within that, no change in the stake money (see §111). The FTT should have concluded that the relevant amount received by KE from its customers that it could actually take for itself had not changed after the date of supply and could not be, and had not been, altered by subsequent recalculation of the amount of VAT chargeable on the supply.

1.4. The FTT erred in §124 in concluding that where the apportionment is necessary to ascertain the taxable amount and where recalculation of the apportionment alters the taxable amount it follows that there has been a change in consideration within Article 73 PVD or a price reduction within Article 90 PVD.

Ground 2

2.1. The FTT erred by failing to conclude that the public guidance given by HMRC was irrelevant to whether there had been a decrease in consideration within Regulation 38, and, most particularly at §110, in placing reliance on the changes which were made by HMRC to that guidance in reaching its conclusion that there had been a decrease in consideration within Regulation 38.

2.2. In particular the FTT erred in §98 and §110 in concluding that the change to HMRC's guidance brought about by the Brief had the effect of decreasing the consideration for the taxable amount of the relevant supplies in accordance with that guidance, or that it affected a change in the amount that KE received from its customers that it could keep for itself, given that the amount which KE could keep for itself had to be ascertained independently of the amount of VAT chargeable on the supplies.

Ground 3

3.1. The FTT erred in its approach to the classification of transactions as either a single supply or multiple supplies in §§99-101 of the Decision. The FTT should have held that a particular transaction, so long as it is economic activity, must comprise either a single supply for VAT purposes or, if not, must comprise several supplies for VAT purposes.

3.2. The FTT should have concluded, on the facts, that there was a single supply of the right to participate in a session of bingo to each customer of KE. Alternatively, if that is the wrong analysis, the only alternative was to conclude that there were separate supplies of the right to participate in each game of bingo.

3.3. The FTT erred in failing to recognise that the correct single/multiple supply analysis for VAT purposes was relevant to the consideration for supplies, and that whether or not there was a single supply of the right

to participate in a session of bingo had to be ascertained at the date of supply and was unaffected by any subsequent event.

Ground 4

4.1. The FTT erred in concluding, in particular in §110 and §118, that KE had correctly identified both the consideration for its relevant supplies and the amount of VAT due to HMRC, in accordance with VATA, when it originally accounted for VAT to HMRC on those supplies.

4.2. The FTT erred, in §112, in concluding that s 19(4) VATA allowed a taxable person, if it had initially made a proper and correct attribution as required by that subsection, to revisit that attribution at a later date, using a new methodology which favoured the taxable person, with the result that the taxable person was entitled to rely on Regulation 38.

4.3. The FTT should have held, notwithstanding HMRC's guidance published at the time KE originally accounted to HMRC, that KE had overstated the amount of VAT due to HMRC when it originally accounted for VAT to HMRC on those supplies and that KE had been entitled to bring a claim under s 80 (subject in particular to complying with the time limit in s 80(4) VATA) but was not entitled to claim under Regulation 38.

Ground 5

The FTT erred in §94 of the Decision in placing reliance on the Brief in reaching its conclusion that there had been a decrease in consideration within Regulation 38, on the basis that HMRC had invited claims to be made by the Brief. The Brief had invited claims, but neither the Brief (nor subsequent published guidance) made reference to Regulation 38 and the Brief expressly referred to claims in instances of 'incorrect' calculation on a game basis, and it was plain from its wording that it was inviting claims under s 80 VATA.

Ground 6

The FTT erred in §98 in attaching significance to accounting treatment, which was irrelevant both to whether there had been a decrease in consideration within Regulation 38, or to whether KE had, initially declared as output tax an amount that was not output tax due, within section 80 VATA, when it submitted to HMRC its VAT returns relating to the relevant supplies.

Ground 7

The FTT erred in §123 in concluding that Article 90 was to be interpreted or applied differently with respect to supplies of cash bingo (of the type made by KE), because of the distinctive nature of cash bingo.

Ground 8

> The FTT erred in §128 in concluding that the credit note drawn up by KE duly recorded a decrease in consideration and met the requirements for a credit note or other document having the same effect in Regulation 38, read together with regulation 24 of the 1995 Regulations, or that it was sufficient given the need for UK law to comply with Article 90 of the PVD."

24. TheRrespondent's position was that these grounds of appeal in fact raised only two basic points:

> "(a) Does the fact that the consideration for the VAT supply formed part of a larger sum that in overall terms did not change, mean that the consideration of the VAT supply did not alter? (The consideration point).
> (b) Does the alteration of the instructions mean that the taxpayer was mistaken when following the original instructions? (The mistake point)".

Ground 1: (No Reduction in Amount received from the Customer)

Appellants' Submissions

25. Counsel for the Appellants argued that it was clear from the consistent case-law of the Court of Justice of the European Union that the exclusive focus for the purposes of Article 90 was on a real reduction in price, in the sense of some actual reduction in what the supplier has actually obtained (or is actually entitled to obtain) from its customer in return for the supply, after the supply has taken place. It was not concerned with any re-calculations or re-attributions departing from calculations or attributions originally performed by the taxable person, to calculate the taxable amount of a supply, when submitting its relevant VAT return for the period in which the supply took place. He referred to H J Glawe Spiel-und Unterhaltungsgeräte Aufstellungsgesellschaft GmbH & Co KG v Finanzamt Hamburg-Barmbek-Uhlenhorst (Case C-38/93) [1994] STC 543 at paragraph 13, First National Bank of Chicago [1998] STC 850 at paragraph 44, International Bingo Technology SA v Tribunal Económico-Administrativo Regional de Cataluña [2013] STC 66 at paragraphs 27 to 29, Goldsmiths (Jewellers) Ltd v Customs and Excise Commissioners (Case C-330/95) [1997] STC 1073 at paragraphs 15-16, Revenue and Customs Commissioners v GMAC UK plc (Case C-589/12) [2014] STC 2603 at paragraph 31, Minister Finansów v Kraft Food Polska SA [2012] STC 787 at paragraph 97, Elida Gibbs Ltd v Customs and Excise Commissioners (Case C317-94) [1196] STC 1387 at paragraphs 18 -24, EC Commission v Federal Republic of Germany (United Kingdom intervening) (Case C-427/98) [2003] STC 301, Freemans Plc v Customs and Excise Commissioners (Case C-86-99) [2001] STC 960 at

number 21, 35, 109 Madgett and Baldwin (trading as Howden Court Hotel) v Customs and Excise Commissioners [1998] STC 1189 (Joined cases C-308-96 and C-94-97) [1998] STC 1189, MyTravel Plc v Customs and Excise Commissioners (Case C-291/03 [2005] STC 1617, Nordania Finans A/S and another v Skatteministeriet (Case c-98/07 [2008] STC 3314. The First-tier Tribunal fundamentally erred by treating a reattribution leading to a recalculation of the amount of the participation fee as within the concept of a "price reduction" in Article 90, and in finding that there had been a decrease in consideration within the meaning of regulation 38. After the relevant supplies of bingo took place, the payments received from the customers, the amount of the prizes and the stake money had not changed and there was no refund to the customers. The recalculation of the taxable amount was not the result of or connected to any "price reduction". The First-tier Tribunal had been wrong to conclude that because the taxable amount had been recalculated on the basis of a new attribution the amount which the Respondent could actually take for themselves had changed.

Respondent's Submissions

26. The Respondent submitted that if the apportionment between various elements of a fixed price changes (whether by agreement of the parties, operation of law, direction of Commissioners, or for any other reason) that will lead to a change in the consideration for each element. Where there were two elements, a change in consideration for one would automatically lead to an equal and opposite change in the consideration for the other. On the session basis, a lower proportion of the stake is treated as having been provided by the Respondent rather than its customers, and there is a corresponding increase in the stakes deemed to be paid by the customers. The change in the consideration that constitutes the participation fee cannot be ignored simply because there is an equal and opposite change in the outside scope element. The Appellants were wrong to suggest that because the overall sum paid out by customers had not altered the underlying consideration for the VAT supply had not altered.

Ground of Appeal 2 (Relevance of Business Brief)

Submissions for the Appellants

27. Counsel for the Appellants argued that HMRC's public notices did not have the force of law and did not amount to directions requiring tax payers to comply with them. What was stated in the public notices did not make either the session basis or the game-by-game basis correct. The changes to guidance published by HMRC cannot amount to a price reduction within the meaning of Article 90.

Submissions for the Respondent

28. Counsel for the Respondent argued that there was not a mistake involved in making the initial ascertainment on the game-by-game basis in line with the then requirements of the Commissioners. There was no suggestion that the earlier direction was unlawful: it had simply been altered, with retrospective effect. The respondent was required by business brief 07/07 to carry out apportionment in accordance with the new methodology, or face assessment from the Commissioners for failing to do so. This led to a decrease in consideration for the taxable supplies in the material period, which was given effect to in the accounts by issue of the internal document of the same effect of a credit note. The deeming in section 19(4) of the Value Added Taxes Act had been altered, and a lower figure was now to be treated as the consideration. Section 19 and regulation 38 should be interpreted purposively to give effect to the aim of the Directives that there be an adjustment to the tax base where, after the supply, there is an event which alters the price to be attributed to the supply. Usually there will be a further agreement between the parties, but in their current case that role was fulfilled by the altered direction by HMRC. Accordingly, grounds 2 and 4 of the appeal fail, and take with them grounds 3, 5, 6 and 7, which can have no basis once the main grounds are dismissed.

Grounds 3, 4 and 5: (Single and Multiple Supplies/Mistake/ Invitation of Retrospective Claims)

Submissions for the Appellants

29. Counsel for the Appellants argued that there was a single supply by the Respondent of the right to participate in a session of bingo for each customer in a return for part of the fixed payment paid by the customer (excluding the stake money) it followed that applying a session basis for the section 90(4) VAT attribution and calculation was appropriate whereas a game basis was incorrect. The taxable amount of a supply was not a matter of HMRC's or a supplier's discretion: the correct approach was to ascertain the amount that the supplier could take for itself out of the total payment. The First-tier Tribunal should have held, notwithstanding HMRC's original published guidance, that the Respondent had overstated the amount of output tax due when it originally accounted for VAT. The Respondent's remedy was repayment of overpaid VAT under section 80 without the need to strain a wide construction of Article 90 and regulation 38. That a section 80 claim was time-barred could not justify any attempt to generate a wide construction of Article 90 and regulation 38. The adjustment in dispute in this appeal was an effort to recover an amount of over-declared output tax for earlier periods, when the right to claim is time-barred. It was plain from the wording of the brief, including the reference to unjust enrichment (a

defence to a section 80 claim), that HMRC was inviting claims under section 80, not regulation 38.

Submissions for Respondent

30. See para 28 above.

Ground 6 (Accounting Treatment)

Submissions for the Appellants

31. Counsel for the Appellants argued that accounting treatment was irrelevant to the VAT analysis.

Submissions for the Respondent

32. Counsel for the Respondent argued that this ground falls with the main grounds.

Ground 7 (Treatment of Cash Bingo)

Submissions for the Appellants

33. Counsel for the Appellants argued that there was nothing in the nature of cash bingo which required an exceptional approach being taken.

Submissions for the Respondent

34. Counsel for the Respondent argued that this ground falls with the main grounds.

Ground 8 (Credit Note)

Submissions for the Appellants

35. The Appellants submitted that there was no price reduction for the credit note to be evidence of, therefore the credit note was wholly inappropriate and invalid. The appeal should be dismissed without any consideration of the credit note.

Submissions for the Respondent

36. The Respondent argued that the effect of the Commissioners' position that the Respondent had to find and issue credit notes to each customer, if applied to suppliers who deal with large numbers of essentially anonymous final consumers in relatively low value/high volume transaction, would make it impossible or excessively difficult for them to access their EU rights under the Directives. Reference was made to C R Smith Glaziers (Dunfermline) Ltd v Customs and Excise Commissioners [2003] STC 419 at paragraphs 23 to 29, Muys' en De Winter's Bouw-en Aannemingsbedrijf BV v Staatssecretaris van Financië (Case C-281/91 [1997] STC 665 at paragraph 12 (Advocate General), Ampafrance SA v Directeur des Services Fiscaux de Maine-et-Loire, Jorion (neé Jeunehomme) v Belgium (Joined cases 123/87 and 330/87 [1988] ECR 4517, Marks and Spencer Plc v Customs and Exercise Commissioner (C-62/00 [2002] STC 1036 at paragraph 34, Société Générale des Grandes Sources d'Eaux Minérales Françaises v Bundesamt für Finanzen [1998] STC 981. In any event, UK case law was against the Commissioner (General Motors Acceptance Corporation (UK) Plc v Customs and Excise Commissioners [2003] VAT Decision [17990] at paragraph 44 and Customs and Excise Commissioners v General Motors Acceptance Corporation (UK) Plc CH [2004] STC 577.

Reference

37. Parties agreed that the tribunal should decide the appeal without it being necessary to make a reference to the Court of Justice of the European Union.

Discussion and Decision

Consideration in Bingo Transactions

38. In considering whether in the current case there has been a decrease of consideration, it is first necessary to consider what constitutes consideration in a bingo transaction.

39. At the outset it is important to recall the underlying principles of the VAT system. These are set out by the Court of Justice of the European Communities in Elida Gibbs as follows:

> "19. The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him.
>
> …

> 21. That basic principle clarifies the role and obligations of taxable persons within the machinery established for the collection of VAT.
>
> 22. It is not, in fact, the taxable persons who themselves bear the burden of VAT. The sole requirement imposed on them, when they take part in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved, is that, at each stage of the process, they collect the tax on behalf of the tax authorities and account for it to them.
>
> 23. In order to guarantee complete neutrality of the machinery as far as taxable persons are concerned, the Sixth Directive provides, in Title XI, for a system of deductions designed to ensure that the taxable person is not improperly charged VAT.
>
> …
>
> 24. It follows that, having regard in each case to the machinery of the VAT system, its operation and the role of the intermediaries, the tax authorities may not in any circumstances charge an amount exceeding the tax paid by the final consumer."

40. The issue in this case must be considered in the light of these principles, and in particular the principle that the taxable amount cannot exceed the consideration actually paid by the final consumer.

41. These principles can be applied without too much difficulty in standard commercial transactions where the consumer obtains goods or a service and pays for that in money or money's worth.

42. Situations where the consumer both obtains money and pays money are less straightforward. Examples of such situations are gambling and foreign exchange transactions.

43. In Glawe, the Advocate General recognised that "gaming transactions are ill-suited to value added taxation" (para 16; a similar statement is made in Freemans plc at para 30)). Glawe involved coin-operated gaming machines. The machines were equipped with two separate compartments: the "cash box" and the "reserve". Winnings were paid from the coins in the reserve. When the reserve was full, coins inserted by players went into the cash box. The operator of the machine was entitled to the coins in the cash box. By statute, the machines were set to pay out as winnings at least 60% of the coins inserted. The court held that the taxable amount for VAT did not include the proportion of the total stakes inserted which corresponded to the winnings paid out. The court referred to what is now Article 73 of the PVD which provides:

> "the taxable amount shall be…everything that constitutes the consideration which has been…obtained by the supplier from…the customer"

44. The court stated:

> "9. In the case of gaming machines such as those concerned in the main proceedings, which, pursuant to mandatory statutory requirements, are set in such a way that they pay out as winnings on average at least 60% of the stakes inserted, **the consideration actually received by the operator in return for making the machines available consists only of the proportion of the stakes which he can actually take for himself.**
>
> 10. Only those coins inserted into the machine which automatically enter the cash box are obtained by the operator, since those which enter the reserve are intended to replenish the money initially provided by him for the operation of the machine.
>
> 11. That interpretation is confirmed by an analysis of the destination, within the machine, of the stakes inserted by the recipients of the services provided, that is to say, the players. The stakes in fact divide into two parts: one serves to replenish the reserve, and thus to pay out winnings, and the remainder enters the cash box.
>
> 12. Since the proportion of the stakes which is paid out as winnings is mandatorily fixed in advance, it cannot be regarded as forming part of the consideration for the provision of the machine to the players, nor as the price for any other service provided to the players, such as giving them the opportunity of winning or the payment of winnings itself."

45. Gawe established the principle that the consideration was the amount which the operator could take for himself.

46. That principle was applied to bingo in International Bingo Technology SA. That case involved bingo cards. The proportion of the card price which was paid as winnings was fixed by legislation. The European Court held that the taxable amount did not include the winnings. It stated at para 29:

> "… the consideration actually received by the organiser of a game for the service supplied consists of the card price after deduction of the portion of that price, fixed by legislation, which must be paid as winnings to players. The organiser actually has at its disposal and can take for itself only that proportion of the sale price."

47. The principle in Gawe was applied to foreign exchange transactions in Customs and Excise Commissioners v First National Bank of Chicago. The bank offered to buy currency at a "bid price" which was lower than the "offer price" at which it offered to sell currency. The bank sought to make a profit, over time, from the difference between the bid and offer prices, ie the "spread". Unlike in Gawe and International Bingo Technology, there was no

fixed proportion. The rates were in constant fluctuation, and the trader could not see, when concluding a particular transaction, at what price he might subsequently effect a further transaction eliminating or fixing his risk. The court held that:

> "Determining the consideration therefore comes down to determining what the bank receives for foreign exchange transactions, that is to say the remuneration on foreign exchange transactions which it can actually take for itself" (para 44)

It concluded:

> "So, the consideration, that is to say the amount which the bank can actually apply to its own use, must be regarded as consisting of the net result of its transactions over a given period of time." (para 47)

It went on to say

> "nor is it necessary for either the taxable person supplying the goods or performing the service or the other party to the transaction to know the exact amount of the consideration serving as the taxable amount in order for it to be possible to tax a particular type of transaction…..Consequently, it does not matter that when the transaction is concluded the parties do not know the basis on which VAT will be charged and that it remains unknown, even afterwards, to the recipient of the service" (para 50)

48. In order to establish what constitutes consideration in the bingo transactions with which this case is concerned, it is necessary to apply the foregoing principles from the European case law to the facts of the case. It is clear from the case law that the consideration is the amount which the taxpayer could take for itself. The amount which the taxpayer could take for itself in the bingo transaction is the participation fee. It does not matter that the participation fee is not a fixed percentage of the session fee: the case law establishes that consideration can consist of the net result of a series of transactions over a period of time. Nor does it matter that the bingo customer does not know how much of the session fee is chargeable to VAT: the case law establishes that it does not matter that the parties do not know the basis on which VAT will be charged and that it remains unknown even afterwards to the recipient of the service.

Change in Consideration

49. Having established that the consideration is the amount that the bingo operator can take for himself, the next question to be considered is what happens if the consideration changes after the date of supply.

50. The law recognises that there may be circumstances where the consideration increases or decreases after the supply, and makes provision in Regulation 38 for a corresponding alteration in the amount of VAT due. This is in line with the principle in Elida Gibbs that the taxable amount cannot exceed the consideration actually paid by the final consumer.

51. The jurisprudence of the European Court discloses a number of cases where there has been what counsel for the Appellants called "a change in the real world": ie some actual reduction in what the supplier has obtained from the customer after the supply. For example, in Elida Gibbs the European Court held that the consideration was the sale price less the value of a cash-back or money off coupon. Other examples include Kraft Food Polska, Freemans plc, and GMAC UK plc.

52. These cases are of limited assistance since they deal with standard commercial transactions of the sale of goods or services. In such standard transactions the focus is on what the customer actually paid for the supply. These cases do not address the particular circumstances of gambling. In gambling transactions the focus is on identifying what the operator is entitled to keep for itself. In conducting that identification what matters is not the amount which the customer has paid but how that amount is divided between the supply and the winnings.

53. In my opinion the effect of the Business Brief was that it altered the amount which the operator was allowed to keep for itself. What the operator is entitled to keep for himself is the participation fee. The operator is not entitled to keep the stakes. On a change from a game-by-game basis to a session basis the participation fee is reduced because a larger proportion of the total amount paid by the customer is now being used to fund winnings. The stake element of the session fee is increased, and as the total amount of the session fee remains the same, then the participation fee is reduced by the same amount. The consideration is the amount which the operator is allowed to keep for itself. The amount which the operator is allowed to keep for itself is the participation fee. The participation fee has been reduced. Therefore the consideration has been reduced.

First Ground of Appeal (No Reduction in Amount received from Customer)

54. The essence of the Appellants' argument on the first ground of appeal was that there had been no reduction in the amount that the Respondent, as bingo promoter, had received from its customers, the bingo players: that amount remained the same, albeit that there was a recalculation of its constituent elements. As counsel put it, there had been no change in the real world.

55. The error in this argument is that it proceeds on the basis that the consideration is the amount paid by the customer by way of session fee. The correct position, as can be seen from the above analysis of the European case law, is that the consideration is the amount that the bingo operator can keep for itself. Accordingly while it is true to say that there was no reduction in the amount that the bingo operator received from its customers (ie the session fee), that is irrelevant as there was a reduction in the consideration (ie the element of the session fee which the operator was entitled to keep for itself). Accordingly the first ground of appeal fails.

Second Ground of Appeal (Relevance of Business Brief)

56. The second ground of appeal states that the guidance given in the Business Brief was irrelevant to whether there had been a decrease in consideration.

57. In my opinion, far from being irrelevant, the Business Brief was fundamental to that question.

58. It is clear from the Business Brief that HMRC wished taxpayers to stop using the game-by game basis and to start using the session basis instead. The language of the Brief is emphatic: in the section headed "Calculating the VAT due" the taxpayer is instructed as to what he "should" or "should not" do. It is also clear that HMRC wanted this change to have retrospective effect, otherwise it would not have invited the taxpayer to make retrospective applications under section 80 of the Value Added Tax Act 1994. The fact that the retrospectivity under section 80 was limited to four years because of the time bar inherent in section 80 does not detract from this.

59. The relevance of the Business Brief is that the taxpayer is being instructed to calculate the VAT in a way which reduced the amount which the taxpayer could take for itself, which, for the reasons set out in paragraph 53 above, constituted a decrease in consideration.

60. Accordingly this ground fails also.

Third Ground of Appeal (Single and Multiple Supplies)

61. This ground states that the FTT erred in failing to recognise that the single/multiple supply analysis was relevant to consideration, and that whether or not there was a single supply had to be ascertained at the date of supply and was unaffected by any subsequent event.

62. In my opinion this ground is misconceived. It focusses on the nature of supply whereas it is clear from the above discussion of European case law that the focus is to be on consideration. As set out in paras 49 to 53 above, consideration can be affected by subsequent events and that is what happened here.

Ground 4 (Mistake)

63. In my opinion the FTT was correct to conclude that the taxpayer did not make an error or mistake when it made its calculations on the game-by-game basis at the stage when that was required by the Appellants. The game-by-game basis was not unlawful. Neither was the session basis. There was merely a retrospective change as to which lawful basis was to be used.

64. That retrospective change is given effect by a change in the deeming under section 14 of the Value Added Tax Act 1994. The HMRC argument that the deeming cannot be revisited at a a later date is not justified by the plain wording of section 14, nor is it compatible with the principles of European law which permit post-supply alteration of the consideration.

Ground 5 (Invitation of Retrospective Claims)

65. The Appellants argued that the FTT erred in placing reliance on the Brief inviting retrospective claims, as such claims were invited in terms of s80 of the Value Added Tax Act 1994 and not in terms of Regulation 38.

66. The fact that the Appellants invited claims under section 80 does not bar any other lawful claims. If, as in this case, the taxpayer has a lawful claim under regulation 38, then it is entitled to exercise it.

Ground 6 (Accounting Treatment)

67. In para [98] the FTT having rejected the Appellants' position as a matter of law and principle, nonetheless went on to test the Appellants' position further by testing how it would operate in terms of accounting practice and noted that the Appellants were unable to explain that. In my opinion the FTT was entitled to do so. That test was in the nature of a practical cross-check. The cross-check does not detract from their reasoning on law and principle.

Ground 7 (Treatment of cash bingo)

68. Contrary to what is said by the Appellants under this ground, there is something distinctive about cash bingo. As discussed in paras 42 to 48 and 52 above, the European case law distinguishes between gambling transactions such as cash bingo from transactions involving ordinary goods or services. This ground fails also.

Ground 8 (Credit Note)

69. Counsel for the Appellants did not press an argument that the Credit Note was not sufficient for vouching the change of consideration for the purposes of Regulation 24. In my opinion he was right not to do so, as the authorities referred to by the respondent demonstrate that the FTT came to the correct decision that the requirements of Regulation 24 had been met.

70. Instead counsel submitted that there was no decrease in consideration for the credit note to be evidence of. As I have already held that there was a decrease in consideration, then this ground of appeal falls also.

Conclusion

71. The FTT Tribunal concluded, with reference to the Principal Issue in the appeal, that the recalculation of the value of the participation fees paid by K E's customers on a session by session basis rather than game by game basis, as stated by the Commissioners to be the correct approach in their business brief 07/07, resulted in a 'decrease in consideration for a supply, which includes an amount of VAT', which occurred after the end of the prescribed accounting period in which the original supply took place, within the meaning of Regulation 38 of the Value Added Tax Regulations 1995. In my opinion they were correct to do so. This appeal is refused.

The Honourable Lord Ericht

Decision issued: 14 August 2017