



TC01185

Appeal number: TC/2010/01378

Gaming duty -- section 11 Finance Act 1997 -- "banker's profits" -- whether commissions and rebates to be taken into account in calculating "banker's profits"

FIRST-TIER TRIBUNAL

TAX

ASPINALLS CLUB LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
ELIZABETH BRIDGE**

Sitting in public at 45 Bedford Square, London WC1 on 14 April, 2011

**Andrew Hitchmough and Jonathan Bremner, Counsel, instructed by Pricewaterhouse
Coopers Legal LLP for the Appellant**

**Sarabjit Singh, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

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DECISION

Introduction

1. This is an appeal against a decision of the Respondents ("HMRC") dated 22
5 January, 2010 to rejected the Appellant's claim for repayment of overpaid gambling
duty in the sum of £1,117,698.13 for periods from 1 April, 2007 to 30 September,
2009 inclusive.

2. The main issue in this appeal is whether certain commission and rebate payments
made by the Appellant to players at its casinos should be taken into account in
10 calculating the Appellant's "banker's profits" for the purposes of calculating its
liability to gaming duty.

Statutory provisions

3. Section 10 (1) Finance Act 1997 imposes the charge to gaming duty:

15 "... a duty of excise (to be known as gaming duty) shall be charged in
accordance with section 11 below on any premises in the United
Kingdom where gaming to which this section applies ("dutable
gaming") takes place on or after [1 October, 1997]."

4. Section 11 Finance Act 1997 deals with the rate of duty and the method of
calculation. Section 11 (1) provides:

20 "Gaming duty shall be charged on premises for every accounting
period which contains a time when dutiable gaming takes place on
those premises."

5. Section 15 (3) Finance Act 1997 contains the definition of "accounting period":

25 "'accounting period' means, subject to the provisions of Schedule 1 to
this Act, a period of six months beginning with the 1st April or 1st
October"

6. The amount of gaming duty which is charged on any premises or any accounting
period is calculated by applying the "specified rate" (set out in a statutory table) to the
"gross gaming yield": section 11 (2) Finance Act 1997.

30 7. The definition of "gross gaming yield" is contained in section 11 (8) Finance Act
1997:

"For the purposes of this section the gross gaming yield from any
premises in any accounting period shall consist of the aggregate of –
35 (a) the gaming receipts for that period from those premises; and
(b) where a provider of the premises (or a person acting on his behalf)
is a banker in relation to any dutiable gaming taking place on those
premises in that period, the banker's profits for that period from that
gaming."

8. In this appeal, it is common ground that it is the meaning of "banker's profits" referred to in section 11 (8) (b) that is in dispute. There is no dispute as regards gaming receipts the purposes of section 11 (8) (a).

5 9. The definition of "banker's profits", which is at the centre of this appeal, is contained in section 11 (10) Finance Act 1997 as follows:

"In subsection (8) above the reference to the banker's profits from any gaming is a reference to the amount by which the value (if any) by which the value specified in paragraph (a) below exceeds the value specified in paragraph (b) below, that is to say –

10 (a) the value, in money or money's worth, of the stakes staked with the banker in any such gaming; and

(b) the value of the prizes provided by the banker to those taking part in such gaming otherwise than on behalf of a provider of the premises."

15 10. It is important to note that there is no definition in the Finance Act 1997 of the expressions "... the value, in money or money's worth, of the stakes staked" or "the value of the prizes provided".

11. Section 11 (10A) Finance Act 1997 (inserted by the Finance Act 2007) provides:

20 "Subsections (2) to (6) (a) of section 20 of the Betting and Gaming Duties Act 1981 (expenditure on bingo winnings: valuation of prizes) apply, with any necessary modifications, for the purposes of gaming duty as they apply for the purposes of bingo duty."

12. Section 20 of the Betting and Gaming Duties Act 1981 provides:

25 (1) A person's expenditure on bingo winnings for an accounting period is the aggregate of the values of prizes provided by him in that period by way of winnings at bingo promoted by him.

(2) Where a prize is obtained by the promoter from a person not connected with him, the cost to the promoter shall be treated as the value of the prize for the purpose of subsection (1).

30 (3) Where a prize is a voucher which—

(a) may be used in place of money as whole or partial payment for benefits of a specified kind obtained from a specified person,

(b) specifies an amount as the sum or maximum sum in place of which the voucher may be used, and

35 (c) does not fall within subsection (2),

the specified amount is the value of the voucher for the purpose of subsection (1).

40 (4) Where a prize is a voucher (whether or not it falls within subsection (2)) it shall be treated as having no value for the purpose of subsection (1) if—

- (a) it does not satisfy subsection (3)(a) and (b), or
 - (b) its use as described in subsection (3)(a) is subject to a specified restriction, condition or limitation which may make the value of the voucher to the recipient significantly less than the amount mentioned in subsection (3)(b).
- 5
- (5) In the case of a prize which—
 - (a) is neither money nor a voucher, and
 - (b) does not fall within subsection (2),the value of the prize for the purpose of subsection (1) is—
- 10
- (i) the amount which the prize would cost the promoter if obtained from a person not connected with him, or
 - (ii) where no amount can reasonably be determined in accordance with sub-paragraph (i), nil.
- (6) For the purpose of this section—
- 15
- (a) a reference to connection between two persons shall be construed in accordance with [[section 1122](#) of the Corporation Tax Act 2010] (connected persons), and
 - (b) an amount paid by way of value added tax on the acquisition of a thing shall be treated as part of its cost (irrespective of whether or not the amount is taken into account for the purpose of a credit or refund).
- 20

13. Section 26C of the Betting and Gaming Duties Act 1981 (as amended by the Finance Act 2007) provides:

26F Remote gaming winnings

- 25
- (1) The amount of P's expenditure on remote gaming winnings for an accounting period is the aggregate of the value of prizes provided by P in that period which have been won (at any time) by persons using facilities for remote gaming provided by P.
 - (2) Prizes provided by P to one user on behalf of another are not to be treated as prizes provided by P.
- 30
- (3) A reference to providing a prize to a user (U) includes a reference to crediting money in respect of gaming winnings by U to an account if U is notified that—
 - (a) the money is being held in the account, and
 - (b) U is entitled to withdraw it on demand.
- 35
- (4) The return of a stake is to be treated as the provision of a prize.
 - (5) Where P participates in arrangements under which a number of persons who provide facilities for remote gaming contribute towards a fund which is wholly used to provide prizes in connection with the use of those facilities (sometimes described as arrangements for “linked progressive jackpot games”)—
- 40

- (a) the making by P of a contribution which relates to the provision by P of facilities for remote gaming shall be treated as the provision of a prize, and
- 5 (b) the award of a prize from the fund shall not be treated as the provision of a prize by P.
- (6) Where P credits the account of a user of facilities provided by P (otherwise than as described in subsection (3)), the credit shall be treated as the provision of a prize; but the Commissioners may direct that this subsection shall not apply in a specified case or class of cases.
- 10 (7) Subsections (2) to (6) of section 20 shall apply (with any necessary modifications) for the purpose of remote gaming duty as for the purpose of bingo duty.

14.

15 **The facts**

15. A Witness Statement was provided by Mr Howard Aldridge, managing director of the Appellant. The witness statement was not challenged by HMRC and was accepted as Mr Aldridge's evidence. In addition, a bundle of documents was produced by the Appellant which, inter alia, contained copies of specimen agreements between
20 the Appellant and selected players referred to below.

16. The facts in this appeal were not in dispute and are as follows.

17. The Appellant holds gaming licences to operate casinos in the UK. Its business consists of gaming activities and also catering services provided by its bars and restaurants.

25 18. The Appellant has, since September 2007, established a number of Premium Player Programmes (the "Programmes"). The Programmes are designed as an incentive to a selected number of wealthy players to encourage them to game with the Appellant.

30 19. The Programmes are available only to the Appellant's most prestigious players. They are only available in London and typically only some 40 players a year participate in them out of an estimated 8000 members.

20. The Programmes were introduced as a result of the Gambling Act 2005 which removed restrictions on the ability to offer such programmes. The changes effected by the Gambling Act 2005 came into force on 1 September, 2007.

35 21. Most of the players who are allowed to participate in the Programmes are based overseas and tend to come to the Appellant's casino as part of a short trip to the UK. Under the Programmes, the Appellant enters into an agreement (the "PPP Agreement") with the player at the beginning of his trip to the UK. As most of the players to whom the Appellant offers the Programmes are on a short visit to the UK,

the PPP Agreement under which each player plays is generally for a short defined period of time up to 14 days (the "Relevant Period").

22. One of the innovations of the Gambling Act 2005 was to make gambling contracts (including PPP Agreements) legally enforceable (see sections 334 to 338 Gambling Act 2005). It was common ground that a PPP Agreement is a legally enforceable contract and can be enforced by the Appellant and by the player.

23. Under the PPP Agreement, the player makes available to the Appellant either cleared funds or a pre-arranged cheque facility in an agreed amount. This is known as "Front Money", by which a player establishes his credit with the Appellant.

24. In addition, under the PPP Agreement the player agrees to meet a minimum "Turnover Requirement" i.e. the player agrees to stake a minimum specified amount of chips during the period of the PPP Agreement.

25. The requirement for Front Money and the Turnover Requirement may be waived at the Appellant's discretion.

26. There are three types of PPP Agreement:

(1) A "**Cash Chip Agreement**" under which the Appellant agrees to pay the player a percentage commission based on the total amount of cash chips staked on all bets over the course of the PPP Agreement, provided the player meets the Turnover Requirement (if applicable). The commission is payable regardless as to whether the player wins or loses.

(2) A "**Rolling Chip Agreement**". Players who enter into a Rolling Chip Agreement are issued with special chips called "rolling chips". We were provided with examples of these chips and with examples of ordinary cash chips (which, for the avoidance of doubt, we returned). Rolling chips are easily distinguishable from ordinary cash chips. The player places his bets using rolling chips in the usual way. A Rolling Chip Agreement operates as follows:

(a) Where a player stakes a rolling chip and wins he does not receive commission on that bet but the rolling chip is returned to him so that he can use it to bet again.

(b) Where a player plays a rolling chip and loses, the rolling chip is retained by the Appellant and is not returned to the player.

Under the Rolling Chip Agreement, the Appellant agrees to pay a commission to the player based on the total value of rolling chips staked on losing bets over the course of the Relevant Period, provided the player meets the Turnover Requirement (if applicable).

(3) A "**Rebate Agreement**". Under a Rebate Agreement the Appellant agrees to pay the player a percentage (typically 5%) of the player's aggregate loss over the Relevant Period, provided the player meets the Turnover Requirement (if applicable).

27. Under the PPP Agreements, any commissions or rebates due to the player are calculated at the point of settlement at the end of the Relevant Period (usually the time at which the player's trip ends and his gaming account with the Appellant is settled).

Submissions of the parties

5 28. Gaming duty in relation to casino gambling is a specialised area. For this reason, we have set out the submissions of counsel in more detail than would usually be the case.

Cash Chip Agreement

(a) The value of stakes staked

10 29. Mr Hitchmough, on behalf of the Appellant, submitted that amounts due from the Appellant to the player under the Cash Chip Agreement reduced the value of the "stakes staked" for the purposes of section 11 (10) (a) Finance Act 1997. In the alternative, he submitted that such amounts increased the value of the "prizes provided" within the meaning of section 11 (10) (b) Finance Act 1997.

15 30. In support of his primary submission Mr Hitchmough drew attention to the first element in the definition of "banker's profits", viz "the value, in money or money's worth, of the stakes staked with the banker" (Section 11 (10) (a)). It was necessary, therefore, to ascertain the "value" of the stakes staked. The value was different from
20 in *Lipkin Gorman v Karpnale Ltd* [1992] 2 AC 548 (HL) 575:

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

25 *'People do not game in order to win chips; they game in order to win money. The chips are not money or money's worth; they are mere counters or symbols used for the convenience of all concerned in the gaming.'*

30 The convenience is manifest, especially from the point of view of the club. The club has the gambler's money up front, and large sums of cash are not floating around at the gaming tables. The chips are simply a convenient mechanism for facilitating gambling with money. The property in the chips as such remains in the club, so that there is no question of a gambler buying the chips from the club when he obtains them for cash." (Emphasis added)

35 31. The only way to identify the value placed on a chip was to look at the agreement between the parties. It followed, so Mr Hitchmough submitted, that "the value of the stakes staked" was the product of the contractual rights and obligations agreed between the casino and the player and reflected in the PPP Agreement. In other words, the commission payable reduced the value of the stake staked. This was
40 supported, by the word "staked" which indicated that it was necessary to identify the value put at risk by the player in the game.

32. Mr Hitchmough argued that this interpretation of section 11 (10) (a) was consistent with that taken in the Gambling Act 2005. He referred to section 353 of the Gambling Act 2005 which defined a stake as follows:

5 “‘stake’ means an amount paid or risked in connection with gambling
and which either –

 (a) is used in calculating the amount of the winnings or the value of the
prize that the person making the state receives if successful, or

 (b) is used in calculating the total amount of winnings or value of
prizes in respect of the gambling in which the person making the stake
10 participates.”

33. Mr Hitchmough submitted, therefore, that in the context of the Gambling Act 2005 a stake was "an amount paid or risked."

15 34. Under the Cash Chip Agreement the player receives the agreed commission
regardless of whether he wins or loses in respect of the bets that he places. Mr
Hitchmough submitted that the effect was, therefore, to shift the odds in favour of the
player and to reduce the value of the stakes staked with the Appellant. This was, he
argued, consistent with the commercial reality of the arrangements.

20 35. In relation to Mr Hitchmough's primary submission, Mr Singh, on behalf of
HMRC, submitted that the words in section 11 (10) (a) should be given their ordinary
meaning. In his submission the "stakes staked with the banker" were the monies
wagered at the time the bet was placed. This was a simple and straightforward way of
calculating the "banker's profits". Mr Singh submitted that Mr Hitchmough's
interpretation introduced unnecessary uncertainty into the simple and workable
25 statutory basis of computing "banker's profits". Mr Singh submitted that Mr
Hitchmough's formulation of the value of the stakes staked, ie "the product of the
contractual rights and obligations which have been agreed between the casino and the
player", meant that the "product" was not known at the time that the bet was placed
and could only be identified at the end of the duration of the PPP Agreement. There
was nothing in the legislation to support Mr Hitchmough's formulation which was
30 adopted solely for the convenience of the Appellant. It would make calculating
gaming duty significantly more difficult than it presently is.

35 36. Mr Singh stated that HMRC did not suggest that the chips were anything other
than symbols of the monies gambled. It did not follow, therefore, that because the
chips themselves were not money or money's worth, the value of the "stakes staked"
had to be the product of the contractual rights and obligations agreed between the
casino and the player.

40 37. In relation to Mr Hitchmough's argument that the word "staked" in section 11
(10) (a) made it necessary to identify the amount put at risk, Mr Singh argued that if a
player intended to cover any gambling losses with a dishonoured cheque, the value of
the "stakes staked" would be zero. In fact, duty was payable on the amount actually
wagered by the player and the player's subjective state of mind as to whether he was
in reality putting any value or risk was irrelevant.

38. In reply, on this point, Mr Hitchmough argued that this represented a misunderstanding of what happens when payment is made by cheque. The cheque is conditional payment of the primary obligation of the transaction, whether that obligation is to pay the purchase price of goods or to repay a loan. Because the cheque is only conditional payment, if it is dishonoured the action to recover the loan or for the purchase price survives: see *Crockfords Club Ltd v Mehta* [1992] 1 WLR 355. For this reason, gaming duty was paid on the full amount of the chips provided even if a cheque was dishonoured.

39. Mr Singh also argued, in relation to Mr Hitchmough's reliance on section 353 Gambling Act 2005 in respect of "the amount paid or risked", that this argument was misconceived. A player under a PPP Agreement was putting at risk the full amount that he wagered with banker because the effect of the Cash Chip Agreement only "kicked in" when the player met the minimum Turnover Requirement. The player could fly home, cut his losses or quit whilst he was ahead before, in each case, meeting the minimum Turnover Requirement. There was no guarantee at the time the player placed the bet that he would meet the turnover threshold and receive a commission under the Cash Chip Agreement.

40. In addition, Mr Hitchmough's formulation of the meaning of "the value of the stakes staked", in Mr Singh's submission, put the calculation of gaming duty at the mercy of private arrangements between the casino and the player. The Appellant said that PPP Agreements tend to last 14 days. But, said Mr Singh, the contract could last any period of time. The effect of Mr Hitchmough's formulation was that it would be necessary to wait until the end of the Agreement, calculate the total amount spent by the player and then calculate the commission. Only at the end of each Agreement would you know the value of the stakes staked and the amount of duty payable.

41. Moreover, section 15 (3) Finance Act 1997 defined "accounting period" beginning on 1 April or 1 October. If a PPP Agreement lasted more than six months it would not be possible to identify the value of the stakes staked in the accounting period. This was another reason why the Appellant's analysis was misconceived.

30 *(b) The value of prizes provided*

42. In the alternative, Mr Hitchmough argued, in respect of the Cash Chip Agreement, that if commission payments did not reduce the value of stakes staked for the purposes of section 11 (10) (a), they increased the value of the prizes provided by the Appellant for the purposes of section 11 (10) (b). Plainly, the payments could not be taken into account under both provisions - there could be no "double counting".

43. Mr Hitchmough referred to the legislative history of section 11 (10) (b) Finance Act 1997. The subsection was amended, with effect from 1 September, 2007, by Finance Act 2007. Prior to its amendment, section 11 (10) (b) referred to:

40 "...the value, in money or money's worth, of the winnings paid by the banker to those taking part in such gaming otherwise than on behalf of a provider of the premises."

44. Mr Hitchmough emphasised the word "winnings". This carried a clear connotation of "success". He contrasts this with the amended wording which referred to "the prizes provided". He submitted that there was no necessary connection between the notion of a "prize" and the player having "succeeded". He referred to the common expression of a "consolation prize".

45. Mr Hitchmough took us to the provisions of the Gambling Act 2005 and submitted that it was clear in the context of that Act that the term "prize" has no necessary association with success. Section 6 (4) Gambling Act 2005 provides:

"For the purposes of this Act a person plays a game of chance for a prize –

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

(b) whether or not he risks losing anything at the game."

46. In addition, section 6 (5) Gambling Act 2005 provides:

"In this Act 'prize' in relation to gaming (except in the context of a gaming machine) –

(a) means money or money's worth, and

(b) includes both a prize provided by a person organising gaming and winnings of money staked."

47. Mr Hitchmough also referred to the Explanatory Notes to clause 104 and Schedule 25 to the Finance Bill 2007, paragraph 42 of which stated:

"Sub-paragraph 2 [of clause 18 in Schedule 25] amends section 11 (10)(b) to align the treatment of winnings to that which applies to remote gaming."

48. Mr Hitchmough explained that clause 18 (2) of Schedule 25 to the Finance Bill 2007 was the provision which, when enacted, changed the terminology of section 11 (10)(b) Finance Act 1997 from "winnings paid" to "prizes provided". The Explanatory Notes made it plain that Parliament was seeking to align the approach taken in relation to gaming generally with that applicable to remote gaming. The two duties were, Mr Hitchmough argued, intended to operate side-by-side in a consistent manner. Under the remote gaming duty regime, Mr Hitchmough submitted, any credits made to a player's account (not just in relation to winnings) were deductible in calculating remote gaming winnings (section 26F(6) Betting and Gaming Duties Act 1981) - also introduced by the Finance Act 2007. Mr Hitchmough argued that paragraph 6.5 of HMRC Notice 455 "Remote Gaming Duty" (April 2010) made it clear that section 26F(6) is intended to cover incentives offered by operators of remote (ie on-line) gaming to gamblers:

"It is widespread industry practice for operators to offer incentives such as 'matched deposit' or 'rake back' schemes. These are aimed at both attracting new players to their sites and retaining existing players. These schemes usually take the form of crediting amounts to players'

accounts (bonuses) on condition, for example, that players stake a set amount in play, or deposit a certain amount in chip purchases.

Any stakes or payments for gaming made from a player's account are defined as remote gaming receipts. It does not matter whether they come from funds deposited by the player or bonuses credited to the account by the operator. This may have the effect of distorting the duty calculation. In order to remove amounts credited to player accounts under 'rake back' and other incentive schemes from duty calculation, you should treat such amounts as winnings."

5

10 49. Therefore, Mr Hitchmough submitted that a "prize" was, in the context of section 11 (10) (b), a reward provided by the casino to the player for fulfilling the agreed conditions of the Programme selected. It did not denote winning or success.

15 50. On this basis, under the Cash Chip Agreement, the commission paid by the Appellant to the player if a particular condition concerning the relevant gaming is satisfied (namely staking an amount over the relevant Turnover Requirement during the Relevant Period), was a "prize provided".

20 51. Mr Singh rejected Mr Hitchmough's submission that there was no necessary connection between the notion of a "prize" and the player having "succeeded". On the contrary, as a matter of ordinary language, Mr Singh submitted, a "prize" was taken to mean a reward for victory, superiority or success. Although there was the concept of a "consolation prize", there was usually a connection between the term "prize" and success.

25 52. The provisions of the Gambling Act 2005 relied upon by Mr Hitchmough did not, in Mr Singh's submission, assist the Appellant's case, viz that "prize" had no necessary association with success. Mr Singh pointed out that section 6 (4) Gambling Act 2005 provided a definition not of "prize" but of "plays a game of chance for a prize". The definition of "prize" is contained in section 6 (5) and provided no support for the Appellant's argument.

30 53. As regards the change in the wording of section 11 (10) (b) from "the value, in money or money's worth, of the winnings paid" to "the value of the prizes provided", Mr Singh submitted that there was no basis for suggesting that that supported the Appellant's case. Remote gaming duty was a different duty from gaming duty and contains its own regime in the Betting and Gaming Duties Act 1981. Mr Singh submitted that it was simply not possible to "read through" provisions applicable to remote gaming duty and apply them to gaming duty.

35 54. Mr Singh submitted that the change in wording in section 11(10) (b) from "the value, in money or money's worth, of the winnings paid" to "the value of the prizes provided", was made for two reasons. First, the revised wording made it clear beyond doubt that non-cash prizes could be taken into account for the calculation of gaming duty. Mr Singh accepted that the original wording included a reference to "money's worth" and that the original formulation could have applied to non-cash prizes in any event. Nonetheless, there was a wish to put this beyond doubt and the wording of section 11 (10) (b) was amended for this reason.

40

55. Secondly, Mr Singh referred to in paragraphs 42 and 43 the Explanatory Notes to the Finance Bill 2007 (Clause 104, Schedule 25), referred to by Mr Hitchmough. Whilst paragraph 42 of the Explanatory Notes referred to the amendment of section 11 (10) (b) "to align the treatment of winnings with that which applies to remote gaming", paragraph 43 of the Explanatory Notes referred to the insertion of a new subsection, (10 A), "that provides for valuation provisions in respect of non-cash prizes as a consequence of the amendment to section 11 (10) (b) above". This made it clear, Mr Singh submitted, that one reason for the amendment to section 11(10) (b) was to take account of non-cash prizes.

56. Mr Singh drew attention to the words of section 20 Betting and Gaming Duties Act 1981(which was incorporated by reference by section 11 (10A) Finance Act 1997) for the purpose of valuing non-cash prizes. Section 20 (1) referred to "the values of prizes provided by him in that period by way of winnings at bingo". The reference to "winnings" indicated that the introduction of the phrase "prizes provided" was not intended to change the concept of "winnings" i.e. a reward for success or superiority. Mr Hitchmough, however, in reply noted that subsection (1) was the only part of section 20 which did not apply for the purposes of section 11 (10A).

57. The second reason for the change to the language of section 11 (10) (b) was referred to in paragraph 42 of the Explanatory Notes to the Finance Bill 2007. As already noted, this explains that the purpose of the amendment to section 11 (10) (b) was to "align the treatment of winnings with that which applies to remote gaming." In his submission a prize was associated with "winnings". There was nothing in that section which supported the Appellant's claim that a "prize" has no association with success. The provision simply did not say that a prize could be associated with a reward for losing bets.

58. As regards the Betting and Gaming Duties Act 1981, section 6 (5) (a) made it clear that the word "prize" included non-cash prizes. Section 6 (5) (b) provided that "prize" included "both a prize provided by a person organising gaming and winnings of monies staked." The reference to "winnings of monies staked" once again associated the concept of "prize" with winnings, ie with success.

59. In any event, all the definitions in the Gambling Act 2005 and the Betting and Gaming Duties Act 1981 applied only for the purposes of those Acts. They could not be incorporated into the Finance Act 1997.

60. Mr Singh referred to the witness statement of Mr Aldridge where he described the Premium Player Programmes as "incentives". Mr Singh accepted that prizes could be inducements if they were a reward of success, but that was not the case here. Mr Singh submitted that the incentive or inducement payments in this case were not rewards for success.

The Rolling Chip Agreement

61. Mr Hitchmough submitted that payments made under the Rolling Chip Agreement increased the value of "prizes provided" for the purposes of section 11 (10) (b) Finance Act 1997.

62. For the reasons already advanced in relation to the Cash Chip Agreement, a prize was simply a reward provided by the Appellant to the player for fulfilling the agreed conditions concerning the relevant game. Under the Rolling Chip Agreement a player had to satisfy two conditions before becoming entitled to payment. First, the player
5 must have satisfied the Turnover Requirement (if applicable). Secondly, the player must have played a rolling chip on a particular bet and lost. The rebate payments were, therefore, the player's reward for these conditions having been satisfied.

63. Mr Singh's arguments in support of HMRC's view that payments under the Rolling Chip Agreement did not constitute "prizes provided" were essentially the
10 same as those in respect of the Cash Chip Agreement.

Rebate Agreement

64. Mr Hitchmough submitted that payments made under the Rebate Agreement increased the value of "prizes provided" for the purposes of section 11 (10) (b) Finance Act 1997.

15 65. In the case of the Rebate Agreement a player became entitled to payment if two conditions were satisfied: first, that the Turnover Requirement had to be satisfied and, secondly, that the player suffered a loss over the period of the Agreement. The rebate payment was calculated by reference to the value of the loss. This was, therefore, in Mr Hitchmough's submission, a "prize provided" by the Appellant, for the reasons
20 already given in relation to the Cash Chip Agreement.

Timing

66. In the course of argument we asked Mr Hitchmough to explain when, on the basis of his arguments in relation to "the value of the stakes staked" and "prizes provided", payments made under the three types of PPP Agreements would be taken into account
25 in calculating "banker's profits".

67. Mr Hitchmough submitted that the payments were taken into account in calculating "banker's profits" at the time when the player's entitlement under an Agreement arose.

68. Therefore, in the case of a Cash Chip Agreement, if it was assumed that there was
30 no Turnover Requirement or the requirement had been satisfied, Mr Hitchmough submitted that the "value of the stakes staked" was reduced by the commission at the time when the player wagered his chips on the table. At that time he knew that he would be entitled to receive a payment.

69. In the case of a Cash Chip Agreement where there was a Turnover Requirement
35 which had not been reached, Mr Hitchmough accepted that the commission did not reduce "the value... of the stakes staked", because at that stage (ie when the bets were placed) it was not clear whether the player would receive a payment. When the player satisfied the Turnover Requirement, commission in respect of games played before the Turnover Requirement was satisfied constituted a "prize provided" and was
40 indistinguishable from the other two Agreements (see below). Bets placed after the

Turnover Requirement had been satisfied qualified for the commission, which reduced the value of the stakes staked.

5 70. As regards the Rebate Agreement, Mr Hitchmough submitted that the deduction from the "banker's profit" (as a prize provided) occurred when the casino paid the rebate at the end of the period of the Agreement. Only at that time was it possible to quantify the losses sustained by the player, assuming, in addition, that the Turnover Requirement had also been satisfied.

10 71. In relation to the Rolling Chip Agreement, the player's entitlement arose when the player put his stake on the table and lost, provided the Turnover Requirement had been satisfied.

15 72. Mr Singh submitted that on the Appellant's argument (viz that the "prize" was a reward provided by the house to a player for fulfilling the agreed conditions concerning the relevant Programme) the value of the "prizes provided" would not be known until the expiry of the agreement, however long. In this case, the agreements ran for a maximum of 14 days. But it was possible that agreements could run for longer. Indeed, it was possible that an agreement could run for longer than the six-month accounting period. This would mean that the value of "prizes provided" in each accounting period would not be identifiable.

20 73. Mr Singh examined the example of a 14 day Agreement which straddled the end of an accounting period. In the case of a Rebate Agreement it would not be possible to tell what the rebate would be since this was calculated by reference to the total losses. At the end of the first accounting period the player might have £100,000 of losses but by the end of the period of the agreement he might have losses of £300,000. If rebates were supposed to be "prizes" Mr Singh submitted that this begged the question of how
25 the value of prizes in each accounting period was to be calculated.

30 74. Mr Singh submitted that the calculation in section 11 (10) Finance Act 1997 envisaged calculating wagers at the time bets were placed and then deducting the value of the prizes for taking part in such gaming. In the case of a Rebate Agreement which straddled an accounting period, no rebate was taken into account in the first period because the rebate could not be calculated until the end of the Agreement. This was an unattractive outcome because it ignored the fact that the gaming which gave rise to the rebate took part (at least in part) in the first period. Suppose an Agreement covered 13 days at the end of one accounting period and one day at the start of the
35 next accounting period, the rebate could not be taken into account at the end of the first accounting period because it was not known what the rebate would be. The Appellant, therefore, had to submit that the rebate payment could only be taken into account for the second accounting period even though only 1 day of gaming took place in that second period. Moreover, it was possible that the player would not play on the 14th day (ie the first day of the second period). This would mean that the rebate
40 would be taken into account for the second period even though no gaming took place at all in that second period. This destroyed the connection implicit in the statutory formula contained in section 11 (10) between calculating the value of "stakes staked"

and "prizes provided", in calculating the "banker's profits" for an accounting period, and the games played in that period.

Discussion

5 75. This appeal raises a question of statutory interpretation on the meaning of the phrases "the value, in money or money's worth, of the stakes staked "and "the value of prizes provided" in section 11 (10) Finance Act 1997.

76. There was no authority cited to us on the meaning of these expressions and we have not been able to find any authority which is of assistance.

10 77. We, therefore, approach this question of statutory interpretation applying the normal rules of giving the words their ordinary meaning in their statutory context, construed purposively.

15 78. Gaming duty was introduced by the Finance Act 1997 and replaced Gaming Licence Duty which had been charged by Part II of the Betting and Gaming Duties Act 1981. Section 14 of the 1981 Act imposed a charge to duty on the gross gaming yield, which was defined (section 14 (2) (b)), as regards "banker's profits", in the same way as the original (unamended) provisions of section 11 (10) Finance Act 1997. Indeed, in the Explanatory Notes to the Finance Act 1997 it was made clear that the amounts that would be the basis of the duty charged would be the same as under the 1981 Act (Explanatory Note 14 to Clause 11).

20 79. It is important to understand that Gaming Duty is an excise duty. It is not, unlike income or corporation tax, a tax on profits quantified in accordance with standard principles of commercial accounting. The definition of "gross gaming yield", and in particular the definition of "banker's profits", contained in section 11 Finance Act 1997 are artificial statutory constructs.

25 80. It seems to us that the definition of "banker's profit" contained in section 11 (10) is intended to be very simple - indeed, almost rudimentary. It does not take account of the general expenses of running a casino but looks only at the profit made by the "banker". It should not, in our view, be over-complicated.

30 81. In argument, we asked Mr Hitchmough what was meant by the expression, in this context, "banker". He replied that a "banker" was a person who acted as the banker in the game being played ie the person taking the bet on behalf of the club. The banker was not necessarily the casino operator because section 11 (8) (b) made it clear that the banker could be either the provider of the premises or a person acting on his behalf.

35 82. In construing the disputed wording in section 11 (10) it is necessary, first, to start with the wording of section 11 (8) which defines "gross gaming yield". As amended by the Finance Act 2007, section 11 (8) provides:

"For the purposes of this section the gross gaming yield from any premises in any accounting period shall consist of the aggregate of –

- (a) the gaming receipts for that period from those premises; and
- (b) where a provider of the premises (or a person acting on his behalf) is a banker in *relation to any dutiable gaming taking place on those premises in that period, the banker's profits for that period from that gaming.*" (Emphasis added)

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83. We have highlighted this wording in section 11 (8) (b) because this provision makes it clear, in our view, that the "banker's profits" must arise in the same accounting period in which the gaming takes place and the disputed provisions of section 11 (10) must be read in this context. We shall return to this point later in relation to the timing aspects of the calculation of "banker's profits".

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84. Section 11 (9) defines gaming receipts, for the purposes of section 11(8) as the "receipts in that [accounting] period from charges made in connection with any dutiable gaming which has taken place on the premises" (excluding admission charges). This provision is not in issue in this appeal. It charges to duty gaming receipts from "equal chance" games where the premises operator provides facilities for the game but the players play against each other (e.g. "table money" in poker) rather than against the house.

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85. Section 11 (10) contains the disputed provision relating to "banker's profits", as follows:

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"In subsection (8) above the reference to the banker's profits from any gaming is a reference to the amount by which the value (if any) by which the value specified in paragraph (a) below exceeds the value specified in paragraph (b) below, that is to say –

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(a) the value, in money or money's worth, of the stakes staked with the banker in any such gaming; and

(b) the value of the prizes provided by the banker to those taking part in such gaming otherwise than on behalf of a provider of the premises."

86. In our view, the terms of the PPP Agreements cannot be taken into account in computing "banker's profits".

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"The value... of the stakes staked with the banker"

87. As regards the Cash Chip Agreement, Mr Hitchmough eventually conceded that the only circumstance in which a commission under this agreement could reduce the value of the "stakes staked" was where there was no Turnover Requirement or the Turnover Requirement had been satisfied. In our view, the expression "the value, in money or money's worth, of the stakes staked *with the banker*" strongly implies that it is the full face value bets placed on the table with the banker (which Mr Hitchmough indicated was the banker for the game and the person who took the bets) that is the amount which is taken into account in the calculation of "banker's profit" for the purposes of section 11 (10) (a). We do not think that a collateral agreement can affect the value of the amounts staked with the banker.

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88. We accept Mr Singh's submission that section 11 (10) is intended to produce a simple and workable calculation without regard to other collateral agreements or arrangements between the casino and the player. We shall see below the difficulties that arise if collateral agreements such as the PPP Agreements are taken into account for the purposes of the definition of "prizes provided" in section 11 (10) (b) and this, to our minds, strongly suggests that the calculation contained in section 11 (10) should be made without reference to the PPP Agreements. In reaching this conclusion, we do not consider that our view is inconsistent with the definition of "stake" in section 353 of the Gambling Act 2005. We shall consider below the extent to which definitions used in the Gambling Act 2005 can be used in construing the provisions of the Finance Act 1997 (as amended). For present purposes, we note that section 353 simply refers to a stake meaning "an amount paid or risked". In our view, our conclusion that the value of the money staked with the banker is the full nominal amount (without deduction for any commission payable) is not inconsistent with that definition and, in particular, with the words "an amount paid".

89. As regards the argument based on the *Lipkin Gorman* case, the chips employed in gambling are simply used as mere symbols of the monies gambled. They represent the face value of the monies wagered at the time the bets are placed. We do not consider that this decision requires us to look at, as Mr Hitchmough put it, the "contractual matrix" between the casino and the player in determining the value assigned to the chips.

"The value of prizes provided"

90. In our view, commissions or rebates paid under the three types of PPP Agreements cannot be regarded as "prizes provided".

91. The Oxford English Dictionary defines "prize" to mean:

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

92. This is the ordinary meaning of the word "prize". It would not ordinarily mean a reward or compensation for failure or for losing. It is true that "consolation prize" is commonly used to refer to a prize awarded to a runner-up. However, it would be unusual to use the word "prize" in this context without the qualifying word "consolation". Moreover, the award for someone who loses a competition or a game is usually referred to as the wooden spoon or a "booby prize" rather than simply a "prize" without qualification. Therefore, it seems to us that the ordinary and natural meaning of the word "prize" is, as Mr Singh argued, a reward for success or superiority and not a reward or compensation for losing.

93. We have considered whether the provisions of the Gambling Act 2005, to which Mr Hitchmough referred, should change our conclusion on the ordinary natural meaning of the word "prize". In our view these provisions do not alter our conclusion.

94. We accept that the amendments to the Finance Act 1997 introduced by the Finance Act 2007 were introduced to take account of changes to the general law connected with gambling introduced by the Gambling Act 2005. Indeed, as Mr Hitchmough pointed out, Schedule 25 to the Finance Act 2007 (which, *inter alia*, made the amendments to section 11 (10) referred to above) is headed "Amendments connected with Gambling Act 2005".

95. We do not think that the definitions contained in the Gambling Act 2005, particularly those contained in section 6, can be imported wholesale into the Finance Act 1997. In fairness to Mr Hitchmough's submissions, we did not understand him to be advocating this approach. Instead, we understood him to be arguing that words and expressions in the Finance Act 1997 introduced by the Finance Act 2007 (in connection with the Gambling Act 2005) should be construed, so far as possible, in a manner consistent with the definition of those words and expressions in the Gambling Act 2005. We accept this approach but there are, we think, limitations to it. We think it is sensible that words used in the Finance Act 1997 (as amended) should, as far as is consistent with their ordinary and natural meaning, bear the same or a similar meaning to the same words in the Gambling Act 2005. However, that does not mean that the provisions of the Gambling Act 2005 can change the ordinary and normal meaning of a word when used in the Finance Act 1997. It would have been perfectly possible for the drafter of the Finance Act 2007, when amending the Finance Act 1997 (particularly section 11 (10)) to have incorporated by reference relevant definitions used in the Gambling Act 2005 but the drafter plainly decided not to do so.

96. Section 6 (5) of the Gambling Act 2005 contains the definition of "prize". This definition provides no assistance to the matter is currently in dispute. It simply provides that the word "prize", in relation to gaming, includes money or money's worth and includes both a prize provided by a person organising gaming and winnings of money staked. The expression "a prize provided by a person organising gaming and winnings of money staked" are, in our view, intended simply to clarify the proposition that a "prize" in the context of gambling includes not just a prize provided by the house but also winnings from other parties (e.g. other players).

97. Section 6 (4) of the Gambling Act 2005 provides:

"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

(b) whether or not he risks losing anything at the game."

98. In our view, this provision does not provide support for the view that a payment made to reward or compensate a player for losing a game is a "prize". It simply indicates that the fact that a player may not, for example, lose any money staked does not, in the event of the player "winning", prevent the gain being "a game of chance for a prize". It says nothing about the character of a payment to a player who does not win.

5 99. Moreover, we do not believe our conclusion should be altered by the provisions of
section 26F(6) Betting and Gaming Duties Act 1981 (which, as we noted above, was
introduced by the Finance Act 2007). This provision applies solely for the purposes of
remote gambling (in most cases, in practice, online gambling). It is certainly true that
10 the Explanatory Notes to the Finance Bill 2007 state that the change to the wording in
section 11 (10) (b) from "winnings paid" to "prizes provided" was intended to align
the approach taken to gaming generally with that applicable to remote gaming.
However, the Explanatory Notes do not explain in what respect or to what extent such
alignment is envisaged. Once again, it would have been perfectly possible for the
15 drafter of the Finance Act 2007 to have, *mutatis mutandis*, incorporated by reference
the provisions of section 26 F of the Betting and Gaming Duties Act 1981 into section
11 (10) Finance Act 1997 when making the amendments to that provision. The
drafter, however, chose not to do so. We consider it most likely that the reason why
the drafter took this approach was because it was considered adequate simply to align
20 the general concept of "the value of prizes provided" in section 26 F and section 11
(10) without incorporating the remaining detailed provisions of section 26 F. In any
event, we do not think it legitimate to use the provisions of section 26 F to alter the
ordinary and natural meaning of words used in section 11 (10) Finance Act 1997.

20 100. In reaching this conclusion we have borne in mind the complications that would
arise from adopting Mr Hitchmough's approach. Gaming duty is charged on premises
for an accounting period in relation to which dutiable gaming taking place. PPP
Agreements can last up to 14 days. The specimen PPP Agreements which we saw
provide that the minimum turnover figures must be achieved within 14 days of the
commencement of the programme, although the Appellant may at its discretion vary
25 the length of the qualifying period. It is, therefore, quite possible that the life of a PPP
Agreement could straddle the end of an accounting period. A few examples illustrate
the difficulties that might arise if the terms of a PPP Agreement could be taken into
account in calculating "banker's profits" for the purposes of section 11 (10).

30 101. *Example 1:* In this example, suppose a player signs a Cash Chip Agreement with
a minimum Turnover Requirement of £250,000. In other words, the player must make
bets worth £250,000 during the, say, 14 day life of the Agreement. Suppose further
that the first six days of the Agreement are the final six days of Accounting Period 1
and the final eight days of the Agreement are the first eight days of Accounting
Period 2. The Turnover Requirement is not satisfied until day nine ie in Accounting
35 Period 2.

40 102. Mr Hitchmough submitted, as we understood it, that the commissions due to the
player in respect of bets made prior to satisfaction of the Turnover Requirement (the
first nine days of the Agreement) were "prizes provided" at the time when the
Turnover Requirement was satisfied. The difficulty with Mr Hitchmough's
submission is that the first eight days of gambling took place in Accounting Period 1
and the "prize provided" (on Mr Hitchmough's submission) in respect of that
gambling accrues in Accounting Period 2. Section 11 (8) Finance Act 1997 makes it
clear that the calculation of bankers profits in an accounting period relates to gaming
that took place in "that period". The commission in respect of the gambling that took
45 place in the first eight days cannot be taken into account in Accounting Period 1

(because it was not clear at the end of that period whether the player was entitled to the commission because the Turnover Requirement had not been reached) and cannot be taken into account in Accounting Period 2 because it did not relate to gambling that took place in that period. There are no provisions in the Finance Act 1997 which
5 allow sums crystallising in one period to be "related back" to an earlier period.

103. *Example 2:* A player enters into a Turnover Chip Agreement with the duration of 14 days. As in Example 1, the duration of the Agreement straddles the end of an accounting period. The player places a number of losing bets in the last few days of Accounting Period 1 but the Turnover Requirement is not satisfied until several days
10 into Accounting Period 2.

104. Once again, commission paid in respect of the losing bets only accrues in Accounting Period 2, when the Turnover Requirement is satisfied. As regards the losing bets placed in Accounting Period 1, the commission cannot be taken into account in calculating "banker's profits" in Accounting Period 1 because it did not
15 accrue in that period. Similarly, the commission cannot be taken into account in Accounting Period 2 because it did not relate to gaming in that period.

105. *Example 3:* A player enters into a Rebate Agreement. Once again the duration of the Agreement straddles the end of an accounting period in the same way as Example 1. The player loses £50,000 in Accounting Period 1. In Accounting Period 2 the
20 player's luck changes and he wins £30,000, resulting in a net loss at the end of the 14 day period of £20,000.

106. Mr Hitchmough accepted that the rebate accrued only at the end of the life of the Rebate Agreement when the player's net losses could be calculated. However, none of the losses were occurred in Accounting Period 2 (the period in which the rebate
25 accrued). Those losses related to gambling in Accounting Period 1. Accordingly, the rebate accruing in Accounting Period 2 cannot be taken into account in Accounting Period 2 because it did not relate to gaming taking place in that period.

107. There are, no doubt, many other permutations which could be considered. Nonetheless, we consider that the above examples indicate the difficulties that arise in
30 adopting Mr Hitchmough's analysis that commissions and rebates arising under the PPP Agreements should be taken into account in calculating "banker's profits". Instead of a simple formula, complexities occur which are simply not envisaged by the legislation and this, of itself, suggests that Parliament did not intend this result to arise. Moreover, attempting to introduce payments made under the PPP Agreements
35 into the calculation of "banker's profits", as Mr Singh correctly pointed out, destroys the connection between the amounts won and lost on the table and the amount on which gaming duty is charged.

108. Finally, we should observe that the fact that the PPP Agreements are intended to be incentives to players to gamble at the Appellant's casino does not, in our view,
40 prevent payments under those Agreements constituting "prizes provided". A prize won by a gambler is undoubtedly an incentive to gamble, but it is nonetheless a prize. For the reasons given above, there are more compelling reasons why we consider

commission and/or rebate payments under these Agreements should not be taken into account in the calculation of "banker's profits".

Decision

109. For the reasons given above, we dismiss this appeal.

5 110. 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
10 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.

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GUY BRANNAN

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TRIBUNAL JUDGE
RELEASE DATE: 17 May 2011

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