TC03408

Appeal number: TC/2012/05827

VAT – appellant licensed by ferry company to operate gaming machines and casino on board ferries – whether separate supplies of gaming machine and casino licence or single supply of gambling provision - separate supplies – place of supply – whether ships capable of being a "fixed establishment" for purposes of determining place of supply – yes – whether "human resources" for purposes of determining fixed establishment had to be employees of person receiving supply- no – casino areas on board ferries were fixed establishments for purpose of place of supply rules in relation to supply of casino licence – no fixed establishment on board ferries for purpose of place of supply in relation to gaming machine licence – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASTRAL MARINE SERVICES LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE SWAMI RAGHAVAN
MR DAVID EARLE

Sitting in public at 45 Bedford Square, London on 26 September 2013

David Goy QC and Michael Jones, counsel, for the Appellant

Philip Shepherd, HMRC officer for the Respondents

DECISION

Introduction

1. The appellant entered into a licence agreement to operate casinos and gaming machines on board certain domestic and internationally bound ships operated by P&O Ferries, in return for which the appellant makes payments to P&O.

2. The appellant argues the licence to site and operate gaming machines and the licence to operate casinos in relation to a particular ship are separate and distinct supplies and that even if the operation of gaming machines and casinos amount to one supply there are separate supplies in relation to each ship. HMRC dispute this and argue there is a single supply in relation to gambling provision for all the ships covered by the agreement.

3. The appellant further argues in relation to certain internationally bound ships that the appellant has a "fixed establishment" on each particular ship for the purposes of the relevant legislation on place of supply for VAT purposes. On departing from UK territorial waters the supply is out of the scope of VAT and no VAT is chargeable.

4. HMRC say that ships, being movable, cannot be treated as "fixed" and that in any case the presence of croupiers, casino equipment and gambling machines on board the ship is insufficient to amount to the ship being a "fixed establishment".

5. HMRC decided in a letter of 26 April 2012 that the ships in question could not be treated as "fixed establishments". This appeal is against the conclusion reached in that letter and the period in question is from 1 January 2010 (being the date legislation on place of supply changed) and 31 December 2012 ("the relevant period").

Facts

6. We had a witness statement from Ms Kristina Graham, who had been the managing director of the appellant since January 2009. Ms Graham gave oral evidence and was cross-examined by HMRC. Her evidence exhibited the licence agreement between the appellant and P&O concluded on 16 December 2008 ("the agreement"), a specimen croupier agreement, and a number of photos showing the situation and environs of the gaming machine and casino facilities. Ms Graham was a credible witness and we incorporate the relevant findings of fact from her evidence below.

7. The appellant is registered for VAT purposes and carries on a business on board P&O ships comprising the operation of gaming machines and running casinos.

8. It has premises at Index House, St George's Lane, Ascot, Berkshire. The services performed there are limited to preparation of accounts and other administrative matters such as dealing with telephone enquiries, liaising with land-

based staff who service the gaming machines, speaking with professional advisers and liaising with the directors of the appellant's Swedish parent company. In the relevant period there were 3 staff working at Index house, these were 2 directors, Ms Graham and Mr Simon Moulton, the other director, and an administrator.

9. In the relevant period the registered office address of the appellant was at its accountants in Ascot up until May 2011. It then changed to the office of the new accountants of the appellant in Rickmansworth.

10. Under the agreement licences to site gaming machines, and to site and operate casinos (referred to in the agreement as "live gaming tables") were granted in respect of ships operating on the following routes. As shown below it was only the routes from Hull and Portsmouth in respect of which licences were provided for both gaming machines and casino operation:

(1) Dover (England) to Calais (France) – gaming machines only

(2) Hull (England) to Zeebrugge (Belgium) – casino and gaming machines

(3) Hull (England) to Europoort, Rotterdam (Netherlands) – casino and gaming machines

(4) Portsmouth (England) to Bilbao (Spain) until September 2010– casino and gaming machines

(5) Larne, (Northern Ireland) to Cairnryan (Scotland) gaming machines only

(6) Larne, (Northern Ireland) to Troon, (Scotland) gaming machines only

(7) Liverpool, (England) to Dublin (Ireland) gaming machines only.

11. In the agreement the sailings to France are described as "the Short Sea routes", the sailings to the Netherlands and to Belgium as "the North Sea routes", the sailing to Spain as "the Western Channel route" and the sailings to Ireland and Northern Ireland as "the Irish Sea routes". This appeal concerns the North Sea and Western Channel routes. There are four ships which sail out of Hull on the North Sea routes (England/ Netherlands and England/Belgium). There was one ship on the Portsmouth- Bilbao route.

12. The ships on the Hull to Zeebrugge route leave at 6.30pm and the sailing takes 12.5 hours each way. The ships on the Hull to Europoort route leave at 6.30pm and the sailing takes 10 hours each way. The ship on the Portsmouth Bilbao route used to leave at 9pm with a sailing time of 34 hours each way.

13. The casinos are only operated and the gaming machines are only switched on once the ships have left the UK docks. It takes approximately 1.5 hours for the ships from Hull to leave UK territorial waters and depending on the precise route taken the ship may graze UK territorial waters again briefly as it passes by the Norfolk coast. It takes approximately 40 minutes for the ship sailing from Portsmouth to Bilbao to leave UK territorial waters.

14. For sailings both to and from the UK the casinos are all closed after the bars close at 1am (time of the country of departure). For sailings between Portsmouth and Bilbao during the day following departure the casinos were open from 2pm to 5pm and then from 7pm until the bars closed again at 1 am.

15. The casinos are sited at a fixed location in a dedicated area central to the bar and entertainment areas on each ship. Entry into the casino site is controlled by the croupiers. There was no door as such but an entrance to the area which in Ms Graham's words were a "sort of portal". There is a notice at the entrance to each casino location stating "Children under the age of 18 years are not allowed in the casino area". The croupiers will ask for a person's ID if they feel the person may be underage.

16. There is a sign in each casino with the house rules in the name of Astral Marine Services. The layouts of the table and the chips carry the appellant's name and logo.

17. There were usually 3 tables – now there are 2 in use. There was one roulette table and two card tables. The area was furnished in an "ambient" visually attractive way.

18. There is an office /workshop in Dover for the servicing of gaming machines on the ferries on the cross channel routes and storage of spare parts and tools, and a similar office/ workshop in Hull for the same purpose in relation to the North Sea routes as well as all the recruitment of the croupiers. The Hull workshop had 3 staff. At the relevant time the Dover workshop had more staff.

The agreement between P&O and the appellant

19. The agreement covers various routes. This appeal is concerned with the two North Sea routes, and the Portsmouth Bilbao route. It is only in relation to those ships on which there are casinos that the appellant seeks to argue it has a fixed establishment on the ship. The agreement where relevant provides as follows (we also describe further provisions in the discussion section below):

> **"Clause 1 Services**
>
> AMS [*the appellant*] is to provide on the terms of this Agreement the following products and services on board all P&O vessels listed respectively in Schedules 1, 2, 3 and 4 operated by P&O on the Short Sea, the North Sea, the Western Channel and the Irish Sea:
>
> British Club/AWP machines (numbers to be confirmed)
>
> Casino Slots machines (numbers to be confirmed)
>
> Video Slots (numbers to be confirmed)
>
> Video and Amusement machines (numbers to be confirmed)
>
> Fixed Odds Betting terminals (numbers to be confirmed)
>
> And any other coin operated pay-to-play leisure machines that may be installed by agreement between the parties (whether a controlled

machine or not) (such machines collectively and individually called the "Machines") and will also supply Live Gaming Tables as set out in Schedules 2 and 3.

Clause 2 Licence

2.1 - P&O grants to AMS an exclusive licence to site and operate all the Machines on board the vessels set out in Schedules 1, 2, 3 and 4 to this Agreement.

Clause 2.2 – P&O grants to AMS an exclusive licence to operate Live Gaming Tables on board the vessels referred to in Schedules 2 and Schedules 3 of this Agreement.

Clause 3 – Fees

In consideration of granting the exclusive licences, AMS shall pay on a monthly basis to P&O the respective amounts specified under Schedules 1, 2, 3 and 4 to this Agreement.

Clause 6 – Reduced profitability

If

6.1.1 - The number of vessels and/or routes covered by this Agreement for any reason alter during the course of the Agreement (other than the closure of the Western Channel route, which is covered in Schedule 1, Clause 7); or

6.1.2 - P&O change the usage of any vessel covered by this Agreement; (e.g. converting a passenger vessel to a freighter or reducing the capacity of a passenger vessel)

resulting in a reduction in income from the relevant vessel(s) for AMS of 25% or more compared to the income received by AMS pursuant to this Agreement (or the previous agreement in place between the parties) during the corresponding three months in the previous year, the parties shall endeavour to reach a mutually acceptable solution to reflect the loss of income suffered by AMS. In the event such an agreement is not concluded within two months of the effective date of the change referred to in Clauses 6.1.1 or 6.1.2 AMS may terminate this agreement by giving P&O not less than three months written notice.

Clause 8 General Service Levels and Responsibilities

Clause 8.1 – AMS will be responsible for maintaining the Machines in good order and service them in accordance with the manufacturer's requirements. AMS will replace Machines as necessary to ensure that the most suitable machines are provided. The cost of maintaining and replacing Machines will be borne by AMS.

Clause 8.2 – AMS will be responsible for maintaining the Live Gaming Table equipment on North Sea and Western Channel vessels in a good condition. AMS will recruit, train, and employ as necessary the croupiers required to operate the Live Gaming Tables ensuring that any relevant UK employment regulations are met if appropriate.

Clause 8.3 – P&O will at no cost to AMS provide suitable full-board accommodation for the croupiers and any other personnel required to operate the Machines and the Live Gaming Tables on Western Channel and North Sea vessels. The accommodation will be in two-berth cabins and will not require the croupiers/ personnel to share mixed gender accommodation."

20. Schedules 1 to 4 to the agreement set out "Services to be provided in relation to vessels operating…" respectively on the Short Sea, the North Sea, the Western Channel and the Irish Sea.

21. Schedule 2 provides:

"SERVICES TO BE PROVIDED IN RELATION TO THE VESSELS OPERATING ON THE NORTH SEA

1. The vessels currently covered by Schedule 2 are as follows:

The Pride of Rotterdam

The Pride of Hull

The Pride of York

The Pride of Bruges

P&O has the right to change these vessels upon the giving of 30 days notice to AMS. P&O will pay for the removal and/or installation costs of the Machines and Live Gaming Tables resulting from such changes.

2. AMS will pay P&O, as its due licence payment, the sum of £1.00 (excluding VAT) per certified passenger carried on all vessels operating pursuant to this Schedule 2.

3. Within seven days of the end of each calendar month (the "Relevant Month") P&O will invoice AMS based on the formula of £1.00 per certified passenger plus VAT for the passengers carried during the Relevant Month.

4. Within seven days of the end of each calendar year of this Agreement, AMS will pay to P&O 60% of any gross revenue collected pursuant to this Agreement for such calendar year in excess of £1,450,000. For the avoidance of doubt, and example of the revenue split is as follows:

Gross income generated in the calendar year - £1,600,000

60% of £150,000 to be paid to P&O

Payment to P&O of £90,000

5. AMS will be responsible for the collection, security and banking of all monies taken from the Machines and the Live Gaming Tables from the vessels operating pursuant to this Schedule 2 and will pay such monies into an account nominated by AMS.

6. AMS will install the Machines on the vessels in areas to be identified and mutually agreed, but at least in all existing areas

where machines are situated onboard each and every vessel, and additionally AMS will retain the areas existing for Live Table Gaming at the time of signing the Agreement (minimum fourteen Live Gaming Tables between the passenger vessels).

7. AMS will disclose to P&O every month the total gross revenue collected from all vessels in Sterling and in Euros."

22. Schedule 3 provides:

"SERVICES TO BE PROVIDED IN RELATION TO THE VESSELS OPERATING ON THE WESTERN CHANNEL

1. The current vessel covered by Schedule 3 is the Pride of Bilbao. P&O has the right to change or withdraw this vessel upon the giving of 30 days notice to AMS. P&O will pay for the removal and/or installation costs of the Machines and Live Gaming Tables resulting from such changes. It is agreed that even though P&O may have other vessels operating to and from Portsmouth, if P&O require services from AMS on such other vessels, such service will be covered by a separate agreement.

2. AMS will be responsible for providing the personnel (croupiers) to operate the Live Gaming Tables on board the vessel, and will also be responsible for providing and maintaining the Live Gaming Tables and all related equipment.

3. A representative from AMS together with a representative from P&O will together progressively over each week empty and count the cash from the Machines plus the cash from the Live Gaming Tables and pay them on a daily basis to the vessel's cashier against receipt.

4. P&O will advise AMS on a weekly basis of the cash taken. P&O will bank all such monies in a separate bank account, such monies to be held on trust for AMS.

5. Within seven days of the end of the calendar month (the "Relevant Month") P&O will invoice AMS with the VAT liable on 70% of the total revenues collected during the Relevant Month. For the avoidance of doubt, an example of the revenue split and VAT liability on £100,000 of income is as follows:

Income generated - £100,000 x 70% = £70,000 x 17.5 = £12,250

Total Liability (£70,000 + £12,250) = £82,250.

6. Within seven days of the end of the Relevant Month P&O will remit 30% of the monies taken during the Relevant Month and shall be entitled to retain the balance as its due licence fee.

7. Refunds payable and floats required shall be deducted from monies collected from Machines before calculating the sums payable under para 6 of this Schedule.

8. AMS will install the Machines on the Pride of Bilbao in areas to be indentified and mutually agreed, but at least all existing areas where machines are situated, and additionally AMS will retain the

areas existing for Live Table Gaming at the time of signing the Agreement (five Live Gaming Tables)."

Invoicing

23. P&O invoiced the appellant £1 plus VAT per passenger on the North Sea routes each month.

24. For the Bilbao route P&O invoiced the appellant monthly for VAT liable on 70% of total income collected during the month and remitted 30% of the income to the appellant.

Croupiers

25. In the period 1 January 2010 to July 2011 the appellant obtained the services of the croupiers through an agency based in the Philippines (Trans Orient Maritime Agencies Inc.) with whom the croupiers had a contractual relationship. From then on the casinos were operated by croupiers who were self-employed.

26. There are two croupiers on board each ship who are engaged on two month rolling contracts. The contracts are typically renewed in the case of a croupier who performs well. P&O provide cabins for the croupiers to live in. They typically stay on board the ships for the whole of their contract (apart from an occasional shopping trip).

27. Under their agreement with the appellant the croupiers are required to follow the ship's requirements such as weekly drills and safety inductions.

28. In addition to operating the casinos, the croupiers clean the gaming machines daily and also as a security measure supervise the weekly collections performed by the appellant's land-based staff. Money collected from the gaming machines and from the casinos (in excess of that required for the cash float) is banked with the Bureau de Change on board the ship. The croupiers are responsible for the security procedures in place to keep the cash float safe. The croupiers do not do any other work on board. Their hours are flexible and vary during the week (during which there are peak times and quiet times). There are no set hours just a maximum of 42 hours per week.

29. The appellant also has full audio visual CCTV throughout the casino areas.

Gaming machines

30. The various types of gaming machines sited on the ships are set out at clause 1 of the agreement (see above at [19]). There were 30-40 gaming machines on each ship. Up to four of the gaming machines are located in the casino area of the ship to create an ambience. The others were located throughout the ships.

Parties' arguments

31. The parties' arguments and the relevant law are set out in more detail below. In short, the appellant accepts it has a business establishment in the UK. It says it has fixed establishments based on the ships in question and that these fixed establishments are most directly concerned with the separate and distinct supplies to each ship in relation to a licence to site and operate gaming machines and a licence to operate casinos. The significance of this is that when the ships are outside UK territorial waters supplies are being made but these supplies are made outside the UK and outside the ambit of VAT.

32. The main issues between the parties in summary were:

(1) Whether there was a single supply of gambling provision to all the ships covered by the agreement as HMRC argue, or a separate and distinct supply in relation to gaming machines and in relation to the casino for each ship.

(2) Whether, when the VAT legislation on place of supply refers to "fixed establishment", this can apply to ships which can navigate outside and into other jurisdictions and the high seas. HMRC say that applying the term "fixed establishment" to ships infringes principles of legal certainty. The appellant disagrees.

(3) Whether, in a situation where the person receiving a supply of services has more than one "fixed establishment", the VAT legislation allows for those fixed establishments to determine the place of supply. HMRC argue the legislation only allows for the place of supply to be determined by reference to the fixed establishment if there is one fixed establishment but no more than one. The appellant disagrees.

(4) Whether, if contrary to HMRC's views the ships are capable of being fixed establishments, the necessary characteristics for fixed establishments set out in the relevant legislation and case-law of permanence, and there being sufficient human and technical resource to receive the supply are met.

Issues

Single or multiple supplies

33. Before applying the place of supply rules it is necessary to identify what supplies are in issue. It was not disputed that the legal propositions relevant to determining whether there was a single composite supply or multiple supplies were those which were set out in the European Court of Justice's decisions in *Card Protection Plan* (Case C-349/96) and *Levob* (Case C-41/04). The appellant also drew our attention to the Upper Tribunal's decision in *HMRC v The Honourable Society of Middle Temple* [2013] UKUT 0250 which discussed the relevant approach to this issue taking account of some more recent CJEU decisions (as to which see below.)

34. The case law recognises two types of single composite supply. The first is where one or more supplies constitute a principal supply and the other supply or supplies do not constitute for customers an end in themselves but a means of better

enjoying the principal services supplied (*Card Protection Plan* at [30]). This type of composite supply was not in issue. Both parties accepted that neither of the types of licences could be regarded as ancillary to the other. It was the second type of supply which was relevant (as set out in *Levob* at [22]) namely where:

> "two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split."

35. The *Middle Temple* case set out various principles of law to be derived from the CJEU case at [60]. In relation to the *Levob* strand of composite supply we think the following are of assistance:

(1) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.

(2) There is no absolute rule and all the circumstances must be considered in every transaction.

(3) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.

(4) In order for different elements to form a single economic supply which it would be artificial to split, they must from the point of view of a typical consumer be equally inseparable and indispensable.

(5) the ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements.

(6) Separate invoicing and pricing if it reflects the interests of the parties support the view that the elements are independent supplies without being decisive.

36. The appellant's primary position is that each of the licences (the licence to site and operate gaming machines, and the licence to operate casinos) is a separate and distinct provision at a distinct place (each ship). The supplies are not so closely linked that it would be artificial to split them. The appellant draws an analogy with one agreement which grants leases in respect of different properties. Even though the landlord and tenant are the same there is clearly not one supply and there could be different options to tax in relation to each property. Just because there is one agreement it does not mean there is a single supply. One document does not equal one supply. It does not matter that there are common provisions as between the different supplies as the provisions could just as easily have been put into separate documents as in a series of leases. There is certainly not a single supply of gambling provision. Separate provision has been made for separate routes. The only link between the

routes is in Schedule 1 para 7 where unavailability of the Bilbao route could affect the fee payable on the Dover-Calais route.

37. HMRC say the nature of the supply is the provision of gambling services. The payment is a cumulative amount for services provided which is detailed in the schedules to the agreement provided. There was no separate payment for either the gaming machines or the live gaming tables. Separating out the supplies into casino/ machine and per ship is artificial given the nature and closeness of kinds of supplies and services. The services are inter-linked and represent the economic substance of one supply. The licences are clearly inter-linked and not distinct and separate. The agreement is interlinked because it relates to the same kinds of services. The services represent a single aim, a single idea for provision of gambling services and there is a single payment for those services. The schedules for each service refer to similar arrangements which are all included within the licence agreement at clause 2. Lots of services are in common through the agreement. P&O agreed in clause 8 to provide accommodation for staff of the appellant to operate both the gaming machines and the live gaming tables.

Discussion

Discussion on single or multiple supplies issue

The matrix of possibilities

38. There are, it seems to us, a number of potential permutations of supply. There are potentially 3 levels (a global supply to all routes, supplies on a per route basis, and supplies on per ship basis) at which 2 types of supply (gambling services, or gaming machine and casino separately) may be provided.

39. The HMRC position of saying there is one global supply covered by the agreement for provision of gambling services for all routes and all ships is at one corner of the matrix. The appellant's position is diametrically opposite. It says there are individual supplies of gaming machine licence and individual supplies of casino licence per ship. (Although even if the supply is of machines and casino as one supply per ship the appellant still argues it succeeds in relation to its arguments on place of supply).

40. We need to consider both dimensions to the matrix. First, we consider whether there is a composite supply of gambling provision, or whether there are separate supplies of gaming machine and casino licence. We then go on to consider whether the composite or separate supplies are made globally under the agreement, per route, or per ship.

Single composite supply of gambling provision or distinct supplies of gaming machine licence and casino licence?

Single agreement and form of agreement not determinative

41. The first issue which arises is on the significance or otherwise of there being one agreement rather than multiple ones. We proceed on the basis that the fact there is one agreement cannot be determinative and does not preclude there being multiple supplies. The appellant gave an example of one agreement with common lease provisions but relating to different properties. That is of course an example and not a reason to find there are multiple supplies here. As set out above at [35(2)] there is no absolute rule and all the circumstances must be considered.

Single price not determinative

42. As set out above at [35(6)] separate invoicing and pricing support there being distinct supplies but is not determinative. That proposition does not necessarily establish that the converse is true, ie that a single price is supportive of a single supply. However what is clear is that a single price could not be determinative of there being a single supply. As pointed out by the appellant the decision of the court in *Card Protection Plan*, acknowledged at [31] that if the circumstances indicated that customers intended to purchase two distinct services it would be necessary to identify the part of the single price which related to the relevant supply (in that case the insurance supply.)

Significance of common or separate provisions?

43. By itself the fact that some provisions are common provisions tells us little as to whether there are separate supplies. It is necessary to look at the nature of those common and separate provisions.

44. The common provisions as between gaming machines and casinos include: fees (clause 3), that all income belongs to the appellant (clause 4), duration, termination, access to remove equipment and non-exercise of lien by P&O (clause 5), agreeing to agree a mutually acceptable solution where there is a reduction of income, number of vessels or route (clause 6), payment time limits and interest rate for late payment (clause 7), croupiers and other personnel (clause 8.3 and 8.4), P&O's responsibilities in relation to machine and gaming table areas, the appellant's obligations in relation to staff (clause 9), regular meetings between the appellant and P&O (clause 10.4), public liability insurance (clause 10.5), force majeure (clause 11), and nature of agreement (clause 12).

45. The provisions which are separate are: licence (clause 2) the appellant's particular responsibilities for the gaming machines and tables (clause 8.1 and 8.2), maximum times machines are allowed to be out of order (clause 8.5), and amusement machine licence duties (clause 10).

46. A number of the common provisions e.g. force majeure, and nature of agreement can be described as boiler plate. Some e.g. payment limits and interest rate

for late payment are a function of the supplier and the recipient of the supply being the same entity. There is in our view little that can be drawn for our purposes from the fact such provisions are the same for gaming machines and casino operation. If there had been a separate agreement these sorts of provisions would simply have been included twice. It cannot be the case that a choice between a more sparing drafting style and a long hand one would make the difference between how the supply is analysed.

47. In relation to the other provisions, we return to the legal propositions set out above at [35].

48. We must look at the essential features and characteristics of the transaction from the viewpoint of a typical consumer. In this case, the consumer is a business which wishes to site and operate gaming machines and live gaming tables. We agree with the appellant that supplies of gaming machine licence and casino operation licence are different in nature. This is reflected in Clause 2 which identifies two licences which are of a different nature. One is to site gaming machines, and the other is to site and operate live gaming tables. These facilities are maintained in a different way by different personnel (the only overlap being that the croupiers clean the machines and supervise collections from the machines). The live gaming tables require croupiers to function as such. The machines do not.

49. When we consider the question of whether from the viewpoint of the consumer the different elements would be equally inseparable and indispensable the answer we reach is that the gaming machine licence and the casino operation licence are not inseparable or indispensable.

50. The fact that some of the routes have gaming machines only suggests to us the appellant has some degree of freedom to choose to receive a separate supply of gaming machine licence.

51. As discussed above the fact there is one set of invoicing, and pricing is not decisive. Ultimately, looking from the viewpoint of the typical consumer (which we think will carry more weight than the factor of there being a single price) we cannot say that the gaming machine licence and casino licence are so closely linked it would be artificial to split them.

52. In relation to the each of the common provisions, none show in our view that the supplies are not independent of each other, or show a link between the two. The substance of each (apart from pricing which as discussed above is not decisive) could just as easily be written as a separate provision. The clause (8.3) which HMRC refer to makes provision for "croupiers and any other personnel" required to operate the live gaming tables having their accommodation provided for by P&O. That seems entirely consistent with there being two distinct supplies. It admits the possibility that croupiers may operate the machines but it cannot mean that staff other than the croupiers operate the live gaming tables (given clause 8.2 requires the appellant to train and employ as necessary *croupiers* to operate the live gaming tables.) A possibility that croupiers may operate the machines under the agreement is

insufficient to mean the supplies are so closely linked that it would be artificial to separate them. (In fact Ms Graham's evidence did not suggest that the machines required "operation" as such but that they were maintained by land-based maintenance staff and cleaned by the croupiers).

53. The separate supplies are reflected in the fact the agreement provides for two separate licences. But we acknowledge that is not decisive, and that if upon examining all the facts and circumstances a conclusion could in principle be reached pointing the other way even if the agreement had granted two licences.

54. Although the point was not argued before us we have considered whether the fact that up to 4 gaming machines are sited in the casino area of each ship means it would be artificial to split the supply of casino and gaming machine licence. In our view this does not make any difference to our analysis. There is nothing in the agreement which specifies the location of the machines in the casino area (the situation of the machines is by mutual agreement) and although Ms Graham explained the machines are sited there to create an "ambience", given the size and distinctive appearance of the live gaming tables from the photos we saw (which showed viewpoints of the casino area without the gaming machines in shot), the casino area nevertheless had the ambience of somewhere where live gaming would take place. The live gaming conducted by the croupiers on the tables could clearly be operated without the gaming machines being present. The gaming machines could be used without the live gaming tables being there or live gaming taking place on the tables.

55. Our conclusion is that there are separate supplies of gaming machine licence and casino licence. The next issue is whether such supplies are made for all the ships, per route, or for each individual ship.

Is there one supply under the agreement which applies to all the routes or a supply per route (i.e. per North Sea route, per the Western Channel route etc.)?

56. Are the supplies for all of the routes so closely-linked that it would be artificial to split them?

57. The agreement sets out the terms relating to each of the 4 routes in the 4 schedules to the agreement. As between the schedules some provisions such as the provisions on machine location are common but others such as the arrangements for the banking of machine monies vary. In particular the price and the method of calculation varies as between the different routes. As set out above (at 35(6)) it is a proposition of CJEU case law that separate invoicing and pricing, if it reflects the interests of the parties, supports the view that the elements are independent supplies without being decisive.

58. We also note the following provisions which are relevant and supportive of there being separate supplies per route.

59. Clause 8.5 sets out the appellant's obligation that no machine shall remain on board in an "out of order" condition for a specified number of hours subject to notification of exceptional circumstances. The specified hours vary according to route between 48 hours for the Short Sea sailings to 96 hours for the Western Channel sailings.

60. Clause 8.7 and 8.8 deal with responsibility for cash floats and refunds. Separate provision is made as between the North Sea routes and the other routes.

61. Clause 10.1 deals with amusement licence duties and differentiates between routes.

62. The only linkage between the routes is that under paragraph 7 of the Schedule 1 which deals with the Short Sea routes, in the event the Western Channel route is closed, the pricing percentages for the Short Sea route are amended upwards in the appellant's favour.

63. When we consider the question from the perspective of a typical consumer (a business seeking to site gaming machines, or to operate casinos on board ferries) we cannot say that the supplies per route are equally inseparable or indispensable to each other. We heard that during the course of the relevant period the Western Channel route stopped operating. The other routes continued nevertheless to be operated.

64. The particular issue to consider though is whether the licences per route were independent of each other. The fact that the routes could obviously operate independently of one another does not lead inevitably to the view the licences for each route were independent of each other. However when we consider whether the licences for a particular route could be supplied even if the licence for another route was not supplied, it is clear that the licences were independent of each other.

65. The fact that the pricing in relation to the licence of one of the routes was contingent on another route does not mean it would be artificial to separate the supplies per route because although the revenue generated on the Short Sea route could change, the supplies of gaming machine licence did not stop when the Western Channel route was closed. (For that matter the supplies of gaming machine and casino licence to the Western Channel route would continue even if the route was not physically operated).

66. Our conclusion is that as between a global supply to all the routes under the agreement and a supply per route, the supplies per route are not so closely linked that it would be artificial to split them.

Supply per ship?

67. As the appellant pointed out this issue does not make any difference in relation to the Portsmouth /Bilbao (Western Channel) route where there was only one ship anyway. It is relevant for the North Sea routes where there are four ships sailing.

68. In terms of the agreement, each schedule specifies the name of the particular ships (or ship in the case of the Western Channel route). For each route P&O is given the right to change the ship on giving 30 days notice. This is supportive of a "per ship supply" to the extent that if the character of the supply was only concerned with a fixed number of ships per route it would not be necessary to set out the names of the ships and a right to change the ships.

69. On the other hand there are other provisions in the agreement which point the other way. For instance the pricing does not vary per ship. Also under paragraph 7 Schedule 2, there is an obligation on the appellant to disclose gross revenue from all the vessels. These provisions are on the face of it not supportive of a "per ship supply". However, as discussed above the case law makes it clear pricing (and in our view provisions relating to pricing, which would encompass the disclosure of revenue provision) cannot be determinative. In any event it is not necessarily clear that a single price tends to suggest a single supply in the same way that separate pricing suggests separate supplies.

70. Paragraph 6 of Schedule 2 to the agreement refers to the appellant retaining a minimum of 14 live gaming tables between the passenger vessels. This does not relate to pricing and on the face of it points towards the supply of casino licence operation, at least on the North Sea route, being at the level of the route. However Ms Graham's evidence which we accepted was that each of the ships usually had 3 gaming tables. Only 4 ships are named in the Schedule. That indicates the provision was not necessarily adhered to in practice and also that in practice the gaming tables were distributed relatively evenly amongst the ships. Even if the terms of the agreement allowed tables to be distributed in any way as long as the minimum was met, this did not correspond to the economic reality of the tables being distributed evenly.

71. None of the above points upon further consideration lead us to the view that the supplies were made per route. When we pose the question whether the supplies per ship are so closely linked that it would be artificial to split them we come to the conclusion that it would not be artificial. Applying the formulation of considering whether a supply of licence for one ship is equally inseparable and indispensable to the licence to situate and operate gaming machines, or the licence to operate casinos for the other ships we cannot say that it is. Should one of the licences in respect of one ship be terminated or frustrated it is clear that the other licences could continue to be consumed on the others. It would not be artificial to regard the supplies as separate.

72. Our conclusion is that there are separate and distinct supplies of gaming licence and casino licence in respect of each ship.

73. Before tackling the remainder of the issues we need to set out the relevant law on place of supply and "fixed establishment".

Law

Domestic Statutory Provisions

74. Section 4(1) Value Added Tax Act 1994 ("VATA") provides:

> "VAT shall be charged on any supply of... services made in the United Kingdom..."

75. Section 5(2) VATA provides:

> "Subject to any provision made by [Schedule 4] and to Treasury orders…(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for consideration; (b) anything which is not a supply of goods but is done for consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services."

76. Section 7A VATA provides:

> Ss(2) "A supply of services is to be treated as made –
>
> (a) in a case in which the person to whom the services are supplied is a relevant business person in the country, in which the recipient belongs..."

77. Section 9 VATA provides:

> Ss(2) "A person who is a relevant business person is to be treated as belonging in the relevant country."
>
> Ss(3) "In subsection (2) "the relevant country" means –
>
> (a) if the person has a business establishment, or some other fixed establishment, in a country (and none in any other country), that country,
>
> (b) if the person has a business establishment, or some other fixed establishment or establishments, in more than one country, the country in which the relevant establishment is, and,
>
> (c) otherwise, the country in which the person's usual place of residence is."

78. Subsection (4) defines "relevant establishment" as follows:

> "In subsection 3(b) "relevant establishment" means whichever of the person's business establishment, or other fixed establishments, is most directly concerned with the supply."

Relevant EU Law

79. Directive 2006/112/EC as amended by Directive 2008/8/EC ("the Directive") provides:

Art 2.1. "The following transactions shall be subject to VAT:

...

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such."

80. Article 44 provides:

"The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located..."

81. Recitals (17) and (18) to the Directive provide:

"(17) Determination of the place where taxable transactions are carried out may engender conflicts concerning jurisdiction as between Member States, in particular as regards the supply of goods for assembly or the supply of services. Although the place where a supply of services is carried out should in principle be fixed as the place where the supplier has established his place of business, it should be defined as being in the Member State of the customer, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods.

(18) It is necessary to clarify the definition of the place of taxation of certain transactions carried out on board ships, aircraft or trains in the course of passenger transport within the Community."

82. HMRC's arguments referred to Article 59a of the Directive (which takes effect from 1 January 2015):

"Prevention of double taxation or non-taxation

Article 59a

In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Articles 44, 45, 56 and 59:

(a) consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community if the effective use and enjoyment of the services takes place outside the Community;

(b) consider the place of supply of any or all of those services, if situated outside the Community, as being situated within their territory if the effective use and enjoyment of the services takes place within their territory.

However, this provision shall not apply to the electronically supplied services where those services are rendered to non-taxable persons not established within the Community."

83. Rules implementing the Directive are set out in Implementing Regulation 282/2011 ("the Regulation").

84. The relevant recitals to the Regulation provide as follows:

> "(4) The objective of this Regulation is to ensure uniform application of the current VAT system by laying down rules implementing Directive 2006/112/EC, in particular in respect of taxable persons, the supply of goods and services, and the place of taxable transactions. In accordance with the principle of proportionality as set out in Article 5(4) of the Treaty on European Union, this Regulation does not go beyond what is necessary in order to achieve this objective. Since it is binding and directly applicable in all Member States, uniformity of application will be best ensured by a Regulation.
>
> (5) These implementing provisions contain specific rules in response to selective questions of application and are designed to bring uniform treatment throughout the Union to those specific circumstances only. They are therefore not conclusive for other cases and, in view of their formulation, are to be applied restrictively.
>
> …
>
> (14) To ensure the uniform application of rules relating to the place of taxable transactions, concepts such as the place where a taxable person has established his business, fixed establishment, permanent address and the place where a person usually resides should be clarified. While taking into account the case law of the Court of Justice, the use of criteria which are as clear and objective as possible should facilitate the practical application of these concepts.
>
> …
>
> (21) Without prejudice to the general rule on the place of supply of services to a taxable person, where services are supplied to a customer established in more than one place, there should be rules to help the supplier determine the customer's fixed establishment to which the service is provided, taking account of the circumstances. If the supplier of the services is not able to determine that place, there should be rules to clarify the supplier's obligations. Those rules should not interfere with or change the customer's obligations."

85. Article 10 of the Regulation defines the place where the business is established:

> "1. For the application of Articles 44 and 45 of Directive 2006/112/EC, the place where the business of a taxable person is established shall be the place where the functions of the business's central administration are carried out.
>
> 2. In order to determine the place referred to in paragraph 1, account shall be taken of the place where essential decisions concerning the general management of the business are taken, the place where the registered office of the business is located and the place where management meets.

Where these criteria do not allow the place of establishment of a business to be determined with certainty, the place where essential decisions concerning the general management of the business are taken shall take precedence.

3. The mere presence of a postal address may not be taken to be the place of establishment of a business of a taxable person."

86. Article 11 defines "fixed establishment":

"1. For the application of Article 44 of Directive 2006/112/EC, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs."

87. Article 20 deals with the situation where the taxable person to whom the services are supplied is established in a single country or where the person has no place of establishment or fixed establishment.

"Where a supply of services carried out for a taxable person, or a non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of Directive 2006/112/EC, and where that taxable person is established in a single country, or, in the absence of a place of establishment of a business or a fixed establishment, has his permanent address and usually resides in a single country, that supply of services shall be taxable in that country.

The supplier shall establish that place based on information from the customer, and verify that information by normal commercial security measures such as those relating to identity or payment checks.

The information may include the VAT identification number attributed by the Member State where the customer is established."

88. Article 21 deals with the situation where the taxable person to whom the supply of services is made is established in more than one country.

"Where a supply of services to a taxable person, or a non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of Directive 2006/112/EC, and the taxable person is established in more than one country, that supply shall be taxable in the country where that taxable person has established his business.

However, where the service is provided to a fixed establishment of the taxable person located in a place other than that where the customer has established his business, that supply shall be taxable at the place of the fixed establishment receiving that service and using it for its own needs.

Where the taxable person does not have a place of establishment of a business or a fixed establishment, the supply shall be taxable at his permanent address or usual residence."

89. According to Article 65 of the Regulation the Regulation shall apply from 1 July 2011.

90. Before considering whether the ships upon which the appellant's machines and casinos are sited are "fixed establishments" and whether any such establishment receives the relevant service and uses it for its own needs it is necessary to deal with some preliminary points of legal interpretation which are in dispute between the parties.

Is it relevant to consider whether the appellant has a "fixed establishment" on a ship on the high seas given the reference to "country" in the legislation?

91. A prior question that arises before considering whether a ship can be a fixed establishment is whether the fixed establishment provisions in the UK's VAT legislation are even relevant given that they only apply where there is an establishment in more than one "country". It is not suggested the appellant has an establishment in the ferry destination countries of Belgium, Netherlands or Spain. Can the reference to "country" be read as including a reference to the high seas?

92. The appellant says the UK legislation must be read consistently with the Directive which refers to "place". The reference to "country" in the UK legislation should therefore be read as a reference to "place". (The implication is that if a ship is a fixed establishment then when it is on the high seas the appellant has establishments in more than one place such that s 9(3)(b) VATA is applicable.) Article 44 in any case has direct effect.

93. HMRC submit that where s9 VATA refers to "country" that is the country in which the supply takes place.

Discussion

94. It is uncontroversial that the UK legislation must be read consistently with the European Directive it implements. However at least for the period 1 July 2011 onwards the position is perhaps not so straightforward as Articles 20 and 21 of the Regulation which elaborates on Article 44 of the Directive apply different rules according to whether a person is established in a "single country" or "more than one country".

95. The underlying issue is whether the purpose of the provisions is directed purely towards resolving conflicts of whether a supply is taxable as between the jurisdictions of two different countries, or whether there is the possibility within the place of supply rules for not just selecting between the jurisdiction of one country and another but the alternatives of one jurisdiction and territory where no country has exercised jurisdiction.

96. The references in recitals (17) and (18) to the Directive refer to resolving conflicts between Member States but do not say anything as to the situation where the choice is between a Member State and a place which is not that Member State but also

not another Member State. It is however instructive in our view to note the provisions of Article 57 which provides special rules in relation to the supply of restaurant and catering services for consumption on board ships, aircraft or trains. This provides as follows:

> "Article 57
>
> 1. The place of supply of restaurant and catering services which are physically carried out on board ships, aircraft or trains during the section of a passenger transport operation effected within the Community, shall be at the point of departure of the passenger transport operation.
>
> 2. For the purposes of paragraph 1, "section of a passenger transport operation effected within the Community" shall mean the section of the operation effected, without a stopover outside the Community, between the point of departure and the point of arrival of the passenger transport operation.
>
> "Point of departure of a passenger transport operation" shall mean the first scheduled point of passenger embarkation within the Community, where applicable after a stopover outside the Community.
>
> "Point of arrival of a passenger transport operation" shall mean the last scheduled point of disembarkation within the Community of passengers who embarked in the Community, where applicable before a stop-over outside the Community.
>
> In the case of a return trip, the return leg shall be regarded as a separate transport operation."

97. Article 57 envisages that transport within the Community may involve crossing into international waters unless there is a stopover. A special rule (place of supply is deemed to be point of departure) is provided for even though the ship may have crossed into international waters. The implication is that but for that special rule the place of supply could be in international waters.

98. While recitals (17) and (18) do not mention the situation of an establishment in international waters, they do not preclude the possibility of a place of supply being in something other than a country and Article 57 as discussed above is consistent with the scenario that a place of supply could be somewhere other than in a country.

99. Taking account of the reference in Article 44 to "place" rather than "country", our conclusion is that the UK legislative references to not having an establishment in any other country (s9(3)(a)), and having an establishment "in more than one country" (s9(3)(b)) may be read as including respectively not having an establishment in a place in international waters, and having an establishment in one place and the other in international waters.

100. Although we did not receive detailed submissions on the point the appellant's argument that Article 44 would in any case have direct effect appears to us to be valid in that the article meets the requirement of being unconditional and sufficiently precise for it to have that effect.

Are ships, being movable objects, capable of being a fixed establishment?

101. HMRC say "fixed" is defined in the OED as "fastened securely in position" or "predetermined and not able to be changed". They refer to Advocate General opinion in the *Berkholz* case (discussed in more detail below) which refers to the term "fixed" meaning "lasting or continuous". The ships lack the necessary degree of permanency. The vessels on which the services are taking place are moving continuously. They are not moored and therefore it is not possible to identify when the supplies of services take place within UK waters and when they take place outside UK waters. The general rule being that the place of supply is where the customer is located then the supplier of a service must be able to determine the place where the customer belongs. Only by knowing the exact location of all of the customer's ships at the time of supply would a supplier know whether it was proper to charge VAT on all or part of the service he provides to the recipient. Not knowing where the customer is violates the principle of legal certainty.

102. Against this the appellant argues that it can be said with certainty where the ship is when the casino is open. It is just a question of apportionment. If there is uncertainty then it exists. There is nothing unusual in difficulties arising in the application of legal provisions – hence HMRC have issued pragmatic guidance to deal with the uncertainty (HMRC's manual VATPOSTR 2300 refers to supplies on board "foreign-going" vessels being treated as made within the UK even when the vessel is within UK territorial waters.)

103. In *Berkholz* the ECJ considered a reference in relation to gaming machines on board a ferry. HMRC say the decision is obiter on the question of whether ships may be fixed establishments, the appellant disagrees. The parties also disagree as to the significance of the ECJ's decision in the subsequent case of *Faaborg* which also concerned supplies on board a ferry.

Gunter Berkholz (Case C-168/84)

104. The reference concerned proceedings relating to a German undertaking (abe-Werbung) whose registered office was in Hamburg and which operated gaming machines on two ferryboats owned by the Federal German Railways (Deutsche Bundesbahn) plying between Germany and Denmark and sailing on the high seas in between. At [2] it was noted that:

> "Those machines are maintained, repaired and replaced at regular intervals by employees of abe-Werbung, who settle accounts with the Deutsche Bundesbahn *in situ*. Although those employees spend a proportion of their working hours in carrying out those operations, the applicant does not maintain a permanent staff on the ferryboats."

105. The question referred was:

> "Must Article 9 (1) of the Sixth Council Directive, of 17 May 1977, on the harmonization of the laws of the Member States relating to turnover taxes (77/388/EEC) be interpreted as meaning that the term 'fixed establishment' also covers facilities for conducting a business

(such as, for example, the operation of gaming machines) on board a ship sailing on the high seas outside the national territory? If so, what are the relevant criteria for the existence of a 'fixed establishment'?"

106. At [18] the ECJ stated:

"It appears from the context of the concepts employed in Article 9 and from its aim, as stated above, that services cannot be deemed to be supplied at an establishment other than the place where the supplier has established his business unless that establishment is of a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present. It does not appear that the installation on board a sea-going ship of gaming machines, which are maintained intermittently, is capable of constituting such an establishment, especially if tax may appropriately be charged at the place where the operator of the machines has his permanent business establishment."

107. The ECJ answered the question accordingly as follows at [19]:

"Article 9 (1) of the Sixth Council Directive of 17 May 1977 must be interpreted as meaning that an installation for carrying on a commercial activity, such as the operation of gaming machines, on board a ship sailing on the high seas outside the national territory may be regarded as a fixed establishment within the meaning of that provision only if the establishment entails the permanent presence of both the human and technical resources necessary for the provision of those services and it is not appropriate to deem those services to have been provided at the place where the supplier has established his business."

Faaborg-Gelting (Case C-231/94)

108. *Faaborg* concerned a ferry operator with a registered office in Denmark which operated a ferry. Again the route was between Denmark and Germany. The Danish operator supplied food and drink to be consumed on the spot on the ferry. The ECJ found this to be a supply of restaurant services.

109. At [16] referring to *Berkholz* the ECJ stated:

"the court has consistently held…that according to art 9(1), the place where the supplier has established his business is a primary point of reference inasmuch as regard is to be had to another establishment from which the services are supplied only if the reference to the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another member state."

110. At [17] and [18] it went on to say that :

"…services cannot be deemed to be supplied at an establishment other than the place where the supplier has established his business unless

> that establishment is of a certain minimum size and both the human and technical resources necessary for the provision of the particular services are permanently present.
>
> This does not seem to apply to a place supplying restaurant services on a ship, especially where, as in this case the permanent establishment of the operator affords an appropriate point of reference for the purposes of taxation."

111. It should be noted that the legislation under consideration in both *Berkholz* and *Faaborg* (Article 9 of Directive 77/388/EC) was different to Article 44 of the Directive in two respects. First, the relevant legislation in those cases determined place of supply by reference to the person making the supply rather than the person receiving the supply. Second, in contrast to article 44, which mandates the place of supply as the place of the fixed establishment if certain criteria are fulfilled, Article 9 of Directive 77/388/EC on its face left open a choice between the place of establishment and the fixed establishment (it provided "the place a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied…"). The court's decisions explain however that recourse is only made to the fixed establishment "if the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another member state."

112. The reason HMRC say *Berkholz* and *Faaborg* are obiter on the issue of whether ships may be fixed establishments is that in both cases the location of each firm's business establishment did not give rise to an irrational result for tax purposes. There was therefore no need for the court to consider the question of whether there was a fixed establishment on the relevant ships.

113. The appellant on the other hand says the proposition that it is possible for ships to be regarded as fixed establishments was part of the basis of the decision and refers in particular to [19] of the decision in *Berkholz* and [15] to [18] of *Faaborg*. If the court had thought it was not possible for ships to be fixed establishments they could have stated this and both decisions could have been much shorter and simpler.

Discussion

114. It is difficult, as the appellant points out, to see how HMRC's position on *Berkholz* can be reconciled with what the ECJ states at [19]. The ECJ was answering the question that had been put to it which asked whether the term "fixed establishment" could cover a ship sailing on the high seas, and if so what were the relevant criteria. The activity of gaming machines was given as an example. Their proposition of legal interpretation clearly relates to a ship sailing on the high seas. The court clearly thought it was possible for a ship sailing on the high seas to be a fixed establishment and went on to give the criteria for fixed establishments.

115. In addition at [17] the court pointed out it was for the tax authorities in each Member State to determine from the range of options in the directive which point of reference was most appropriate. This assumes that there was more than one option to

choose from. If moving objects such as ships were incapable of being a fixed establishment it would not have featured as one of the options to choose from.

116. HMRC's reference to fixed being equivalent to "lasting" or "continuous" in the Advocate General's opinion in *Berkholz* does not assist their argument that ships cannot as a matter of principle be fixed establishments. In our view, to the extent the court incorporated the notion of "lasting" or "continuous" in its decision, it did this by reference to the concept of "permanent presence". In any case the reference to "lasting" and "continuous" would we think refer to the establishment. In principle there would be no reason why an establishment could not be lasting and continuous even though it was on a ship.

117. We have considered whether because, as pointed out above, the legislation in *Berkholz* involved the tax authority being able to make a choice as between the business establishment and a fixed establishment the position would be different where the legislation, as is the case here, *requires* the fixed establishment to be treated as a place of supply. In other words is it the case that any endorsement that ships may be fixed establishments in *Berkholz* (decided under Article 9 of Directive 77/388/EC) would not be valid under the new legislation under Article 44? There is, in our view, nothing in the decision in *Berkholz* which indicates that acceptance that a ship could in principle be a fixed establishment is linked or dependent on there being an ability to fall back to the place of the business establishment. Equally the fact Article 9 looked at the place of the person making the supply whereas Article 44 looks to the person receiving the supply does not affect any endorsement in *Berkholz* of the possibility that ships may be fixed establishments.

118. Aside from HMRC's arguments on the significance of *Berkholz* and *Faaborg* we are also not persuaded that sanctioning the proposition that ships could be fixed establishment infringes principles of legal certainty as HMRC suggest. In the circumstances of this case P&O will know the location of its ships. In any case, even if the apportionment as between different places of supply were not necessarily straightforward this would not mean it could be assumed that a result which gives rise to the need for apportionment cannot be one which is intended by the legislation. (See for instance the CJEU's decision in *CPP* where it was acknowledged there may have to be an apportionment of a single price where there were multiple supplies.) Further, recital (21) of the Implementing Regulation indicates the legislative framework envisages that there may be a situation where the supplier is unable to determine the place and there should therefore be rules. Any difficulty there is relates to how the provision is applied on the facts rather than uncertainty as to how the legislation is to be interpreted. The uncertainty HMRC point to is not a bar to concluding that as a matter of principle ships may be fixed establishments.

119. It is fair to say the Advocate-General in *Faaborg* had reservations around certainty. But, in our view his reservation was more to do with the uncertainty of apportionment, rather than an objection to ships being fixed establishments per se, and he mentions an alternative test if a ship was a fixed establishment of looking to see which state the fixed establishment had close links with (which assumes that ships could be fixed establishments).

120. In terms of the decision of the Court we cannot see that *Faaborg* suggests that ships cannot in principle be fixed establishments. The court's conclusion at [18] appears to link the two factors of the business establishment affording an appropriate point of reference (the "rational result" test) and the criteria for a fixed establishment. It is not possible to disentangle those two elements to say that *Faaborg* establishes ships cannot be fixed establishments.

121. We ought to note that at [46] in the Advocate General's opinion in *RAL* (referred to below) which concerned an amusement arcade on land the Advocate General contrasted the stability of the supply of gaming services in the amusement arcades with the situation in *Berkholz* noting the importance of those fixed establishments not being "on board sea-going vessels moving from one country to another…". It is clear however from the remainder of what he said that this was a circumstance which would justify the selection of the place of business as determining the place of supply. In contrast to the legislation before us, selecting the place of business was possible and the Advocate General's views spoke to the "rational result" test which is no longer relevant under the legislation relevant to this appeal. To the extent the opinion is of any persuasive assistance, the opinion is actually supportive of the appellant's position because it is implicit that sea-going vessels moving from one country to another could be capable of being fixed establishments.

122. We conclude there is no bar in principle to a ship, being a moving object which can navigate across the high seas from one jurisdiction to another being a fixed establishment (provided the necessary criteria for being a fixed establishment are satisfied).

123. In terms of the relevant period covered by this appeal the above conclusion applies both in relation to the period when the Regulation was not applicable (1 January 2010 to 30 June 2011) and the period when it was (1 July 2011 to 31 December 2012).

HMRC argument that recourse can only be made to the place of the fixed establishment where there is only one fixed establishment

124. HMRC say that the application of the reference to the fixed establishment in Article 21 of the Regulation is only appropriate where the supply is for the needs of one, and only one, fixed establishment. Their argument relies on the fact that in the Regulation the words refer to "…the service is provided to **a** fixed establishment of the taxable person…" (emphasis added). Where a service is used at more than one place then reference must be to the business establishment. Unlike other provisions such as the use and enjoyment measures in Article 59a of the Directive where it is clearly envisaged that a supply can be apportioned in terms of where the services are effectively used and enjoyed, Article 21 does not suggest that this is appropriate as between establishments.

125. HMRC clarified that they were not saying there could not be more than one fixed establishment with supplies made to those other establishments. There could be

multiple fixed establishments but if that was the case then the place of supply was always to be regarded as the business establishment of the supplier.

Discussion

126. Given the conclusion we have reached above that there is a single supply per ship it is not necessary to determine this point because in respect of each supply the appellant is arguing that there is only one potential fixed establishment in issue namely each of the ships.

127. However if we were wrong in that conclusion and there were for instance a single supply of gambling provision, or a single supply of gaming machine or casino supply per route (so that the issue of there being more than one potential fixed establishment of each ship then arose in relation to the North Sea route) we do not see that HMRC's interpretation can be correct.

128. It is perfectly possible to read the Regulation in our view so that it applies to multiple fixed establishments in different Member States. It is clear from the reference to "more than one country" in the Regulation that there could be more than two countries to which the place of supply is attributed. The situation where a consumer has a number of different establishments in different Member States each consuming the same supply for its own needs could clearly arise.

129. The article in the Regulation HMRC refer to assumes that there is a fixed establishment using the service for its own needs and says that in that case the place of supply is at that fixed establishment. It refers to "a" fixed establishment because it has already identified a particular fixed establishment (the one that is consuming services for its own needs). If there are other fixed establishments using the services for their own needs the place of supply will be at each of those other fixed establishments.

130. As to HMRC's argument on Article 59a we do not agree that because there is no apportionment provision there cannot therefore be more than one place of supply determined by multiple fixed establishments. Article 59a is not part of the scheme of the legislation until 1 January 2015 and that article is in any case a provision which deals with the situation where the deemed effect of the place of supply rules falls out of kilter with where the services are effectively used and enjoyed as between places inside and outside of the Community. Article 21 already assumes that the establishment is "using" the services in order for it to count as a "fixed establishment". If a supply is made to multiple fixed establishments there would not be any insuperable difficulty in apportioning according to use of the services. The appellant referred us to an acknowledgement by the Advocate General at [21] in *Faaborg* to the effect that apportionment is not always easy. But, the difficulty or otherwise of carrying out an apportionment in practice would depend on the particular factual circumstances.

131. In any case as the appellant points out HMRC's position leads to absurdity. Take the example of two competing businesses receiving the same type of supply of

services at their fixed establishment(s). Both have a place of business in one place but the first has one fixed establishment, the other has two fixed establishments. The place of supply would be different as between the two businesses for no apparent reason. It would be the place of the fixed establishment in the first case but the place of the business establishment in the second. The appellant says VAT ought to operate neutrally in relation to businesses which operate in the same manner. It cannot matter that one business has one ship and the other has two (assuming each ship is a fixed establishment.)

132. We would also note that HMRC's position leads to a distinction being drawn between the period between 1 January 2010 and 1 July 2011 and periods after 1 July 2011 (when the Regulation which HMRC rely on for their interpretation came into force) with no apparent rationale. For these reasons, if we had to decide this matter, we could not agree that HMRC's interpretation of the Regulation was correct. In so far as they rely on the use of the singular in the domestic legislation (s9(3)(b) VATA) we do not consider this could be correct for the further reason that account would need to be taken of s6(c) of the Interpretation Act 1978 (words in the singular include the plural and vice versa) by virtue of which the reference to "country" could be read as "countries", and "is" is changed to "are".

Did the appellant's presence on board the ships amount to enough of a presence of human and technical resources to amount to a fixed establishment?

133. As noted above Article 11 of the Regulation provides a definition of what is meant by the reference to "fixed establishment" in Article 44 of the Directive. The Regulation became applicable only part way through the period in issue. However both parties agreed that in the period prior to the application of the Regulation, the test as set out in the Regulation reflected the definition of "fixed establishment" that would apply as result of the *Berkholz* decision. We note that recital (14) to the Regulation which mentions amongst other concepts, the concept of "fixed establishment" also mentions taking into account "the case law of the Court of Justice." We agree with the parties that there is no significant difference between the definition of "fixed establishment" in the period 1 January 2010 to the application date of the Regulation and the period after that date.

134. The appellant describes the questions to be answered in relation to the establishment as follows following on from *Berkholz* and the Regulation:

(1) Certain minimum size?

(2) Degree of permanence?

(3) Suitable structure of human and technical resources to enable it to receive and use services supplied to it?

135. The appellant says these criteria are satisfied for each of the ships sailing out of Hull and the ship sailing out of Portsmouth for the following reasons:

(1) Casinos are located on fixed locations on board the ships

(2) Access is controlled by the croupiers

(3) Signs indicate the appellant runs the business

(4) There are two croupiers on board at any one time who run the casinos

(5) The croupiers work for the appellant

(6) The croupiers have responsibilities regarding the gaming machines to clean and to supervise the cash collection

(7) There are a significant number of gaming machines on each ship – 35 to 40

136. In addition to the requirement set out above it should be noted that Article 11 of the Regulation requires that the "suitable structure in terms of human and technical resources" is "to enable [the establishment] to receive and use the services supplied to it for its own needs." The services are those referred to in Article 44 of the Directive in respect of which the place of supply is to be determined. We consider therefore that it is necessary to examine the issue of fixed establishment in relation to each supply.

Significance of presence of croupier and the fact they were not employed by appellant

137. HMRC say this case suffers from the same flaw as disclosed by the facts of *Berkholz*. The casino tables operate through independent contractors (the croupiers) who are engaged on short term appointments. They work on 2 month self employed contracts which may or may not be renewed. They are not employees. The croupier agreement states the appellant can change the ship the croupier is allocated to without notice. The croupiers change. It is questionable whether the croupiers are the appellant's resources at all.

138. The appellant argues that none of the above are relevant. Staff are permanently on board the ships even if their identity may change from time to time. The staff work on behalf of the appellant in providing services to the passengers. These staff are human resources of the appellant. There is no requirement that they must be employees. The capacity of the persons is irrelevant as long as they are acting on behalf of the trader. Vis à vis third parties the capacity of persons is also irrelevant and not dependent on the person's employment/ non-employment status.

139. In support, the appellant referred to the ECJ's decision in *Customs and Excise Commissioners v DFDS A/S* (Case C-260-/95). The decision concerned a fixed establishment in the UK in the form of a UK subsidiary which acted as the agent of a Danish company. There were employees of the UK subsidiary but they were not employees of the Danish company. The focus of enquiry was the independence of the agents but the appellant says the case is not consistent with a requirement that human resources must be employees of the company in question.

140. The appellant also referred us to the Advocate-General's opinion ([40] to [41]) in *RAL (Channel Islands) and others v Customs and Excise Commissioners* (Case C-452/03) in support of the proposition that it is a mistake to elevate the fixed establishment test to too high a level. It is a minimum requirements test. As pointed

out by the Advocate General at [53] of his opinion requiring the persons present to be employees would lead to absurd results. The example was given of security staff in charge of opening and closing premises. They deserved to be considered as human resources which would confer a fixed character on the establishment. It would be unacceptable that the establishment was no longer fixed if the security activities had been outsourced to an independent security company.

141. By virtue of the casino, croupiers, equipment and gaming machines the appellant argues it had a fixed establishment on each of the ships.

142. HMRC say *DFDS* can be distinguished on the basis that the decision concerned the issue of whether the UK company was auxiliary to a Danish company. In *RAL* the outsourced ancillary services were of a more permanent nature than a 2 month contract. The croupiers here are not outsourced or supplied to the company they are separate independent contractors.

Discussion – does it matter the croupiers are not employees?

143. In *DFDS* the UK subsidiary referred to above was a sales agent of a Danish tour operator and the UK subsidiary marketed tours in the UK on behalf of the Danish supplier. The issue was whether the Danish parent had a fixed establishment in the UK.

144. The ECJ considered that it was first necessary to determine whether the UK subsidiary was independent from the Danish company. The court found it was not; the UK subsidiary acted merely as "an auxiliary organ of its parent". The court considered whether the UK establishment was of the requisite minimum size in terms of necessary human and technical resources, and having regard to the facts, in particular to the number of employees (which was stated elsewhere to be 100) that the establishment was a fixed establishment.

145. In the *RAL* case the issue was whether a Guernsey company had fixed establishments in the UK in relation to supplies of slot machine gaming services. The machines were installed in amusement arcades with regular opening hours "like any other business establishment" and there were staff permanently attending to customers and looking after premises and machines (Advocate-General's opinion at [45]). As pointed out by the appellant, the Advocate-General's opinion makes some observations which are helpful to the appellant's case in so far as it suggests that it is not necessary that the human resource for a fixed establishment is restricted to employees. In the event the court did not need to consider the point as it reached its decision on the basis that the supply of gaming services was "entertainment or similar activities" so under the particular rules of the relevant legislation (Article 9(2)(c)) the place of supply was the place where those services were physically carried out.

146. We disagree with HMRC's argument that the croupiers must be employees in order to be considered as human resources of the appellant for the purposes of determining whether a place meets the criteria for being a fixed establishment.

147. HMRC have not provided any authority for the proposition that human resource for the purpose of the fixed establishment test has to be in the form of employees. Neither the terms of the Regulation nor the terms of the court's judgment in *Berkholz* support such a restrictive interpretation of the reference to human resources of the appellant. The Advocate General opinion in *RAL* supports a broader approach being taken to the interpretation of "human resource" (even though the court did not end up having to go into the issue.)

148. As the appellant points out, on its facts the decision in *DFDS* does find there to be a fixed establishment even though the employees in that case were employees of the UK subsidiary and not the Danish parent. Admittedly this has to be seen in the circumstance where the UK subsidiary was found to be an auxiliary organ of the Danish parent. Nevertheless to the extent the court noted (at [26]) that the fact the UK subsidiary, which had separate legal personality, owned the premises in the UK was not sufficient to establish that the UK subsidiary was independent from the Danish company, we think the decision is supportive of not using legal status as a determining factor in terms of understanding who the human resources belong to.

149. The croupiers cannot be ignored as human resources of the appellant just because they are not employees.

150. As noted above at [26] in the period 1 January 2010 to July 2011 the appellant obtained the services of the croupiers through an agency based in the Philippines (Trans Orient Maritime Agencies Inc.) The parties did not make any submissions on the relevance of this. In our view whether the services of the croupiers were obtained through an agency or whether the croupiers were independent contractors makes no difference to whether it was possible for the presence of the croupiers to count as human resources of the appellant.

Application of definition of fixed establishment to facts

151. As discussed above at [136] we need to consider the fixed establishment criteria in respect of each supply. For each supply we need to consider whether there is a sufficient degree of 1) minimum presence 2) permanence 3) human technical resource to enable the establishment to receive and use the service.

152. As between the different supplies to each ship on the North Sea and Western Channel route of the licence to operate casinos, we do not consider, and it was not suggested to us, that there were any material differences between the factual circumstances surrounding the supplies of such licences as between the ships. Similarly the facts surrounding the supplies of licence to site and operate gaming machines were not materially different as between the various ships. On that basis while we will consider the supplies of the licence to operate casinos separately from the supply of licence to site and operate gaming machines our conclusions in respect of each type of supply will apply to each of the ships.

Licence to operate casino

153. In terms of there being a minimum presence, we are satisfied that the presence of the appellant's equipment in a designated area of each ship and the presence of the croupiers working on behalf of the appellant fulfil this requirement both geographically and temporally. From the photographs we saw and the evidence of Ms Graham it is clear to us that the casino areas are large enough to allow the location of card and roulette tables together with seating for multiple players and the croupier and space in between. On the Hull routes the casinos are open for 6 and half hours on each voyage from early evening when the ship departs until 1am. For the Portsmouth Bilbao route, the casino is open from 9pm to 1am, 2-5pm the following day and then 7pm to 1am.

154. We are also satisfied there is the requisite degree of permanence. The appellant's equipment and signage remain in place on the ship throughout each voyage and when the ship is in port. The croupiers working on behalf of the appellant are there for the duration of the opening of the casino.

155. We also consider that there is a sufficient degree of human and technical resource to enable the establishment to receive and use the service. The service supplied is a licence to operate live gaming tables. This requires croupiers in order to allow for the gaming to be live and gaming tables, both of which are present. We accepted Ms Graham's evidence that the croupiers' had two month "rolling contracts" and that the contracts were typically renewed where the croupier performed well. However to the extent the croupier's contracts can be described as short-term we do not agree this has the significance HMRC seeks place on it. As the appellant points out the identity of the staff is not relevant; their presence is. In the *DFDS* decision it was noted there were 100 employees at the establishment, but no enquiry was made into how long any particular employee was there. There is no indication that a different conclusion would have been reached if it were the case that there were a high turnover of those 100 employees.

156. There is however a need to be clear about what the establishment is that we find to be a fixed establishment. In our view it is not the ship which is the fixed establishment of the appellant but the designated casino area on board the ship. That is where the technical and human resources which enable the casino operation licence to be received and used are to be found. The fact that the casino area is on board the ship, or that the croupiers are accommodated elsewhere in the ship when off duty, does not in our view mean the ship can be regarded as the fixed establishment of the appellant.

Licence to site and operate gaming machines

157. In our view the presence of 35-40 gaming machines on each ship is capable of amounting to a minimum presence and one which provides a sufficient degree of permanence given the machines remain in place on board the ships.

158. The issue of whether there is a suitable structure in terms of human and technical resources, and in particular the human resources to enable the establishment

to receive and use the supply of licence to site gaming machines is less clear cut. There is also the issue to consider of what "the establishment" is in relation to this supply.

159. The question of whether this is sufficient degree of "human or technical resources" to enable the putative location to receive and use the service supplied to it must in our view take account of what the service is. The supply is of a licence to site and operate gaming machines. The human and technical resource in respect of the situation and operation of gaming machines will be different from that required for a live gaming table operating licence to be received and used.

160. Nevertheless it seems from *Berkholz* that even in respect of gaming machines some degree of human resource is required. The facts there similarly concerned gaming machines and while there were humans servicing them there were no permanent staff on board the ship.

161. The issue is whether the appellant's staff on board the ship do is of a sufficient degree to enable the services to be received and used. The situation aspect of the licence requires no human resource beyond putting the machines into place to use the licence. In order for the machines to be operated human resource is required to empty and maintain them.

162. The evidence from Ms Graham was that gaming machine collections were performed by the land-based staff and supervised by the croupiers. In addition the croupiers were responsible for cleaning the machines. The land-based staff carrying out maintenance and collection. It seems that without their input the "structure" (to adopt the term used by Article 11 of the Regulation) to enable the service to be received and used would be incomplete. We note however that as highlighted by appellant the Advocate General in *RAL* at [41] cautions against looking at the necessary level of human and technical resources in this way. Referring to *Berkholz* he observed:

> "The Court of Justice did not make the permanent presence of *all* possible human and technical resources, *possessed by the supplier himself*, in a certain place a precondition for concluding that the supplier has a fixed establishment there. That amounts, in my view, to the adoption of a *minimum requirements test* for characterising a given set of circumstances as constituting a "fixed establishment" within the meaning of Article 9(1)…".

163. Even taking account of the Advocate-General's view there must be a minimal level of human resource at the place whose "fixed establishment" status is in issue, we are not persuaded that the presence of persons working on behalf of the appellant in the casino area who also clean the machines daily and who supervise other staff who perform collections from the machine does amount to a sufficient degree of human resource to enable the appellant to receive and use the service.

164. It does not seem to us that receipt and use of the gaming machine licence would be impaired in any significant way if the machines were not cleaned daily by the

croupiers or if the collections were not supervised by the croupiers. There are a number of ferry routes where the appellant sites and operates identical types of gaming machine on board ferries without any indication that the machines need to be cleaned while on board and in relation to which collections are not supervised. Although this is not determinative we also note there is no mention in either the croupier's agreement or agreement between P&O and the appellant which refers to the croupier's cleaning and supervision duties. The fact that persons working on behalf of the appellant are accommodated in the same location as the machines is not sufficient either. It seems to us that the croupiers do what they do because they are already on the ship and it is convenient for them to do these tasks. They are not doing them "to enable receipt and use of the licence".

165. As to the question of what is the "establishment", Ms Graham's evidence was that up to four of the machines are located within the casino area but that the majority were located throughout the ships. This is different from the "amusement arcade" described in *RAL* which was a location with "regular opening hours, like any other business establishment, and there are staff permanently attending to customers and looking after the premises and machines" (see *RAL* at [45]).

166. The appellant makes it clear that they do not seek to argue that the ships where there are only gaming machines amount to a fixed establishment. Their argument is that it is the combination of gaming machines and casino area together with croupiers aboard the ship which means the ship is a fixed establishment of the appellant.

167. But, even if the presence of the croupiers were to satisfy the requirement of minimal human resource it does not follow in our view that combining their presence with 30-40 gaming machines and a casino area, that the whole ship is to be viewed as an establishment of the appellant which receives the gaming machine licence. The dispersal of that quantity of machines throughout the ship and the presence of an area (which is as found above an establishment in relation to another supply) does not turn the ship into the appellant's establishment. We disagree therefore that the combination of the appellant's gaming machines, casino, and the presence of the croupiers makes the ship an establishment of the appellant in relation to the gaming machine licence supply.

168. We have also considered whether if the establishment is taken to be the casino area, whether it can be said that this is an establishment which fulfils the requisite requirements in relation to the services i.e. the gaming machine licence. However we do not think it does. While there are some technical resources (in terms of the gaming machines which are located in the casino area) the human resources at that establishment, namely the croupiers, do not enable the gaming machine licence supply to be received and used. As discussed above the carrying out of cleaning and collection supervision by the croupiers is in our view insufficient.

169. To summarise, in respect of the gaming machine licence supplies, we conclude that the ships carrying upon them a combination of machines, casino area and croupiers, do not by virtue of that combination amount to an establishment of the appellant. They would in any case not meet the requirements for a "fixed

establishment" for want of sufficient human resource in relation to the supply. The establishment of the casino area on board the ship, does not meet the requirements for "fixed establishment" because of insufficient human resource.

For the purposes of s9(3)(b) VATA 1994 what is the "relevant establishment"? As between the appellant's business establishment and fixed establishment(s) which "is most directly concerned with the supply" (s9(4) VATA 1994)?

170. The appellant argues that the fixed establishments of the ships are the establishment "most directly concerned with the supply" for the purposes of s9(4) VATA 1994.

171. As a preliminary matter we observe that in so far as s9(4) VATA 1994 requires it to be determined which as between the business establishment and the fixed establishment is "most directly concerned" with the supply, this test does not correspond to the proviso in Article 44 (the words "however, if those services are provided to a fixed establishment…".). The words of s9(4) VATA 1994 contemplate that a comparison needs to be made as between competing establishments in order to find out which is "most directly concerned". The proviso in Article 44 asks whether services are provided to a fixed establishment. It does not require any such comparison to be made with other establishments. Similarly in relation to the period after the application of the Regulation (1 July 2011) the words of Article 11 of the Regulation refer simply to the supply being received and used "for [the establishment's] own needs". Article 21 of the Regulation refers to the establishment receiving the service and "using it for its own needs". Neither requires any comparison to be made with other establishments.

172. In order for the fixed establishment to be determinative of the place of supply, under Article 44 (in the period prior to application of the Regulation (1 July 2011)) all that is required is that the supply is "provided to a fixed establishment". In respect of the supply of casino operating licence we have found that the casino area on board each of the ships is a fixed establishment of the appellant. It is clear to us that that supply "is provided to" the fixed establishment of the casino area.

173. Reading the domestic legislation consistently with Article 44, we consider that once it is established that the service is provided to the fixed establishment, it must follow that it is the fixed establishment rather the business establishment which "is most directly concerned with" the supply. There is not a further test of looking to see whether the casino area is more directly concerned with the supply than the business establishment of the appellant in the UK. If the legislation could not be interpreted in this way then Article 44 would, as the appellant argues, have direct effect. If we are wrong on these points we would in any case find that the casino area was the establishment most directly concerned with the supply of casino licence operation. In both cases the requirement is satisfied because as the appellant points out, without the casino operation licence the establishment would not be able to carry out its activities.

174. For the same reason the references in Article 11 and 21 of the Regulation to the establishment using the supply for its own needs are fulfilled by the casino area in relation to the supply of casino operation licence.

175. The Regulation applies a uniform and directly applicable rule across the EU in relation to when the fixed establishment determines the place of supply. In relation to the period following the application of the Regulation (1 July 2011), to the extent s9(4) VATA 1994 cuts across that uniform rule by imposing a further test of looking to see whether the fixed establishment is more "directly concerned" with the supply than the business establishment this extra requirement is invalid and must be disregarded. In any case it follows from what we have said above that if we were wrong on this point, the casino area would on the facts before us be the area which was "most directly concerned with the supply."

176. We have found that in respect of the gaming machine licence the appellant does not have a fixed establishment so the issue does not arise in relation to that supply. The place of supply would therefore be determined according to the place of the appellant's business establishment which is the UK.

Conclusion

177. The supplies of licence to site and operate gaming machines and licence to operate casinos to the appellant in respect of each ship sailing on the North Sea and Western Channel routes constitute separate supplies.

178. In relation to the supply of casino licence the casino area on board each of the relevant ships was a "fixed establishment" of the appellant for the purpose of the VAT rules on place of supply.

179. In relation to the supply of gaming machine licence the ships were not "fixed establishments" of the appellant and the appellant did not have a "fixed establishment" on board such ships.

Decision in principle

180. The appellant has asked that this decision is given in principle on the basis that the parties will need to discuss to what extent the supplies should be treated as made inside the UK and to what extent they are to be treated as made outside the UK. HMRC raised no objection to proceeding on this basis.

181. In relation to the supply of casino licence, our conclusion that the casino area on board the ship is the fixed establishment (rather than the ship as the appellant argues) still results in there being an issue over how that supply is to be apportioned in terms of place of supply. If the apportionment cannot be resolved between the parties they may revert to the Tribunal.

182. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 19 March 2014