[2016] UKFTT 508 (TC)

TC05257

Appeal number: TC/2013/02867

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

K E ENTERTAINMENTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RUTHVEN GEMMELL WS
MEMBER PETER R SHEPPARD FCIS, FCIB, CTA

Sitting in public at Edinburgh on 24 – 26 May 2016

Roderick Cordara QC, instructed by EY, for the Appellant

Peter Mantle, Barrister, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Introduction

1. This is an appeal by KE Entertainment Limited ("KE") of 39 Rosslyn Street, Kirkcaldy, Fife, Scotland, against a decision dated 21 March 2013 issued by the Commissioners of HM Revenue and Customs ("HMRC") that KE should not have made an adjustment in the sum of £460,630.36 to its VAT return for the period ending 12/12. HMRC issued an assessment, on the same day, for the sum of £460,626.34 [a £4.02 difference] based on that decision.

2. The issue in this appeal was considered by the First-tier Tribunal in the case of *Carlton Clubs plc* [2011] UK FTT 542 (TC) ("*Carlton Clubs*") (Appendix 1) which determined the appeal in favour of Carlton Clubs holding that it was correct to make a like adjustment in like circumstances to that made by KE. HMRC did not appeal against that judgement explaining that the reason for this may have been a difference of opinion between two policy bodies within HMRC and that they had not taken specialist legal advice within the time period allowed for an appeal.

3. The *Carlton Clubs* decision, being a First-tier Tribunal decision, was only binding on the parties and, accordingly, when considering the claim by KE, HMRC decided not to apply it although the circumstances were virtually identical. HMRC's view, therefore, was that *Carlton Clubs* was incorrectly decided. KE seek to rely on the Tribunal's reasoning in *Carlton Clubs* in support of its grounds of appeal to this Tribunal. The parties were reminded that the decision in KE's case of this Tribunal will also be only binding on the parties to it.

4. Mr Roderick Cordara and the instructing accountants appeared/acted in *Carlton Clubs* and Mr Sheppard, the Member in this case, was also the Member in *Carlton Clubs.*

5. By means of an Order released on 16 June 2014, the KE case was ordered to proceed as the Lead Case pursuant to Rule 18(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the First-tier Tribunal Rules") for the related cases of New Empire Bingo Club Ltd (TC/2013/02866) and New Globe Bingo & Social Club Limited (TC/2013/03157). It was confirmed at the hearing that both these companies, and KE, operated in Scotland. HMRC confirmed that they have a great many other cases dealing with the same issues in relation to taxpayers based in England.

6. The application for a Lead Case stated: "Each of the Appellants' businesses are similar in nature and therefore the facts in each appeal relating to how the participation fees have been paid and should be calculated are the same or sufficiently similar and the same issue of law is common in all three appeals".

7. The principal issue in this appeal, set out in the Direction of the Tribunal released on 16 June 2014, is "Whether or not a recalculation of the value of the participation fees paid by KE's customers on a session by session basis rather than game by game basis, as stated by the Commissioners to be the correct approach in their Business Brief 07/07, results in a 'decrease in consideration for a supply, which

includes an amount of VAT', which occurred after the end of the prescribed accounting period in which the original supply took place, within the meaning of Regulation 38 of the Value Added Tax Regulations 1995?".

8. The parties agreed a Statement of Common Issues and Facts dated 27 March 2015 which amongst other matters stated "Customers of all three Appellants [including KE] pay a fixed sum to participate in a session of bingo which entails the right to play in several separate games of bingo, each of which offers a cash prize. For the purposes of VAT, this sum is divided into a stake and a participation fee. The stake is the element of the sum which is paid by the customer that is used to fund the prize for the winner. It is not consideration for any supply."

9. In simple terms KE say that "consideration" must be given its technical meaning in accordance with the VAT legislation. As such "consideration" is limited to the participation fee since this is the only sum received by KE for its own use.

10. HMRC, in simple terms, say that the circumstances in this case cannot rely on Regulation 38 because there has not been a change in the "consideration for a supply" which they define as being where the amount of the supply has changed and has affected the VAT element of that supply.

11. HMRC say that a claim such as KE's should be made under Section 80 of the VAT Act 1994 ("VATA") which had to be made within four years from the end of the accounting period in which the over declaration of output tax was made and as KE are "out of time" to make a claim in respect of the amount at issue before this Tribunal, KE are seeking to circumvent that time limit by relying on Regulation 38 which does not impose time limits 'for amendments to be made'.

Bingo and VAT - General Background

12. A clear and concise explanation and statement of the background to the VAT and bingo is given by Judge Reid in *Carlton Clubs* (see paragraphs 6 to 15), and are adopted as part of this decision as being largely similar to the circumstances of KE's business, and explain the distinction between the calculation of the VAT liability on the one hand on a game by game basis ("game basis") and on the other hand on a session by session basis ("session basis"). Paragraphs 4 and 5 are also relevant with the difference that KE operates bingo clubs only in Scotland and not the North of England, does not have a book of tickets described as a Carlton Connection and it offers national and linked games to its customers.

13. A witness statement by Michael Lowe was produced to the Tribunal and Mr Lowe was present during the hearing. Although Mr Lowe took the oath and confirmed his statement there was no cross examination by either KE or HMRC. Instead HMRC submitted their written observations setting out the statements they accepted and those they did not. This judgement will refer to statements which have been agreed by both parties, unless specifically stated to be otherwise. The Tribunal had no ability to test the credibility of Mr Lowe but in general terms this was not in

doubt and he made helpful contributions to technical enquiries throughout the hearing which were accepted by the parties.

14. The Tribunal also had before them a Hearing bundle of documents, which included KE's 14, one-sided, pages of arguments and HMRC's 36, one sided, pages of skeleton argument, and an Authorities bundle which included the legislation and HMRC publications, parts of which are shown at Appendix 2, and reference to 40 Cases, which are shown at Appendix 3.

KE'S Particular Circumstances

15. In KE's VAT return for the period ending 12/12, it sought to make an adjustment that it was entitled to receive a repayment in respect of overpaid output VAT in the sum of £425,630.40 [later adjusted] in respect of the years 1996 to 2004 pursuant to Regulation 38 of the Value Added Tax Regulations 1995.

16. KE's accountants explained by letter dated 29 January 2013 that KE considered that whereas historically it had accounted for output tax on participation fees on a game basis, in accordance with HMRC's published guidance at the relevant time, HMRC's Brief 07/07 indicated that it should have been accounted for on a session basis. The effect of the Brief and the session basis allowed KE to reduce the value of the participation fees (on which VAT was payable) where the participation fees for games within the session were added to the stake money (which was outside the scope of VAT) received from customers to guarantee a certain level of prize or to create additional prize money for other games within the session. In the period 1996 to September 2004 this resulted in a reduction of £460,626.36 in output tax and KE relied on the decision in *Carlton Clubs*.

17. KE issued an internal credit note (as deemed appropriate in *Carlton Clubs)* to adjust the VAT and as a result the 12/12 VAT return became a repayment return.

18. HMRC replied by letter dated 21 March 2013 stating that they did not consider that it was relevant whether the issue of the Brief was or was not a change in policy in determining the consideration and that customers are charged for a right to take part in a game of bingo and the amount they pay is the gross amount. HMRC stated that some of that amount goes towards the participation fee and the rest is allocated as stake money. At the end of each game the prize-money will have been calculated and so by the end of a session, at the latest, the stake will also be known. "At that point all the facts necessary to identify the consideration are available. The consideration does not change, after the supply of bingo has taken place. There is no subsequent renegotiation of the consideration between the parties. Nor are there any further payments made or received by the parties. All that has been or is to be paid for the supply has been paid at the time of the supply. Consequently, any adjustment based on a mistake in identifying the stake, we consider is not an adjustment that could be made under Regulation 38. It is also not appropriate to issue credit notes. Your claim is therefore rejected."

19. HMRC then informed KE that it owed HMRC £460,626.34 for the period between 1 October 2012 and 31 December 2012 pursuant to Section 73 (1) of VATA. They also reminded KE that First-tier Tribunal decisions, such as *Carlton Clubs,* "are not binding".

20. During the course of the hearing it was confirmed that KE had made a claim under Section 80 of VATA and had been repaid output tax for the period that could be covered by such a claim, given the time limits in place. KE's claim under Regulation 38 was made, it was explained, because the session basis formula threw up an amended figure which KE considered they could take for themselves.

21. KE appealed to the Tribunal and by 12 November 2013 a further application had been made to treat the appeal as a Lead Case for certain related cases.

22. KE was established in 1996 at which time a three-year time limit was placed on tax claims in relation to the refunding of understated or overpaid VAT. As is clearly explained in Judge Reid's judgement (see paragraph 20) in *Carlton Clubs*, these time limit changes and the subsequent requirement to provide for a transitional period left the claim, to which this appeal relates, outstanding. Calculation of VAT due on a game basis means that the sum originally allocated as the participation fee would be subject to VAT in full. This would be the case even although, in reality, this participation fee may have been reduced to "top up" prize-money in games where there was either guaranteed prize money or it had been decided to offer additional prize money, even to the extent that the "top up" payment could even exceed the participation fee, making such a game loss making.

23. Calculation on a session basis means that the total prizes paid out in a session are deducted from the total session fee; that is, the participation fee is the sum left after all of the prizes have been deducted. The session basis, therefore, results in a decrease in the taxable consideration and VAT payable and in this regard is "advantageous", to the taxpayer.

24. KE's claim, of £460,626.36, represents the VAT fraction of the total of the "top up" and additional payments made by KE in the period between 1996 and September 2004. The issue before the Tribunal is whether this sum represents a "decrease in consideration in a supply", as required by Regulation 38 or not.

HMRC's Notices and Business Brief

25. On 1 January 1984, HMRC published VAT leaflet number 701/27/84 entitled Bingo which was in turn replaced on 1 March 1990 by VAT leaflet 701/27/90 where paragraph 7 confirms that the stake, or card, money which goes back to players as prizes during the game for which it was paid, is outside the scope of VAT, as "nothing is supplied for the stake payment". At paragraph 8, however, it directs that in calculating the stake money, any participation charges which are used as additional prize-money are to be excluded. As Judge Reid said in *Carlton Clubs* (see paragraph 36), it is "curious" that the leaflet only deals with the calculation of the value of *exempt* supplies in relation to cash bingo.

26. In June 1997, HMRC published VAT Notice 701/27/97 entitled Bingo in which it repeats at paragraph 4.1 the calculation process detailed in paragraph 8 of the 1990 leaflet. This provided "Where the sessions/participation fees are exempt, the value of the exempt output is the total amount charged to play bingo, less the stake money. To find this value the following procedure must be carried out for each tax period -

(a) add together the gross session and participation fees (do not make any deductions for bingo duty payable);

(b) add together all the amounts of stake money given back to the players as prizes (participation charges which are used as additional prize-money are to be excluded);

(c) deduct (b) from (a).

This is the value of the exempt outputs."

27. In March 2002, Notice 701/27 was issued which cancelled and replaced the 1997 Notice. This provided: "You may make one composite charge to each player for admission, participation and session charges, and stake money. To work out your VAT you will need to allocate the amount of your charge to each part. You must first calculate and deduct any amount due for admission. The value of admission is standard-rated for VAT- see paragraph 2.2. You will then need to work out the value of your participation in session charges using the formulae in paragraphs 3.2 and 3.3. The liability of participation and session charges is explained in paragraph 2.1." Paragraph 3.2 repeated the calculation process in paragraph 4.1 of the 1997 notice. There was no distinction between taxable and exempt supplies.

28. On 1 February 2007, HMRC issued Business Brief 07/07 entitled VAT - Cash Bingo: Accounting for VAT on participation and session fees. This and a relevant comment are set out in *Carlton Clubs* (see paragraphs 40 and 41), as follows:

> 40. This document begins with a statement that it clarifies HMRC policy on how to calculate participation and session fees paid by cash bingo players. It notes that HMRC have received enquiries from some bingo promoters performing VAT calculation on a *game by game* basis asking whether they are acting correctly. This is said to have prompted the issue of *this clarification.* The document further provides *inter alia* as follows: -
>
> CALCULATING THE VAT DUE
> When a player pays to participate in all or part of a bingo session, the supply made by the promoter is the right to participate in the number of games during that session for which they have received payment.
>
> As a player cannot participate in further sessions unless they make further payment, the supply to the player is completed when the session ends. In these circumstances the amount of VAT due on participation and session charges should properly be calculated on a session-by-session basis by deducting the stake money arising in each individual session from the total amount (less any admission fees) paid by players to participate in that same session. Where money from other sources is added to the stake money received in the session in order to meet guaranteed prizes, that additional money cannot be used to reduce the value for VAT of the participation and session charges paid for taking part in that session.
>
> Where a player pays to take part in an additional game ("flyer") that does not form part of the session charge, this is a separate supply of the right to participate in that further game. The

VAT due on fees charged for participating in additional games should be calculated on a game-by-game basis.

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

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

Notice 701/27 Bingo will be updated.

MAKING CLAIMS OR ADJUSTMENTS

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

- where the total of previous errors does not exceed £2000 net tax, an adjustment may be made to your current VAT return; but
- where the total of previous errors exceeds £2000 net tax a separate claim should be submitted to HMRC (in these cases the errors must not be corrected through your VAT returns). HMRC may reject all or part of a claim if repayment would unjustly enrich the claimant. More information about unjust enrichment can be found at part 14 of Notice 700/45

41. It is difficult to understand what is meant by the underlined passage unless it is a reference to other sessions. It cannot be a reference to other games in the same session otherwise there would be no difference between the *game by game* basis of calculation and the *session* basis."

29. In September 2007 HMRC issued Notice 701-27 entitled Bingo. It cancelled and replaced the 2002 Notice and clarified the procedure for accounting for VAT on participation and session fees for bingo. The Notice provides, *interalia*, as follows: (*Carlton Clubs,* paragraph 42).

This notice cancels and replaces notice 701/27 Bingo (March 2002)

3 ACCOUNTING for VAT

3.1 HOW DO I APPORTION COMPOSITE CHARGES

You may make one composite charge to each player for admission, participation and session charges, and stake money. To work out your VAT you will need to allocate the amount of your charge to each part.

You must first calculate and deduct any amount due for admission. The value of admission is standard-rated for VAT - see paragraph 2.2. You will then need to work out the value of your participation and session charges using the formulae in paragraphs 3.3 and 3.4. The liability of participation and session charges is explained at paragraph 2.1.

3.2 **SHOULD I CALCULATE THE VAT ON A GAME BY GAME BASIS** 5 **OR ON A SESSION BASIS?**

When players pay to participate in all or part of a bingo session, the supply you make to them is the right to participate in the number of games during that session for which you have received

payment. As the players cannot participate in further sessions unless they make further payment, the supply to the players is completed when the session ends. In these circumstances you should calculate the amount of VAT due on participation and session charges on a session-by-session basis.

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

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

3.3 **WORKING OUT PARTICIPATION AND SESSION CHARGES FOR BINGO (CASH PRIZES)**

You must carry out the following calculation for each session:

Step Action

1 Add up the value of stake money given back to players as prizes. This is the value of stake money you received. (Do not include participation charges used as additional prize money.)[underlining added]

2 Add up the total value of charges you made for participation and session charges and stake. (Do not make any deduction for bingo duty payable).

3 Deduct step 1 from step 2 to give the value of your participation and session.

A principal change at Section 3.3 was for taxpayers to "carry out the calculation for each session", whereas the prior versions required the calculation for 'each tax period'.

Legislation

30. See Appendix 2.

Cases Referred to or cited in the Authorities bundle

31. See Appendix 3.

KE's Submissions

32. KE say that only the participation fee element of the amount paid by a customer for a session of bingo, is the consideration for a VAT inclusive supply; it is the element of the sum that is retained by KE as its consideration for the provision of the game; it is the consideration received by KE for its taxable supply to its customers of the right to play bingo for prizes and it alone registers on the VAT 'radar screen'.

33. Consequently, KE's appeal raises similar issues as in *Carlton Clubs* and KE adopt the reasoning of the Tribunal's unappealed decision contained therein.

34. KE say that they ascertained the participation fee element of the sum paid by customers during the years 1996 to 2004 in accordance with the "then directions of HMRC" as set out in the then current Public Notices, which was to do so on a game by game basis, rather than on a session basis; and that HMRC must have been aware of and approved of this treatment. Ascertaining this element on a game by game basis rather than a session basis resulted in a worse financial outcome to KE and they would have not done so unless they were required to do so. When HMRC issued their

Business Brief 07/07 KE say "HMRC changed its requirements and advised that this was not correct and that the calculation should be carried out on a session basis".

35. After taking appropriate advice, KE gave effect to the recalculation of participation fees on a session basis which resulted in a retrospective reduction in the consideration for taxable supplies made by KE for the right to participate in games of bingo. KE gave effect to this by issuing a credit note, in KE's VAT return for the period ended 12/12, in accordance with regulations 24 and 38 of the Value Added Tax Regulations. This entailed an adjustment of £460,626.36 showing output tax due.

36. KE, therefore, say there was a change in the consideration for the taxable supply and do not accept HMRC's submission that KE had made a mistake in the earlier periods, particularly when it was simply following HMRC's instructions. If HMRC's submissions are correct, it meant KE could only make claims under Section 80 of VATA, in respect of which it was out of time for those periods under appeal.

37. KE rely on the direct effect of Articles 11A.1(a) and 11C.1 of the Sixth Directive and Articles 73 and 90 of the Principal VAT Directive (collectively "the valuation Articles") which, they say, should be construed purposively, in order to achieve the overall purpose of the provisions, irrespective of any constraints or inadequacies of the UK legislation (if any) (see *General Motors Acceptance Corporation (UK) plc* [2006] VAT Decision [19989]).

38. The valuation Articles require VAT to be charged on the correct amount of the consideration finally treated as coming into the hands of the taxpayer, even if there have been events which cause that sum to be altered after an initial payment (see *Elida Gibbs Ltd v CCE* (Case C317-94) [1996] STC 1387 at paragraph 19).

39. KE refer to Sections 19(2) and (4) VATA and to Regulations 24 and 38 of the VAT Regulations and say HMRC's arguments raise two basic points; "does the fact that the consideration for the VAT supply formed part of a larger sum that in overall terms did not change, mean that the consideration of the VAT supply did not alter and does the alteration of the instructions by HMRC mean that the taxpayer was mistaken when following the original instructions?". KE say that both questions require a negative response.

Supplies

40. KE say that the VAT system focuses on individual supplies and it is at the supply level that the analysis must be carried out. When a supply is made up of amounts that need to be apportioned there needs to be a mechanism to do so and when that mechanism changes it will lead to a change in the consideration for each element. Where there are two elements a change in the consideration for one will automatically lead to an equal and opposite change in the consideration of the other.

41. In relation to Bingo it is only the participation fee that is the subject of the mechanism and a change in the consideration that constitutes the participation fee cannot be ignored because there is an equal and opposite change outside the scope element. They say the word "consideration", or a synonym for it, is referring to the

consideration for supplies, not the payments which are *ex hypothesi* not consideration for supplies. Consequently, the consideration for a VAT supply can be altered where the overall sum paid out by customers has not and if, as HMRC say, it cannot be altered then there would never be any application of the relevant valuation Articles or Section 19 or regulation 38 to situations where an overall payment is apportioned differently after the initial payment has been made.

42. In relation to Bingo none of the customers are claiming VAT and it is impossible to individually identify them. The supplier and customer do not need to know the apportionment process at the outset and may never find out what the process is. Accordingly, the supply chain has to be seen against this background. Similar issues arise in relation to foreign exchange transactions.

Deemed supplies

43. KE refer to Article 73 entitled "Supply of goods or services" which states "the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of supply". KE say that taxable amount in Article 73 is equivalent to "value" in the UK legislation and specifically in Section 19 of VATA.

44. KE say that regulation 38 is a correct partial interpretation of Article 90 of the Principal VAT Directive headed "Adjustments in the course of business" and applies where there is "an increase in consideration for a supply". The word "consideration", is not used as a contractual term but as a term of art and means "the taxable amount". KE say that, throughout, HMRC confuse the amount paid by the customer with the "taxable amount" worked out by a formula suggested by HMRC. The formula gives the taxable amount and, therefore, the consideration, so that one drives the other.

45. As the formula used is artificial it produces a value judgement as a means of predicting a past event, it is the only means of dealing with what is a "moving target" and there is no subjective evidence to assist in the apportionment exercise and in ascertaining the amount subject to VAT.

46. KE say this necessitates a deeming process which assigns a value to the supply and which is recognised by Section 19(4) of VATA which states: "Where a supply of any goods or services is not the only matter to which the consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it" and which they say is an implementation of the valuation Articles; it is put there for circumstances where there is a single price for a disparate group of things and where an apportionment process is needed on a global basis.

47. KE say that if a given supply is deemed on Monday to be worth 10 (with a legal consequence), but that deeming is revised and on Wednesday it is deemed to be worth 5 (with an altered legal consequence), there has been an alteration in the consideration, albeit that it is a deemed consideration: both deemings are of equal status. It must, therefore, be possible for an amount to be altered where the amount is

deemed and if not there could never be any change in consideration, whether the result of agreement between the parties or otherwise. Any change would be a correction of a mistake which is contrary to common sense and the statutory scheme. The deeming in Section 19 is, therefore, designed to ascertain an amount for the purposes of the valuation Articles.

The Taxable Amount

48. The valuation Articles state "where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States. KE say that Section 19 of VATA and Regulation 38 of the VAT Regulations must be interpreted purposively to give effect to the aim of these Articles that there has been an adjustment to the tax base where after supply, there is an event which alters the price to be attributed to the supply. In this case there is no further agreement between the parties but KE say that role is fulfilled by the altered "direction by HMRC"; namely the change from the game basis to the session basis.

49. KE say it is necessary to look at the aggregate or global value of supplies and work out a value figure and it is not possible to look at each supply individually; that the game basis and session basis are to a large extent theological. A value judgement is necessary to make an analysis of money out and money in, coupled with a decision as to when to make the set off; it being a fine point whether it is per session or per game.

50. The set off or amount of the set off affects the "net profit" and which is the proxy for the taxable turnover. The formula creates the physical reality and it would only be if a formula was unlawful that a claim would need to be made under Section 80 of VAT and not under Regulation 38 which deals with "adjustments".

Mistake or Clarification

51. KE say there was no mistake in making the initial ascertainment of the amount of the taxable consideration, in line with the requirements of HMRC. "It does not lie in the mouth of the Commissioners to suggest that by simply following their directions, a taxpayer has made a mistake". KE say it would be unfair, especially when it is proposed to combine it with the suggestion that the taxpayer is out of time to "correct the error", when there is no way of knowing of the "error" until the Commissioners announced the change of policy. There is no suggestion that the earlier direction was unlawful, it is simply being improved on, with retrospective effect; it is a new methodology. HMRC simply changed their mind and cannot point to an error between them as both bases are lawful. The game basis was the "recommended basis" set out in Business Brief 07/07 for an additional game (a "flyer" game) that does not form part of the session charge. KE say there is not one correct answer for calculating the correct amount of VAT in the world of Bingo, nor in ascertaining the period in which any "set-off" is made, as this is not defined. The Notices and the Business Briefing did not say that anything was wrong; there is no

statement that having used the game basis it was unlawful; it simply said it is better to have it on a session basis.

52. KE say the consideration of supply is not the price paid by the customer for a session of bingo as it includes an amount which is not a supply (the stake money), and an amount which the supplier can take for his own. These concepts have been considered in *H J Glawe Spiel-und Unterhaltungsgerate Aufstellungsgesellschaft mbH & Co KG v Finanzamt Hamburg-Barmbeck-Uhlenhorst* (Case c-38/39) [1994] STC 543 and *First National Bank of Chicago v Customs and Excise Commissioners* (Case C-172/96) [1998] STC 850.

53. *H J Glawe* concerned gaming machines in Germany whereby the money that was inserted into the machines was divided into two physically separated boxes one being the stake money, the other being the profits, after expenses, for the supplier. It was held that the stake money was not taxable and the case is well summarised in *Carlton Clubs* (see paragraphs 63 and 64). KE say that the operator's turnover was the amount he was able to remove from the machine and that the formula for ascertaining this was met by regarding each payment by the gambler as consisting of two components, one is the price paid for the services provided by the operator (including the VAT payable on that amount) and the other component is regarded as an amount contributed to the common pool to be paid out as winnings.

54. The Advocate-General in *H J Glawe* when considering that gaming transactions were ill suited to value added tax stated that the court "must seek an interpretation which is consistent with the aims and principles of the common VAT system". The interpretation, consistent with the commercial reality of the transaction and with the aims and basic principles of the VAT Directive (to charge in proportion to the actual turnover which a trader earns from his supplies of goods and services after deduction of tax on the cost components thereof), is to tax the "operator's turnover, which consists of the amount he is able to remove from the machine and not the total amounts inserted by players".

55. *First National Bank of Chicago v Customs and Excise Commissioners* concerned a bank's foreign exchange transactions and the problems of identifying the consideration received by the bank as it had charged no actual fee or commission for a large number of transactions. The solution was to regard the taxable amount as the net result of its transactions over a given period of time ([1998] STC 850, [1998] ECR I-4387), (see paragraph 47 of the Court's decision). The formula was required because there could be all sorts of answers and all could be right. KE say this adopted the general principle of *H J Glawe* that you need a set of processes and a structure, a mechanism, to arrive at the taxable amount and you may need to group together a number of supplies in a manner which the customer does not need to know about at the outset and indeed may never find out. Global amounts could be used instead of individual calculations.

56. KE adopt the Tribunal's reasoning at paragraphs 66 to 68 of *Carlton Clubs.*

57. KE refer to Schedule 11 of VATA which says that HMRC are "responsible for the collection and management of VAT". Whereas KE accept that VAT notices do not have the force of law, they say they are issued by HMRC under their care management powers and have "tones of authority". They are "directing taxpayers to behave in a certain way". KE adopt the reasoning at paragraphs 53 to 56 and 61 to 62 of *Carlton Clubs*, the latter emphasising that there has been a change of policy rather than a clarification of an existing policy announced by Business Briefing 07/07.

Regulation 38

58. KE adopt the reasoning of the Tribunal in *Carlton Clubs* at paragraphs 69 to 74 in relation to Regulation 38 which they say can apply to them in the same way as a change of formula which produces an increase or decrease in consideration as if there had been a contractual dialogue. KE do not accept that there has been no alteration in the "real world" as HMRC assert.

59. KE says that the customer pays for a session; there is no discussion as to the apportionment and never has been. This is a Section 19(4) type of single sum for multiple reasons but there is no contract so that judgement calls are made by the managers who do not know when the payment for the session is made what the split will be. KE say that HMRC are confusing the amount paid by the customer with the taxable consideration worked out later by a formula suggested by HMRC. The formula gives the taxable consideration so that one drives the other. There is no contract for an apportionment but instead an artificial formula is used to provide a value judgement.

Credit Note

60. KE adopt the reasoning of the Tribunal in *Carlton Clubs* at paragraphs 75 to 83 and their analysis of *GMAC* [2003] in relation to the status of the credit note which they say was required to meet Regulation 24 of the VAT Regulations. KE say there was nothing more that could be done and in terms of that judgement they met the evidential requirements of Regulation 38 read with Regulation 24 of the VAT Regulations and say it was not practical nor possible to deliver individual credit notes to all of its customers during the relevant periods.

61. KE further refer to the *Minister Finansow v Kraft Foods Polska SA* [2012] decision where a Polish trader issued correcting invoices where discounts were given, for goods returned or errors identified after supply. The tax authorities said they could only benefit from Article 90 and reduce the taxable amount if they could show an acknowledgement from the customer and if they had any practical difficulties in so doing, it was irrelevant. KE say that the European Court of Justice said it was not unlawful to demand proof until it 'was impossible or excessively difficult" for the taxable person to obtain such a receipt and at which time the Article 90 relief should be made available.

62. KE say that the *Freeman*s case, referring to refunds given at the time, has nothing to do with Article 90 and its predecessors. HMRC read Article 90 as if KE

needed to pay out money to have a Regulation 38 claim where there is no requirement in the regulation for any such payment to be made. The heading of the regulation is "Adjustment". In any event, you can have a VAT liability before being paid by customers and that liability may nevertheless require adjustment. Regulation 38 refers to an increase in consideration of supply and nowhere is there a requirement that a payment needs to be made; all that is required is to demonstrate an alteration of the level of the consideration. KE refer to the Advocate General's opinion that there was no change in the consideration and that you do not have to show a refund to demonstrate an alteration. Regulation 24 defines "increase in consideration" in terms of a credit or debit note, which is the antithesis of a payment.

63. KE say that if a formula used by a taxpayer is not unlawful it must work within the Directive and refute HMRC's suggestion that this could be unilateral. KE say that in this case it was bilateral and an industry wide practice suggested by HMRC. KE say that the purpose of HMRC's Notices and Business Briefings is to provide administrative directions and if they change the method of calculation they consequently alter the consideration which is taxable.

HMRC's Submissions

64. HMRC's submissions are based on what they say are matters of fact namely; the fixed payment made by customers did not change after KE made its supplies of bingo. There were no changes in the amounts of prizes paid by KE to customers, no change in the amount of the participation fee obtained by KE from the customer (no change in the stake) and no "price reduction" of the supply bingo made by KE, within the meaning of Article 90.

65. HMRC say, that a "price reduction" within Article 90 and a "decrease in consideration" within Regulation 38 requires the supplier's customer to pay less for the supply; that the issue is whether there has been a reduction in consideration of supplies of bingo, which in turn means a "decreasing consideration" within the meaning of Regulation 38 and which is in turn dictated by whether the recalculation is a "reduction in the price" of the supply within the meaning of Article 90. HMRC say that KE assume the recalculation is a "reduction in consideration" and seeks to present HMRC's case as trying to transform that (assumed) "reduction in consideration" into something else.

66. HMRC say that *Carlton Clubs* was wrongly decided; that KE miscalculated the actual taxable amount of its supplies of bingo in the period 1996 to September 2004 and consequently declared output tax to HMRC which was not output tax due and consequently "overpaid VAT". HMRC say that whether or not KE did so in reliance of HMRC's relevant public notices is irrelevant. Similarly, HMRC say it is irrelevant whether KE acted under a mistaken belief or whether HMRC also shared a mistaken belief. What matters is whether there has been a "reduction in price" of KE's supply of bingo within the meaning of Article 90.

67. HMRC say that the £460,630.36 is not due in accordance with UK or EU VAT legislation; that KE had a right to obtain a refund by means of Section 80 of VATA;

and that KE have brought their remaining claim, eight years after the end of the claim period, within the scope of Regulation 38, because each claim under Section 80 became time-barred three years after the end of the relevant prescribed accounting period. As a consequence, it is legitimately time-barred by a time limit (Section 80 (4)) which the UK has enacted in compliance with the requirements of EU law.

68. HMRC say that the words "cancellation, refusal or total or partial non-payment" in Article 90(1) clearly necessitate an event occurring between the supplier and its customer. Similarly, they say "decrease in consideration" in Regulation 24 entails "a decrease in the consideration due on a supply made by a taxable person". This consideration can only be due from the customer to the supplier and is what Article 73 means when it says "obtained or to be obtained by the supplier, in return for the supply, from the customer".

69. HMRC refer to *H J Glawe* and *First National Bank of Chicago* as authorities for the proposition that Article 73 requires that regard be paid to the net result of a supplier's transactions over a given period of time, thereby identifying the amount that the supplier can actually take for it. In KE's games of bingo with cash prizes, the prize for each game within a session will either be decided by the club manager after ticket sales for the session finish and before the session starts, or have been fixed even in advance of that. Consequently, HMRC say no subsequent change occurs in either the fixed amount of payment from the customer or the cash prizes; it all happens on the same day, indeed before the session starts. Both *H J Glawe* and *First National Bank of Chicago* similarly provide no support for the proposition that there can be more than one right way of calculating the correct amount of tax, *H J Glawe* (see paragraphs 8 and 9 of the Court's Judgement at page 551).

70. HMRC say that the taxable consideration is the amount paid for it, not the face value so there cannot be two taxable amounts, *First National Bank* (see paragraph 49 page 872).

71. KE's recalculation in 2012 did not alter the amount due from the customer; the original position on the day of each relevant bingo session was not altered; KE has not paid anything back to its customers since that day as a result of the recalculation; and there is no event occurring between the supplier and customer. Reference is made to *Elida Gibbs* at paragraph 24 as authority that the tax authorities may not in any circumstances charge an amount exceeding the tax paid by the final consumer. Article 90 is concerned with what is actually received by the supplier and whether that changed after the supply takes place (see *Kraft Foods* at paragraph 27).

72. HMRC referred to *Freemans plc v CCE* (Case C-86/99) [2001] STC 960 where the European Court of Justice interpreted Articles 11A(3) and 11C(1) of the Sixth Directive in the context of supplies of goods by a mail order retailer where customers paid in instalments after delivery. When the full catalogue price had been paid the customer received credits which could be used thereafter. The court held that there was no price discount at the time of supply of the goods under Article 11A but there could be a price reduction under Article 11C but only when the credit amount was, as a matter of fact, withdrawn or used. HMRC say, therefore, that to establish a price

reduction within Article 90 there must be a real or actual reduction in the amount actually obtained (although in *Freemans* the amount was received and retained) and that mere entries in the books of account do not amount to a price reduction. HMRC classify this as a reduction in price in the real world and so does not include recalculations, or re-attributions nor 'departing from calculations or attributions originally performed by a taxable person to ascertain the taxable amount of supply when submitting its relevant VAT return'. To come within Article 90 there has to be a change in the relationship and the customer must get something back; a credit entry is not enough and with KE there was no change in the relationship with its customers.

73. HMRC say that in cases where an apportionment exercise is required to ascertain the taxable amount, changes in the calculation can affect the apportionment but it does not follow that there has been a change in consideration within the meaning of Article 73 or a price reduction within Article 90, see *Madgett and Baldwin* Joined cases C-308/96 and C-94/97) [1998] STC 11898 (see paragraphs 40 to 42). It is irrelevant to KE's case whether the recalculation was carried out unilaterally by KE or prompted by HMRC. Neither of them are a "price reduction" within Article 90. HMRC say that KE cites no authority on Article 90 which supports its contention that a recalculation or reattribution is within the scope of Article 90 and *Carlton Clubs* also cites no such authority.

74. Article 90 is not concerned with events in general but with specific events, being cancellation, refusal or total or partial non-payment or where the price is reduced after the supply takes place. KE's initial right was to pay no more VAT than it was liable to pay. It overpaid and it was entitled to obtain a refund under Section 80 of VATA and Article 90 simply has no role. This provides legal certainty to the taxpayer and the time bar on reclaiming tax is mirrored by obligations on HMRC to time bar them from making assessments. As stated in HMRC notice 700/45, claims could be made where they had been made "incorrectly".

75. Regulation 38 mirrors the requirement of Article 90 that there be a price reduction in that it requires that there be a decrease in the "consideration due". It is concerned with an actual change occurring in the amount payable or paid between a supplier and its customer. This is underlined by the requirement, at Regulation 38(4) that the customer, if a taxable person must make a corresponding entry in its VAT account, if there is a decrease in the consideration, and the requirement by means of Regulation 24 that a decrease in consideration must be "evidenced by a credit note or any other document having the same effect".

76. HMRC say that the correct amount of tax payable is contained in the legislation and that there is only one correct taxable amount. This cannot be a provisional calculation attempted at one time and revisited at another.

77. HMRC say that Article 90 is concerned with only what is actually received by the supplier from the recipient of the supply in return for it and whether that has changed after the supply takes place (see *Goldsmiths (Jewellers) Ltd* (Case C-330/95) [1997] STC 1073 at paragraphs 15 to 16; *Kraft Foods Polska SA* (Case C-588/10) [2012] STC 787 at paragraph 27).

Carlton Clubs

78. HMRC say that the Tribunal's reasoning in *Carlton Clubs* was flawed when it stated that the change from a game basis to a session basis affected the calculation of the consideration which in turn affected the calculation of the taxable amount and consequently the VAT, because it ignored the fact that the recalculation did not affect what Carlton Clubs actually obtained from its customers in return for its supplies of bingo, being the amount which it could take for itself. The Tribunal erred by failing to distinguish between, on the one hand, a price reduction or decrease in consideration, in its only true meaning of a reduction in the actual amount obtained by the supplier from its customer in return for the supply, and, on the other, recalculation of the taxable amount reflecting a new (and the correct) approach to ascertaining what was the consideration the supplier had actually obtained in return for its supplies. The former was a given, a matter dependent on what had occurred on the day the supply of bingo had taken place.

79. Consequently, the Tribunal in *Carlton Clubs* was wrong to conclude that the fact the total amount paid by the customer had not changed was "irrelevant" and should have asked itself the question of whether the amount of money that its customers had paid to *Carlton Clubs* in return for bingo supplies had changed after the supplies. The Tribunal was wrong to conclude that "the amount of each component had changed", at paragraph 72 of the judgement. On the facts there had been no change in what the customers had paid as a stake (which *Carlton Clubs* could not take for itself) and what they had paid to *Carlton Clubs* in return for supplies of bingo. A change in the form of a reduction in the price of supplies between the supplier and its customer was essential.

80. HMRC say that *Carlton Clubs'* reliance on *Elida Gibbs* was misconceived as the case was concerned with "the consideration actually paid by the final consumer", which was reduced when a cash back coupon was processed and the customer received a cash refund. HMRC distinguish this from *Carlton Clubs* where there was no actual repayment to the customer and where the Tribunal were not looking up and down the chain of transactions but were instead dealing with a single payment by the customer which related to both the supply and something else (eg the stake money). The customer's payment related solely to the supply of goods and so the "money off coupon" was in no sense comparable to the recalculation carried out as a result of Business Brief 07/07.

81. Similarly, the Tribunal erred in concluding that support for the application of Regulation 38 came from the general principle that "a trader should not pay VAT on something greater than the consideration actually received for the supply in question". HMRC reiterated that the supply in question from its customer had not changed after supply had taken place.

82. HMRC say that the Tribunal in *Carlton Clubs* was misconceived in placing reliance on the view that HMRC's Public Notices and the Business Brief were "administrative decisions" (see paragraphs 69 and 70); and that the relevant Public Notices required VAT to be calculated on a game basis in the sense of compelling tax

payers to follow them and that failure to follow HMRC's guidance would have been an "infringement" of some sort (see paragraph 70). HMRC say that the Public Notices do not have the force of law; they do not affect taxable person's rights and obligations in the UK VAT legislation or their rights under directly effective provisions of EU law; and HMRC had no relevant power to direct taxable persons on these matters.

83. HMRC say that the UK VAT legislation gives HMRC certain powers to make directions for certain purposes, such as paragraph 1 of Schedule 6 of VATA but no such power applies in relation to Section 19 (4) of VATA. HMRC has administrative power under Schedule 11 of VATA to give public guidance on its view of the interpretation and application of VAT law but in so doing cannot alter the obligations of a taxable person under the UK's VAT legislation and in particular cannot make a greater amount of output tax due from any taxable person than would have been properly due if a notice had never been published.

84. HMRC say, however, that its Notices should not simply be disregarded and they expect taxpayers to follow them. Where they take a different view of their obligations under the law, the proper course is either for the taxable person to follow them, in effect under protest, and seek a ruling from HMRC on the matter, or the taxable person can follow its own view of the law when making its VAT returns, disclosing where it has not followed guidance. VAT is a self-assessing tax and HMRC's Notices do not alter the "taxable amount for consideration for relevant supplies" of bingo in the UK or EU VAT legislation.

85. HMRC's Business Brief 07/07 did not affect what taxable persons were required to do by UK tax legislation but set out HMRC's policy that the amount of VAT on participation and session fees should be properly calculated on a particular basis. It said that bingo promoters "who now find that they have done so incorrectly may make a claim to HMRC for a repayment of any resulting over declaration". HMRC say the Business Brief was not instructing (and could not be "directing") taxable persons to do anything.

86. The Tribunal in *Carlton Clubs* was wrong to reach the conclusion that a reattribution or recalculation of the taxable amount of supplies was a "decrease" of consideration, within Regulation 38 in circumstances where there had been no Public Notices or Business Brief containing the "change of policy". HMRC say that a unilateral recalculation by a supplier would have been nothing more than a correction of an earlier error and outside the scope of Regulation 38.

87. HMRC say that a change in apportionment carried out under subsection 19(4) VATA does not amount to or equate with a price reduction within Article 90 or a decrease in consideration within Regulation 38 as this confuses a mechanism used by a supplier to try to ascertain the taxable amount of the supply with the actual consideration obtained by the supplier from the customer in return for the supply. KE in effect received a single price for multiple supplies, as the amount of the stake is not an amount the supplier can keep for itself. Consequently, there was no change in the participation fee or the prizes after the supply of bingo had taken place.

88. Where an overall payment is apportioned differently, after the initial payment has been made, the normal position will be that if the second apportionment is valid and correct then it necessarily follows that the first apportionment was incorrect. In these circumstances Article 73 is engaged and not Article 90. An over declaration of the taxable amount of supplies (and VAT) when submitting a VAT return is not the same as or equivalent to a price reduction within Article 90.

89. HMRC do not accept that the word "deemed" in Section 19(4) VATA can bring a recalculation of taxable amount or a reactivation of a payment between a VAT supply and something which is not a VAT supply within the scope of Regulation 38 (and possibly even Article 90). They say Section 19(4) is clearly applicable to establishing the consideration for a supply at the time at which it is made and it does not provide for an initial or provisional amount to be ascertained and then for the amount to be revisited by the supplier at a later date. It is a false premise to suggest that Section 19(4) authorises the consideration for a supply to be deemed "on Monday" and for that deeming to be revived "on Wednesday". HMRC say that such a recalculation would only be appropriate if the original deeming was in error, an error which the taxable person was required or permitted to correct. It is not permitted by Section 19(4) VATA and the section cannot extend the scope of Article 90 or Regulation 38 which must be construed to conform with Article 90.

90. The fact that HMRC in its Notices and Business Brief interpreted the relevant legislation in a particular way, published its interpretation and then changed its interpretation, and published that, is irrelevant to whether there was a price reduction within the meaning of Article 90 and accordingly whether there was a decrease in consideration within Regulation 38. HMRC cannot increase or decrease the amount of VAT a taxable person is obliged to account for and pay without any basis in legislation for doing so. KE's legitimate expectations were not frustrated because what was announced in the Brief was beneficial to KE and not disadvantageous in any respect. HMRC say it was not unfair, although unfortunate, for the Brief to invite Section 80 claims which might be time limited or time-barred. HMRC say that KE could, and indeed did, claim under Section 80 as they had "brought into account as output tax an amount that was not output tax due".

91. Whilst resort to Regulation 38 would be beneficial to KE in this case, because its claim under Section 80 is time-barred, reliance on Regulation 38 would, absent the time bar on Section 89 claims, be disadvantageous to KE. Changes following a "price reduction" in Article 90 give the right of interest from the time between the original payment of VAT and the reduction. However, Member States are obliged to repay with interest amounts of tax levied in breach of EU law (see *Littlewoods Retail Limited v HMRC* [2012] STC 1714 at paragraph 26).

92. HMRC say that there was no price reduction for a credit note to evidence in terms of Regulation 24 and it is therefore wholly inappropriate and invalid; and that a credit note with a single "reduction" for each year does not in any event meet the minimum requirements which are not merely technical but rather are consistent with securing the purposes of Regulation 38 (see *CCE v General Motors Acceptance Corporation (UK) plc* [2004] STC 577, Ch at paragraph 38).

Decision

93. In the opinion of the Tribunal, the submissions on behalf of KE are to be preferred. Those submissions rely heavily on the circumstances and reasoning in the *Carlton Clubs* case and, accordingly, as this is a lead case, where this Tribunal has accepted the reasoning in *Carlton Clubs*, it is repeated in full.

94. The facts in this case are not in dispute. The Tribunal noted that whereas HMRC claim, as a matter of fact, that no changes had taken place, they had nonetheless invited claims to be made in the Business Brief and Notices.

Notices

95. The Tribunal consider that the proper interpretation of the Notices issued prior to Business Brief 07/07 on February 2007 is that VAT was to be calculated on a game basis and that participation fees were taxable in full, even although additional prize money was funded from participation fees. The Business Brief 07/07 stated that the participation and session fees should be properly calculated on a session basis, which was confirmed by Sections 3.2 and 3.3 of the September 2007 Notice which also retained the game basis for an additional (or "flyer") game. Neither the Notice nor the Business Briefing declared that either basis was wrong or unlawful and HMRC expect and expected taxable persons to follow their guidance.

96. KE in applying the guidance set out in the Business Briefing and Notice, followed what the notice said, albeit retrospectively and, whether or not under protest, made a claim and sought a ruling from HMRC on the matter, by means of an adjustment to their 12/12 VAT return, which was to refuse payment. The Tribunal accept that HMRC's powers to give public guidance under its administrative powers cannot alter the obligations of a taxable person under the UK's VAT legislation nor make a greater amount of output tax due from any taxable person than would have been properly due if a notice had never been published.

97. The Tribunal consider that when interpreting the position pre-Business Brief 07/07 and the Notice of September 2007 the line was drawn at game level rather than at session level for calculating the tax due on participation fees.

Supply

98. The Tribunal consider that the redrawing of that line did affect the calculation of the consideration which in turn affected the calculation of the taxable amount and consequently the VAT. In changing the basis from a game basis to a session basis, the amount of VAT reduced and in applying that reduction it did increase the amount which KE could take for itself, in effect recouping participation fees used to top up prizes. HMRC were unable during the hearing to explain to the Tribunal how on an accounting basis, using double entry bookkeeping, a reduction in the VAT would not result in an increase in the participation fee income, given that the prize money remained unaltered. The Tribunal were of the view that a reduction in the amount of VAT payable, therefore, increased the participation fee amount actually obtained by

KE for itself from its customers in return for its supplies of bingo and as the amount of VAT had reduced so had the taxable consideration.

99. As stated in *Carlton Clubs*, the VAT regime focuses on supply and consideration for the supply. There can be a single supply and multiple considerations, multiple supplies and a single consideration. The consideration may have several components; some may fall within and some outwith the scope of the VAT regime. How a transaction is analysed will affect the nature and extent of the supply and the amount of the consideration.

100. The activity of playing bingo can be analysed as a single supply for each game with one consideration paid at the outside of the session, or, alternatively, the activity can be analysed as a single supply of a session of bingo for a single consideration. The supply for an overall session in itself can be broken down into components for each game within the session. Further analysis is then required because part of the sum paid by the customer is stake money which falls outwith the scope of the VAT regime.

101. Whichever analysis applies depends on where the line is drawn with reference to the supply on the one hand and the consideration on the other. Supplies may be globalised to a lesser or greater extent or not at all. The drawing of the line at any particular point is not always obviously correct or obviously wrong.

102. In *H J Glawe*, it was held that VAT is a tax on turnover and, in relation to amounts paid into a gaming machine, the turnover was the amount that the taxpayer was able to remove from the machine. The principle of individual taxation (ie that each supply should give rise to a separate VAT charge which is proportional to the price paid) was met by regarding each payment as consisting of two components.

103. In *First National Bank of Chicago*, a case relating to a bank's foreign exchange transactions, the problem was to identify the consideration received by the bank as it charged no actual fee or commission for a large number of transactions carried out. The solution was to regard the taxable amount as the net result of its transactions over a given period of time.

104. In KE there was no dispute that the calculation had been on a game basis and was then recalculated on a session basis. The figures are not in dispute.

Regulation 38

105. Any change in consideration is bound to be retrospective in nature. KE had in accordance with HMRC's guidance changed the consideration for the supply of the right to participate in cash bingo sessions over a period between 1996 and 2004. The Tribunal considers that such a change falls within the scope of Regulation 38 and is not an error. Regulation 38 applies where there has been an increase or a decrease in consideration evidenced by a debit or credit entry. The regulation does not restrict its application by reference to the means by which the consideration changes.

106. The Tribunal considered that it would be wrong to give the expressions, "a price reduction" in Article 90 and "decrease in consideration" within Regulation 38, unduly narrow interpretations, and that a purposive approach should be adopted in circumstances where the consideration paid for the supply of bingo was of a mixed nature, being partly the stake fee and partly the participation fee. An even more narrow view, might be to consider that the amount KE actually obtained from its customers included the stake money; the stake money being simply a cost that a supplier of bingo has to bear in order to provide a supply. *H J Glawe* and guidance produced by HMRC, however, clarified that this was not the case and that only participation fees and not stake money were to be the subject of VAT, this being justified "because nothing is supplied for it".

107. The Tribunal consider that whereas there was no change in the fixed payment made by customers, there was a change in the amount of the participation fee obtained by KE from its customers and, consequently, a price reduction within the meaning of Article 90. The Tribunal considered that interpreting Regulation 38 to require a decrease in consideration as meaning a customer has to actually pay less is similarly too narrow an interpretation.

108. The Tribunal, therefore, accept KE's submissions that there does not need to be a requirement to actually pay less, and therefore a payment back to the customer, in order to have a Regulation 38 claim. As KE say, it is possible for a taxpayer to have a VAT liability before being paid by customers and that liability may nevertheless require adjustment. The heading of Regulation 38 is "Adjustments in the course of business" and the regulation refers to an increase or decrease in consideration for a supply. It makes no specific requirement for an actual payment to be made.

109. The Tribunal, accept KE submissions, on the Advocate General's opinion in *Freemans* that where there was no change in consideration, the taxpayer did not have to show a refund to demonstrate an alteration, and on Regulation 24 which in defining "increasing consideration" in terms of a credit or debit note, was the antithesis of an actual payment.

110. The Tribunal consider that the calculation on a game basis was in accordance with the HMRC administrative directions and was, therefore, correct and valid and that the calculation on the session basis was also in accordance with HMRC administrative directions and must also be correct and valid. The sums properly attributable to the participation fees were also correctly calculated and the basis of calculation has been accepted and settled in relation to different return periods. Where these calculations have been changed or adjusted by moving from a game basis to a session basis, there must have be a decrease in the consideration properly attributable to the supply of the right to participate in a bingo session.

111. *Carlton Clubs* considered the case of *Elida Gibbs* when considering whether the fact that the amount paid by the customer had not changed in the sense of a money off or cash back coupon being presented to the manufacturing company but where the sums received by the manufacturing company from the wholesalers, to whom they supplied the goods, did not change. The *Carlton Clubs* Tribunal considered that it was

irrelevant that the amount paid by the customer had not changed because it was in two components, one being the consideration for a supply which falls within the VAT regime and the other which did not. Consequently, they said the amount of each component had changed as the stake money becomes greater and the consideration becomes less by equal amounts. This Tribunal does not accept that the stake money has actually become greater but what has changed is the payment that is within the VAT regime which must be viewed in terms of the general principle that a trader should not pay VAT on a sum which is greater than the consideration ultimately received for the supply in question. This Tribunal considers that the consideration for the supply in question is the amount which KE can take for itself. It is that which changed and not the stake money.

112. The Tribunal considered Section 19(4) VATA and whether it provides for an initial or provisional amount to be ascertained and then for that amount to be revisited by the supply at a later date. HMRC's submission was that it is clearly applicable to establishing the consideration for a supply at the time at which it is made. The Tribunal consider that it would be to give this provision too narrow and restrictive an interpretation to prevent its application when making a retrospective calculation of tax, in circumstances where there was no error. The Tribunal does not consider that KE were in error by using the game basis for eight years and then by the route of HMRC guidance changing to the session basis; which required to be a deemed basis where "a supply of any goods or services is not the only matter to which a consideration in money relates".

113. The Tribunal consequently accepts that the application of Section 19(4) VATA in KE's circumstances means it is necessary to carry out a deeming process to assist in the factual process of apportioning the payment made by a new customer into two parts and, furthermore, that there can be adjustments to deemed considerations in the same way as there can be to an alteration of a consideration in terms of *Elida Gibbs*. The deemed consideration was arrived at by using a new methodology which led to a decrease in consideration for the taxable supplies and that decrease was given effect to by the issue of a credit note in the 12/12 period.

114. Dealing with a deemed consideration, does not affect the principles applied in *Elida Gibbs* that (i) the taxable amount collected by the tax authorities cannot exceed the consideration paid by the final consumer, and (ii) the principle of neutrality born out of Article 11C (iii) of the Sixth Directive which provides that, where the price is reduced after the supply takes place, the taxable amount is to be reduced accordingly.

115. The distinction made is between the sum received from bingo customers which did not change and the consideration for the taxable element of the supply which was reduced by the participation fees used to top up or provide additional prize money. The VAT now found to have been overpaid represents the VAT element of the participation fees used as top up or additional prize money which is not part of the VAT regime.

116. HMRC say that to come within Article 90 there has to be a change in the relationship and the customer must get something back; that Article 90 is not

concerned with events in general but with specific invents being cancellation, refusal or total or partial non-payment or where the price is reduced after the supply takes place. They say that KE cites no authority which supports its contention that every calculation of reattribution is within the scope of Article 90 and that *Carlton Clubs* also cites no such authority. The Tribunal consider that in relation to supplies of bingo where it is impossible to make a payment back to each and every participant in a bingo session, retrospectively, this sufficiently distinguishes those cases put forward, where it is possible.

117. Different considerations apply for bingo supplies because of the nature of supply and the Tribunal agrees with the Advocate General's opinion in *H J Glawe* that gaming transactions are "ill-suited to value-added tax" and consequently that the court "must seek an interpretation which is consistent with the aims and principles of the common VAT system". As in *H J Glawe*, it would have been impossible to have repaid the players of the machines if there had been an error in calculating the amount that was divided between the physically separated boxes for the stake money and the other for the amount the supplier could take for his own.

Mistake or Recalculation

118. The Tribunal does not consider that KE made a mistake by using the game basis, which HMRC published as guidance, and then change to the session basis; again, in terms of HMRC's published guidance nor that it made an error in doing so. There was no evidence that either basis was unlawful and, therefore, the Tribunal concludes that they were both lawful. As a result of the nature of bingo supplies, being a mixture of a vatable supply and a non-vatable supply to customers who can no longer be contacted or have their contracts amended after the supply has taken place, there was an alteration in the calculation of the deemed elements of the consideration with the result that a lower figure was treated as the taxable element of the consideration, in place of the earlier, higher figure.

119. In the case of KE, as a result of the nature of bingo supplies, there can be no further agreement between the parties which has the effect of altering the overall price, in terms of Sections 19 of VATA and Regulation 38.

120. The Tribunal considered that the amount KE actually obtained from its customers in return for its supplies of bingo being the amount it could retain for itself (and not the amount of the stake which was given in prizes) did change. That amount had changed and the Tribunal considered that HMRC were incorrect in their submission that the amount of money its customers paid to KE, by which they mean the stake money *and* the participation fee, or in their words "the fixed payment", in return for bingo supplies was the *only* [emphasis added] relevant factor in determining whether there had been a price reduction in terms of Article 90 and a decrease in the consideration for a supply in terms of Regulation 38.

121. The Tribunal accepts HMRC's submission that there was no change in the amount of prizes paid by KE to customers. It is how the accounting for the source of the prize money paid affects the level of the taxable supplies that has changed.

122. The Tribunal consider that bingo supplies, like foreign exchange transactions where no fees or commissions are charged, require a purposive interpretation of the relevant legislation which is consistent with the aims and principles of the common VAT system. The supply of cash bingo has, as noted, a number of distinguishing features principally that part of the amount paid is stake money and is neither due to the supplier nor is it subject to VAT; that an analysis the nature of the supply requires a line to be drawn with reference to supply on the one hand and consideration on the other hand; that reduction in price cannot be paid back or refunded to customers; there are no contracts that can be amended; and that any alterations or recalculations may require a deeming process in order to arrive at the taxable consideration.

123. The Tribunal considered the decision in *Kraft Foods Polska,* that the need for a supplier to obtain acknowledgement from his customer of a receipt of a correcting invoice was wholly impractical in relation to the supply of cash bingo; and in considering *Freemans*, that this case was looking at a price and discount at the time of supply of the goods and not, in terms of Article 90, after the supply had taken place. Consequently, the ECJ case law as authority for the proposition that the exclusive focus of Article 90 is on a real reduction in price, in the sense of some actual reduction in what the suppliers actually obtained from its customer after the supply has taken place, can be distinguished in the circumstances of the supply of cash bingo. There could not practically be a real reduction in the fixed payment but what was achieved as a result of the change from the game basis to the session basis was a reduction in VAT and as a result a decrease in the consideration that was taxable.

124. The Tribunal considers that where an apportionment is necessary to ascertain the taxable amount and where that changes the calculation of the taxable amount it follows that there has been a change in consideration within the meaning of Article 73 or a price reduction within Article 90.

125. The aim of Regulation 38 is to provide a mechanism for adjustments in the course of business where there is a decrease in consideration for a supply and given effect to in the business accounts of the taxable person. The Tribunal consider that Regulation 38 is applicable.

126. The Tribunal consider that the price was reduced after the supply took place and accordingly Article 90 applies, notwithstanding that because of the distinctive nature of cash bingo supplies no actual payment was made back to customers.

Credit Note

127. Regulation 24 of the 1995 Regulations requires an increase or decrease in consideration to be evidenced by a credit or debit note or any other document having the same effect. The Tribunal in *GMAC* (2003) VAT decision 17990, considered the issue of satisfying the credit note requirements of Regulation 38. The Tribunal observed that this requirement had to be construed in a way that produced a result which complied with Article 11C(1) as otherwise the tax payer would not be able to rely on community law and rights which could not be cut down by conditions imposed by Member States. The Tribunal considered it was not essential that the

document be passed from the issuer to the person receiving the credit or that the VAT element need be identified in the document evidencing the decrease in price. The decision was upheld on appeal ([2004] STC 577) and endorsed this reasoning and observed that the purposes of Regulation 24 are (i), to ensure that increases in the consideration are duly recorded by the taxable person, (ii), to guard against fictitious claims for adjustments and (iii) to enable the Commissioners to verify adjustment entries in the taxable person's VAT account by inspecting that person books and accounts.

128. In relation to KE's credit note the Tribunal are satisfied that the decrease, in this case, is duly recorded, that it is not a fictitious claim and that HMRC are able to verify the adjustment. Accordingly, the Tribunal considers that KE meets the requirements of Regulations 24 and 38 construed in the light of and having regard to the purpose of Article 11C(1) of the Sixth Directive.

129. As was stated in *Carlton Clubs*, it is difficult to envisage what more KE could have done to comply with the requirement to produce evidence of the decrease in consideration in accordance with Regulations 38 and 24. It was not possible to identify individual customers; it was therefore not possible to issue a credit note to any such customers and it seems unlikely that any of the customers would have been taxable persons. The change in consideration has been recorded. There is no suggestion of a fictitious claim being made. The entries have been verified by inspection by HMRC.

130. Accordingly, the requirements of Regulation 24, as they relate to the issue in KE, should not be construed in an unduly technical manner which would not meet the purposes of the regulation, which in turn is to give effect to the general principle in Article 11C(1) of the Sixth Directive that the taxable amount is to be reduced accordingly where the price is reduced after the supply takes place.

131. The proper interpretation of the notices and leaflets issued prior to the Business Brief 07/07 issued in February 2007 is that the notices required VAT to be calculated on a game basis and The Business Brief 07/07 and a subsequent Notice required VAT to be calculated on a session basis. The Tribunal considered that neither the game basis nor the session basis were unlawful. They were simply different methods of calculating the tax liability and were different methods put forward by HMRC in their guidance. When the session basis was introduced the game basis was retained so it was not as though the game basis became objectionable to HMRC at that time.

132. This change, the drawing of the line at session level, resulted in a change in the only part of the fixed payment made by a customer that was subject to VAT and which is the subject of VAT legislation. In terms of KE's internal accounting it was due to pay less VAT under the session basis than it was under the game basis. The Tribunal consider this was an adjustment in the course of business being a decrease in consideration for a supply which was given effect to in the business accounts of KE by means of compliance with Regulation 24.

133. Articles 73 and 90 have direct effect and a confirming interpretation of Regulation 38 must be adopted requiring that it be interpreted as far as possible in the light of the wording and purpose of Article 90 in order to achieve the result pursued by the Directive. The Tribunal consider that such an interpretation should not be unduly narrow and that a purposive approach should be adopted. The supply of cash bingo has a number of distinctive features and as the Advocate-General stated in his opinion in *H J Glawe*, gaming transactions are "ill-suited to taxation on a value added basis" and consequently "the court must seek an interpretation which is consistent with the aims and principles of the common VAT system" (see paragraph 16 *et seq.*).

134. The general principle of the VAT system is that a trader should not pay VAT on a sum which is greater than the consideration ultimately received for the supply in question and the Tribunal consider that consideration to be the participation fee which altered as a result of a change from calculation on a game basis to a session basis.

135. The internal credit note constitutes sufficient compliance with Regulations 24 and 38 construed in the light of having regard to the purpose of Article 11C(1) of the Sixth Directive.

136. The Tribunal consider, for the reasons stated, that the recalculation of the value of the participation fees paid by KE's customers on a session basis rather than a game basis, as stated by the Commissioners to be the correct approach in their Business Brief 07/07 resulted in a "decrease in consideration for a supply which includes an amount of VAT" which occurred after the end of the prescribed accounting period in which the original supply took place, within the meaning of Regulation 38 of the 1995 Regulations.

137. The appeal is allowed.

138. 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.

W Ruthven Gemmell

TRIBUNAL JUDGE

RELEASE DATE: 18 July 2016

Appendix 1

[2011] UKFTT 542 (TC)

TC01389

Appeal number: TC/2010/05384

Value Added Tax; Bingo; method of calculation of VAT liability; change in policy by HMRC; retrospective claim; basis of claim; change of consideration; effect of issue of internal credit note; Value Added Tax 1994 ss19, 24, &80; Value Added Tax Regulations 1995, Regulation 24 and 38 EU Sixth Directive Article 11A.1(a), 11C.1; Appeal allowed.

FIRST-TIER TRIBUNAL

TAX

CARLTON CLUBS PLC **Appellant**

- and -

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

TRIBUNAL JUDGE: **J. GORDON REID Q.C., F.C.I.Arb.**
Member: **PETER SHEPPARD F.C.I.S., F.C.I.B., ATII**

Sitting in public at George House, 126 George Street, Edinburgh on 7, 8, & 9 June 2011

Roderick Cordara Q.C. Essex Court Chambers, London, for the Appellant

Sean Smith, Advocate, Axiom Advocates, for the Respondents

DECISION

Introduction

1. **Bingo** is the subject of this appeal. The Appellant operates bingo clubs at which its customers compete *inter alia* for cash prizes. Throughout the eighties until 2007, and, in particular, between 5 December 1996 and 31 December 2003, the Appellant calculated its VAT liability on what is known as the *game by game* basis. Following the publication by HMRC of Business Brief 07/07 on 1 February 2007, the Appellant recalculated its liability on what is known as the *session* basis, and gave effect to this (for the period between 1996 and 2003) in its VAT return for the period ending December 2009. This entailed an adjustment of £718,732.32 to Box 1 of the return showing output tax due. The Respondents (HMRC) have reversed the adjustment. The Appellant sought reconsideration of that decision, which was upheld, and now appeal to this Tribunal.

2. A Hearing took place at Edinburgh on 7, 8, and 9 June 2011. The Appellant was represented by Roderick Cordara Q.C. (of the English Bar). Mr Cordara led the evidence of George Carter, C.A., the Appellant's financial controller. He also led the evidence of Jim Maclean an assurance officer with HMRC. HMRC were represented by Sean Smith, advocate. He led no evidence. Both parties produced Skeleton Arguments. A joint bundle of productions was also produced.

3. Finally, by way of introduction, we record that we refused, at the end of Mr Carter's evidence-in-chief on the morning of the first day, an application by Mr Smith to adjourn the Hearing on the ground that he had not been able to obtain instructions from HMRC on their policy in relation to the interpretation of certain HMRC notices and documents. While we had some sympathy for Mr Smith's position, we took the view that, balancing the interests of justice and fairness, progress could and should be made on other aspects of the appeal, and if necessary, Mr Carter could be recalled to give further evidence. In the event, that was not required, and Mr Smith was able to present and argue the case for HMRC without any apparent disadvantage. No further request for an adjournment was made and the hearing proceeded to a conclusion in the usual way.

Bingo and VAT-General Background

4. The Appellant operates a number of bingo clubs in Scotland and in the north of England. Cash prizes are paid to those who participate in games of bingo and win. A customer who wishes to participate, pays a fixed sum to participate in a session of bingo. This is known as the session fee. Payment entitles the customer to participate in a session which may last for about two hours and consists, usually, of fifteen games of Bingo. The customer, in exchange for the fixed sum, normally about £10 or £11, typically receives books of tickets or cards which contain lists of numbers for each game.

5. We were provided with a sample. This comprised (i) a book of ten tickets or cards of different colours-a different colour for each of the ten games, (ii) a book of two gold cards, one for each of two games, (i) one ticket or card described as the

national game, and (iii) a book of two tickets or cards described as *Carlton Connection.* This pack or cache of tickets or cards thus makes up a session comprising fifteen games of bingo. The *national game* is a single game in which clubs owned by various operators in England and Scotland link up to play a single simultaneous game; this provides a large prize culled from the stakes of all the players from the various clubs taking part. It is sometimes referred to as Linked Bingo. The *Carlton Connection* games are similar to the *national game* but restricted to a link-up of the Appellant's clubs.

6. Each ticket for each game is divided into six blocks. Each block contains fifteen different numbers randomly set out from 1 to 90.

7. Over and above the session fee, some of the Appellant's clubs charge an admission fee to gain entry to the club. This is entirely separate from the session fee. It is subject to VAT. There is no dispute about this. Accordingly, the admission fees do not feature at all in the issues we have to resolve, and need not be mentioned again.

8. Although the customer pays a single session fee to participate in a bingo session, the sum paid has two components. The first is what has been referred to as the *participation fee.* This is the consideration received by the Appellant for the supply to its customer of the right to play bingo for cash prizes. VAT is payable on this component. The second component is the *stake.* This is the contribution which each customer makes towards the cash prizes paid out to the winner of each game in the session. This component or element is outside the scope of the VAT regime.

9. While the session fee will, so far as the customer is concerned, generally be the same fixed sum, the split between the *participation fee* and the *stake* for each game will vary depending on the number of customers participating in a session and the amount of prize money to be paid out for each game. Thus, the fewer the number of customers for a session, the lower the amount of total stake available for the winner. In such circumstances the Appellant will top up the stake money to enable any advertised or guaranteed cash prize for a game to be paid out.

10. Thus, if there were 100 customers each paying £10 for a session of fifteen games and the first game has a guaranteed cash prize of £200, with an allocated ticket price of £2 for say the first game (i.e. £200 in total for 100 tickets), the participation fee might be £0.25 producing gross participation fees of £25 [100 x £0.25] (this sum is VAT inclusive); the stake per ticket would be £1.75 producing gross stakes of £175 [100 x £1.75]; additional prize money of £25 would be required to bring the prize money up to £200. On this game, a loss of £25 would be made or at least the gross participation fee would be reduced to nil. If the prize money were greater than £200 then top up prize money would have to be greater than £25 and thus greater than the allocated participation fees.

11. If, on the other hand, the cash prize for the second game is £100 and the allocated ticket price is £1.50 (i.e. £150 in total for 100 tickets), the participation fee might be £0.50 producing gross participation fees of £50 (this sum is VAT inclusive); the stake

per ticket would be £1 producing gross stakes of £100; no additional prize money would be required to be added to bring the prize money up to £100.

12. If these two games comprised the whole session, then the total VAT inclusive gross participation fees amount to £75 (£25 + £50) if one simply adds up the gross participation fee for each game. This is essentially the *game by game* basis of calculation.

13. If, on the other hand, the *session* basis is used, the gross participation fees are calculated by adding up the gross ticket sales (£200 + £150) i.e. £350, and deducting therefrom the total prize money (£200 + £100) i.e. £300; this produces total VAT inclusive gross participation fees of £50 (£350-£300) instead of £75. The different result arises because the additional prize money which had to be added in the first game is set off against the total participation fees to produce a net total VAT inclusive participation fee for the whole session. In other words, any negative balance on an individual game is carried forward to other games in the same session. However, there is no set off or consolidation *between* sessions only *within* a *session.*

14. From the foregoing, it can be seen that the session basis of calculation is more beneficial to the Appellant. Their case essentially is that for many years they accounted for VAT on turnover on the basis of a *game by game* calculation, as they thought that was what HMRC and their predecessors required. The position changed they say, after the publication of the 2007 Business Brief. That, they say, enabled them to adopt the *session* basis of calculation and make, in effect, a retrospective claim for overpaid VAT over many years. In essence, the Appellant's position, as expressed by Mr Carter in evidence, is that the inability to include the top-up or additional prize money in the VAT calculations came to an end and enabled a more favourable method of calculation to be made and applied retrospectively.

15. At a practical level, the bingo club manager has to decide immediately after the sale of tickets for a particular session closes and immediately before the bingo session begins, what the prize money for each game will be (except insofar as guaranteed by previous advertisement). Although the time for allocation between participation fee and stake is short, the manager's allocation generally proceeds along the lines of the split for the same session for the same time of day of the previous week. There is thus a broad template built up by experience of likely custom for particular sessions. For example a session on Tuesday morning may attract few customers compared with say a Wednesday afternoon. A guaranteed prize might be offered to attract customers into the club.

Further Details and History

16. Mr Carter joined the Appellant in 1982. One of his functions was to introduce computerisation at head office level. Computerised systems were introduced at club level in about 2000. These computerised systems duplicated the systems already in place. The pre-existing system calculated VAT liability on a *game by game* basis.

17. There was at least one *Control Visit* by HMRC or their predecessors. The nature, extent and scope of that visit is unclear, although it must have been obvious from any reasonable examination of the Appellant's records that the *game by game* method of calculation was being used. Whatever the extent or intensity of HMRC's examination of the Appellant's records, no criticism of the Appellant's use of the *game by game* basis was made.

18. Between the periods in issue, namely October 1996 and December 2003 (the "Accounting Periods in Issue"), and before then, the Appellant calculated the value of participation fees on a game by game basis as described above. Mr Carter was not familiar with the HMRC Notices and Business Briefs referred to below although he did recollect the Business Brief dated 1 February 2007.

19. Following the issue of Business Brief 07/07 on 1 February 2007, the Appellant submitted claims in respect of the overpayment of output tax in the accounting periods between April 1973 and September 1996 and from December 2003 to December 2006. These claims were paid by HMRC. They proceeded on the *session* basis of calculation.

20. It may seem odd that earlier and later claims have been resolved. However, in 1996 a three year time limit was placed on tax claims in relation to the refunding of understated or overpaid VAT. In 1997 this three year cap was extended to late input tax claims. The legislation contained no transitional period for input tax claims. In broad terms, the relevant legislation was held to be unlawful by the Court of Appeal and the House of Lords in *Fleming t/a Bodycraft*[1]. The absence of a transitional period to enable persons with accrued rights to make their claims, infringed Community law principles of effectiveness and legitimate expectation. The result was that a transitional period was created by s121 of the Finance Act 2008, which provided *inter alia* that output tax overpaid in accounting periods ending before 4 December 1996 could be made before 1 April 2009. That left the claim, to which this appeal relates, outstanding.

21. The Appellant sought advice from Ernst & Young. Thereafter, on 22 December 2009, the Appellant issued an internal accounting document which gave effect to the recalculation of their VAT liability for the Accounting Periods in Issue on the *session* basis. It would not have been practicable for the Appellant to issue individual credit notes to all of its customers, who would by that stage, have been largely unknown and/or untraceable.

22. The internal accounting document was on the Appellant's headed notepaper and was in the following terms:-

"22nd December 2009

INTERNAL CREDIT NOTE

---

[1]2008 1 WLR 195

To sales and VAT 5th Dec 1996-Q4 2003 subject to adjustment of VAT on "Added Prize Money" following sessional calculation per business brief 07/07

Net Sales	£4,159,802.97
VAT thereon	£ 727.965.52
Gross Sales	£4,887,768.49"

The document also contained what appeared to be Mr Carter's reference.

23. By letter to HMRC dated 24 December 2009, the Appellant intimated that it would be making an adjustment to its VAT return for accounting period 12/09 within the meaning of Regulation 38 of the VAT Regulations 1995. The letter notes that the Appellant has made the appropriate adjustments for periods from 1973 to 4 December 1996 and for periods from the first quarter of 2004 to 29 April 2009 when cash bingo became exempt from VAT. The letter records that these have already been settled with HMRC. The letter continues:-

> This letter is concerned with adjustments to be made by Carlton in accordance with the requirements of regulation 38 for sums received from 5 December 1996 to the end of Q4 FY 2003. In those periods, Carlton attributed the payments received from customers to its taxable participation fees on a game by game basis and accounted for VAT to HMRC accordingly.
>
> Following the issue of Business Brief 07/07, Carlton has now revisited these calculations. Applying the calculation on the proper basis has resulted in a reduction in the consideration charged to customers over the material periods (and a corresponding increase in the stake money provided by them). Over the whole of this period, the total reduction in consideration is £4,887,768.49 which includes VAT of £727,965.52.

24. This re-calculation was given effect to in the Appellant's return for the period to December 2009 submitted to HMRC towards the end of January 2010. The consideration for supplies was reduced by £727,965.52 and led to a net repayment of £530,487.18 being sought in that return.

25. On or about 15 February 2010, Mr Maclean and a colleague visited the Appellant's premises at Inverness. Mr. Maclean checked the Appellant's calculations which he accepted subject to the sum of £727,965.82 being reduced by £9,233.20 and the net sum repayable being reduced accordingly. The Appellant accepted the modification to their figures. They gave effect to it by producing a back-dated *Internal Debit Note* dated 22 December 2009 in the following terms

INTERNAL DEBIT NOTE

To Correct Financial Year 2003: Sales and VAT 5th December 1996-Q42003 subject to adjustment of VAT on "Added Prize Money" following sessional calculation per business brief 07/07

Net Sales	£52,761.16
VAT thereon	£9,233.20
Gross Sales	£61,994.36

26. The figures are now common ground. Mr Maclean examined what he described as the *non time barred* part of the claim. That claim was calculated on the same basis as the present claim relating to the Accounting Periods in Issue. Mr Maclean accepted this was so.

27. By letter to the Appellant dated 18 February 2010, HMRC (per Mr MacLean) intimated that they considered that Regulation 38 was not engaged; and that the underlying consideration had not changed. The letter notified a formal adjustment to the Appellant's return for the accounting period 12/09; this effectively rejected the Appellant's Regulation 38 adjustment so that payment of £188,245.14 was required instead of repayment. Mr MacLean made a further visit on 25 February 2010 and thereafter engaged in correspondence with the Appellant and Ernst & Young about the claim. By letter dated 18 March 2010, Ernst & Young sought a reconsideration of the HMRC decision contained in their letter dated 18 February 2010. By letter dated 25 May 2010 to the Appellant, HMRC affirmed its earlier decision. The basis of the affirmation was that there was no change in the underlying consideration.

Legislative Framework

28. Section 19 of VATA provides *inter alia* as follows:-

> (2) if the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of VAT chargeable, is equal to the consideration.
>
> (4) Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

29. The Value Added Tax Regulations 1995 provide *inter alia* as follows:-

> 24 "increase in consideration" means an increase in the consideration due on a supply made by a taxable person which is evidenced by a credit or debit note or any other document having the same effect and "decrease in consideration" is to be interpreted accordingly.
>
> 38 (1) This regulation applies where-
>
> (a) there is an increase in consideration for a supply, or
>
> (b) there is a decrease in consideration for a supply,
>
> Which includes an amount of VAT and the increase or decrease occurs after the end of the prescribed accounting period in which the original supply took place.
>
> .....
>
> (3).....the maker of the supply shall
>
> (a) in the case of an increase in consideration, make a positive entry; or
>
> (b) in the case of a decrease in consideration, make a negative supply,
>
> for the relevant amount of VAT in the VAT payable portion of his VAT account
>
> .....

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

30. Article 11A.1(a) of the Sixth Directive provides *inter alia* as follows:-

1 The taxable amount shall be:

(a) In respect of supplies of goods and services..... everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies .....

31. Article 11C.1 of the Sixth Directive provides *inter alia* as follows:-

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

However, in the case of total or partial non-payment, Member States may derogate from this rule.

HMRC Public Notices

32. On 1 January 1984 HM Customs & Excise published VAT Leaflet No 701/27/84 entitled *Bingo*. This document was not in the documents produced for the Hearing but was referred to in a later publication. The Tribunal requested it and it was duly produced.

33. Paragraph 4 confirms that in relation to cash bingo the stake which goes back to the players as prizes is outside the scope of VAT. Paragraph 5 provides that the taxpayer must account for VAT on the gross session and participation charges even if the taxpayer finances some of the prizes from them. This instruction is consistent with the *game by game* method of calculation illustrated above. This instruction could not be complied with if VAT liability is calculated on a *session* basis as illustrated above. Paragraph 7 provides that all session and participation charges are taxable in full even if added prizes are funded from those charges.

34. On 1 March 1990 HM Customs & Excise published VAT Leaflet No 701/27/90 entitled *Bingo*. This Leaflet replaced the 1984 Leaflet. Paragraphs 7 and 8 relate to Cash Bingo. Paragraph 7 notes that session and participation charges at cash bingo promoted at clubs and other premises which are not licensed under the Betting Gaming &Lotteries Act 1968 are exempt from VAT, whereas if the premises are so licensed, the session and participation charges are standard-rated. We are concerned with licensed premises.

35. Paragraph 7 also confirms that the stake or card money which goes back to the players as prizes during the game for which it is paid is outside the scope of VAT, as nothing is supplied for the stake payment. It notes that any admission charge is standard-rated.

36. Curiously, the Leaflet only deals with the calculation of the value of exempt supplies in relation to cash bingo. However, it is interesting to note that at paragraph

8, the leaflet directs that in calculating the stake money, any participation charges which are used as additional prize money are to be excluded. This is consistent with what the Leaflet has to say about Prize Bingo (also exempt) at paragraph 6(b)(ii) where it provides that participation charges used as additional prize money are to be excluded from the calculation of the value of the exempt supply.

37. In June 1997, HM Customs & Excise published Notice 701/27/97 entitled *Bingo*. As with paragraph 8 of the 1990 Leaflet, paragraph 4.1 of the 1997 Notice describes the calculation where the session fees are exempt and contains the same instruction that any participation charges which are used as additional prize money are to be excluded.

38. In March 2002, HM Customs & Excise issued Notice 701/27. This cancelled and replaced the 1997 Notice. Paragraph 1.1 notes that the technical content of the 1997 Notice has not been changed. The method of calculation is the same (section 3.2) as earlier Notices. In calculating the value of stake money given back to the players as prizes, the notice provides (at section 3.2):-

> Step 1
>
> Add up the value of stake money given back to players as prizes. This is the value of stake money you received (do not include participation charges used as additional prize money)
>
> Step 2
>
> Add up the total value of charges you made for participation and session charges and stake (do not make any deduction for bingo duty payable)
>
> Step 3
>
> Deduct step 1 from step 2 to give the value of your participation and session charges

This section does not distinguish between taxable and exempt supplies.

39. On 1 February 2007, HMRC issued Business Brief 07/07 entitled *Cash Bingo: Accounting for VAT on Participation and Session Fees*.

40. This document begins with a statement that it clarifies HMRC policy on how to calculate participation and session fees paid by cash bingo players. It notes that HMRC have received enquiries from some bingo promoters performing VAT calculation on a *game by game* basis asking whether they are acting correctly. This is said to have prompted the issue of *this clarification*. The document further provides *inter alia* as follows:-

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

the stake money received in the session in order to meet guaranteed prizes, that additional money cannot be used to reduce the value for VAT of the participation and session charges paid for taking part in the that session. [underlining added]

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

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

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

Notice 701/27 Bingo will be updated.

Participation and session fees/Making claims or adjustments

MAKING CLAIMS OR ADJUSTMENTS

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

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

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

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

41. It is difficult to understand what is meant by the underlined passage unless it is a reference to other sessions. It cannot be a reference to other games in the same session otherwise there would be no difference between the *game by game* basis of calculation and the *session* basis.

42. In September 2007 HMRC issued Notice 701/27 entitled *Bingo*. It cancelled and replaced the 2002 Notice. At section 1.3 it notes *inter alia* that it clarifies the procedure for accounting for VAT on participation and session charges on bingo. The Notice provides *inter alia* as follows:-

This notice cancels and replaces notice 701/27 Bingo (March 2002)

.....

3 ACCOUNTING for VAT

3.1 HOW DO I APPORTION COMPOSITE CHARGES

You may make one composite charge to each player for admission, participation and session charges, and stake money. To work out your VAT you will need to allocate the amount of your charge to each part.

10

You must first calculate and deduct any amount due for admission. The value of admission is standard-rated for VAT-see paragraph 2.2. You will then need to work out the value of your participation and session charges using the formulae in paragraphs 3.3 and 3.4. The liability of participation and session charges is explained at paragraph 2.1.

3.2 SHOULD I CALCULATE THE VAT ON A GAME BY GAME BASIS OR ON A SESSION BASIS?

When players pay to participate in all or part of a bingo session, the supply you make to them is the right to participate in the number of games during that session for which you have received payment. As the players cannot participate in further sessions unless they make further payment, the supply to the players is completed when the session ends. In these circumstances you should calculate the amount of VAT due on participation and session charges on a session-by- session basis.

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

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

3.3 WORKING OUT PARTICIPATION AND SESSION CHARGES FOR BINGO (CASH PRIZES)

You must carry out the following calculation for each session:

Step	Action
1	Add up the value of stake money given back to players as prizes. This is the value of stake money you received (Do not include participation charges used as additional prize money.)[underlining added]
2	Add up the total value of charges you made for participation and session charges and stake (Do not make any deduction for bingo duty payable)
3	Deduct step 1 from step 2 to give the value of your participation and session charges

Finally, we have noted that since the conclusion of the Hearing, HMRC have published Notice 701/29 Betting, gaming and lotteries (13 July 2011). It states that it replaces *inter alia* Notice 701/27 Bingo (March 2002), referred to above, and discusses the VAT implications of a wide range of games of chance and games which combine skill and chance. It has no bearing on the issues we have to decide.

Submissions

Appellant

43. The Appellant's argument was, in essence, that (i) historically, participation fees were calculated on a *game by game* basis in accordance with HMRC policy and directions in published Notices; these notices are administrative statements giving rise to a legitimate expectation that the *game by game* method was acceptable and indeed required (ii) HMRC policy changed in February 2007 and that change, and not a mistake or error on the part of the Appellant, required the participation fees to be calculated on a *session basis*; HMRC changed the parameters and the Appellants

adjusted the apportionment between participation fees and stake money accordingly; neither method is wrong, they just produce different results; the prohibition in the September 2007 Notice in relation to additional prize money (underlined above) must apply across sessions and not *inter* session otherwise it would make no sense; the context of the 2007 Business Brief makes that clear; however no such reading down applies to the earlier notices because the context of the 2007 Business Brief is absent; (iii) HMRC invited retrospective claims, (iv) for the Accounting Periods in Issue, the Appellant gave effect to this by issuing an internal credit note which gave rise to the resulting figures in its December 2009 VAT return in accordance with regulation 38 of the 1995 Regulations as there was a change in the consideration for the right to participate in the bingo sessions. In any event, there was overpayment of VAT and this was properly corrected by the issue of the internal *credit note*.

44. What has occurred, the Appellants contend, is a statutory deeming process which has led to the consideration being reduced retrospectively. That cannot be characterised as a mistake as no error was made at the time of the original calculation of the tax. Reference was made to s19 VATA and to regulation 38 of the 1995 Regulations. S19(4) related to a single payment with multiple functions; deeming is part of the process.

45. By challenging the credit note, HMRC were attempting to cut off the Appellant's access to its EU rights. Where suppliers have a large number of essentially anonymous final consumers in low value, high volume transactions, the HMRC approach would make it impossible or excessively difficult for traders such as the Appellants to access their EU rights under the Directives (*Marks & Spencer plc v C&EC 2002 STC 103 at paragraph 34; Societe Generale des Grandes Sources d'Eaux Minerales Francaises v Bundesamp fur Finanzen 1998 STC 981.* The Appellant's internal document had all the material characteristics of a credit note (*General Motors Acceptance Corporation (UK) plc v C&EC 17990 paragraph 44; and on appeal at 2004 STC 577 paragraph 38.* Even if the credit note falls outwith the scope of regulation 38, it nevertheless has effect, as a common and accepted everyday means of giving effect to agreed changes in consideration and to correct errors. Reference was made to Notice 700/45/2009 section 4.10. A section 80 claim was unnecessary and regulation 38 was not exhaustive and did not prevent a credit note being issued in the present circumstances.

46. Reference was also made to *General Motors Acceptance Corp (UK) plc 2006 VAT Decisions 19989, HJ Glawe Spiel-und Unterhaltungsgerate Aufstellungsgesellschaft mbH & Co KG v Finanzamt Hamburg-Barmbek-Uhlenhorst (Case C-38/93 1994 STC 543 paras 14-26, C&EC v First National Bank of Chicago (Case C-172/96) 1998 STC 850; C&EC v Littlewoods 2001 STC 1568 at paragraphs 8-23; Lex Services plc v C&EC 2004 STC 73; Oxfam 2010 STC 686; CGI Group (Europe) Ltd 2010 UKFTT 224; CR Smith Glaziers (Dunfermline) Ltd v C&EC 2003 STC 419 at paragraphs 23 to 29; Muy's en De Winter's Bouw-en Aannemingsbedriff BV v Staatssecretaris van Financien (Case C-281/91) 1997 STC 665 paragraph 12 (AG); Ampafrance SA v Directuer des Services Fiscaux du Val-de-Marne (Joined Cases C-177/99 and C-181/99) 2000 ECR 1-7013 paragraph 60; Jorian (nee Jeunehomme) v Belgium (Joined Cases 123/87 and 330/87 1988 ECR 4517.*

47. The authorities did not identify one correct answer as to how to apportion VATable and out of scope elements. There were a number of possibilities. Attribution of input tax in partial exemption cases illustrates this point. Here, the Appellant does not suggest that the pre-2007 *game by game* method was wrong.

HMRC

48. Mr Smith submitted that there has been no change in policy regarding the manner in which the operator should properly apportion the session fee between stake money and participation fee. Even if there has that does not amount to a change in consideration. He referred to *Elida Gibbs Ltd (Case 317-94) 1996 STC 1387*. There was no decrease in the sum properly attributable to participation in the bingo session. If it was correct to calculate the VAT liability on a *session* basis it was always correct to do so notwithstanding any advice from HMRC. He accepted that the prohibition on including additional prize money in the 2007 Notice should be read down so as to apply *inter sessions* but submitted that this interpretation should apply to the earlier notices too. On a session basis one simply deducts the prize money from the total participation fees. You do not need any pre-conceived notion of the stake if the *session* basis is used. If the HMRC advice in the Notices was wrong it should have been challenged and if VAT was overpaid it should have been reclaimed under s80 of VATA.

49. Regulation 38 cannot be used to turn what was not VAT into VAT and vice versa (*C&EC v McMaster Stores (Sc) Ltd 1996 SLT 935; The Robinson Group of Cos Ltd v C&EC VAT Decision 16081 (Manchester)*). There was no event giving rise to a change in consideration. At most there were two separate *deemings* of equal status. There is no overpayment if the first deeming is correct.

50. With regard to the *credit note* the document does not record the acceptance by both parties that any event triggering a decrease in consideration has occurred (*General Motors 2004 STC 577 at paragraph 38*). Moreover, the advice given by HMRC in Notice 700/45/2009 section 4.10 is inapplicable as the return for the prescribed accounting period had already been rendered.

51. The Appellant was in error in accounting for more output tax than was due. S80 of VATA makes provision for reclaiming overdeclared or overpaid output tax. The statutory defences such as unjust enrichment and time bar should not be capable of being by-passed by the issue of an internal *credit note*.

Discussion

52. We found both Mr Carter and Mr Maclean to be generally credible and reliable. Mr Maclean's evidence was actually led by Mr Cordara, and was not the subject of cross-examination.

Notices

53. We are of the view that the proper interpretation of the notices and leaflets issued prior to the Business Brief 07/07 issued in February 2007 is that these notices required

VAT to be calculated on a *game by game* basis. We recognise that the language is a little vague and ambiguous in places. We are doubtful whether it is appropriate to subject these notices to the same analytical processes normally deployed to construe legislation or a commercial document.

54. There is, however, at least one important thread which runs through these pre 2007 notices. It is the requirement that participation fees are taxable in full even although additional prize money is funded from participation fees. This can be seen in paragraphs 5 and 7 of the 1984 Leaflet. The 1990 Leaflet makes the same point in relation to exempt supplies. The 1997 Notice (section 4.1) is to the same effect. This is made even clearer in section 3.2 of the 2002 Notice.

55. The Business Brief published in February 2007 states expressly for the first time that participation and session charges should properly be calculated on a session by session basis. This is confirmed by sections 3.2 and 3.3 of the September 2007 Notice.

56. The prohibition, on including in the calculation participation charges used as additional prize money, must relate to other sessions (we understood counsel to be agreed on this) otherwise it makes no sense and there would then be no difference between the *game by game* basis and the *session* basis. The whole point of the two methods of calculation is that the *game by game* basis does not allow any set off at all of additional prize money funded from participation charges. The *session* basis allows set off at session level i.e. from one game to the next within a single session. It does not permit set off across different sessions. The two methods of calculation are illustrated above and in the appendix to this Decision. It is on the *session* basis of calculation that the Appellant's claims for other periods have been settled.

The Nature of the Supply

57. The VAT regime focuses on supply and consideration for the supply. There can be a single supply and multiple considerations, multiple supplies and a single consideration. The consideration may have several components; some may fall within and some outwith the scope of the VAT regime. How a transaction is analysed will affect the nature and extent of the supply and the amount of the consideration.

58. The activity of playing bingo over say a two hour period can be analysed as a single supply for each game- i.e. fifteen supplies to each individual customer (or to the total number of customers participating as a group in one session) with one consideration paid at the outset of the session. Alternatively, the activity can be analysed as a single supply of a session of bingo for a single consideration.

59. Further, the analysis might break down the consideration for the supply of the overall session into components for each game within the session. In addition, the consideration has to be further analysed because a part of the sum paid by the customer or consumer is stake money which falls outwith the scope of the VAT regime.

60. Which analysis applies depends on where the line is drawn with reference to supply on the one hand and consideration on the other hand. Supplies may be *globalised* to a lesser or greater extent or not at all. The drawing of the line at any particular point is not always obviously correct or obviously wrong.

61. Our interpretation of the pre-2007 Notices and Leaflets issued by HMRC and their predecessors is that the line was drawn at game level rather than at session level. Even then, the analysis involves multiple supplies at game level. There is a single supply to each of the customers who participate in each game. The participation fees are added up to identify the gross participation fees for a game.

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

63. We should mention the main authorities cited. *Glawe* concerned gaming or slot machines operated in bars and restaurants. The facts illustrate a physical manifestation of the division between participation fees and stake money. Each machine had two separate compartments, the *cash box* and the *reserve;* the cash box contained coins which the owner or operator of the machine was able to remove from the machines and retain for his own benefit. The *reserve* held the stock of coins from which winnings were paid out. The machines were set, in accordance with statutory requirements, so that they automatically paid out about 60% of the coins inserted after deduction of turnover tax. The issue before the Court was whether *Glawe* was assessable to VAT on all the coins inserted or only on those which entered the cash box. It was held that the winnings paid out from the *reserve* did not form part of the taxable amount. A similar analysis in relation to roulette is to be found in the opinion of Advocate General Jacobs in *Fischer v Finanzamt Donaueschingen (Case C-283/95 1998 STC 708 at 715 paragraph 47*).

64. *Glawe* reminds us that VAT is a tax on turnover. There, the operator's turnover was the amount he was able to remove from the machine, not the amounts inserted by the players. The principle of individual taxation (i.e. that each supply should give rise to a separate VAT charge which is proportional to the price paid) was met by regarding each payment as consisting of two components; one is the price paid for the services provided by the operator (including the VAT payable on that amount); the other component is regarded as an amount contributed to the common pool available to be paid out as winnings (see *paragraphs 18 and 28 of the Opinion of Advocate General Jacobs and paragraphs 10-12 of the Court's Decision*).

65. In *First National Bank of Chicago,* a case relating to a bank's foreign exchange transactions, the problem was to identify the consideration received by the bank as it charged no actual fee or commission for the large number of transactions carried out. The solution was to regard the taxable amount as the net result of its transactions over a given period of time (*paragraph 47 of the Court's Decision*).

66. *Glawe*, and *First National Bank of Chicago* demonstrate that the consideration for the supply of services may be regarded as consisting of the net result of transactions over a given period of time. Furthermore, it is not necessary for either party to know the exact amount of the consideration serving as the taxable amount in order for it to be possible to tax a particular type of transaction (see *First National Bank paragraphs 47 -49 of the Court's Decision*).

67. What that period of time should be will depend upon the circumstances of each case. We have not detected any principle or rule which provides a definitive answer for every situation. In *First National Bank*, emphasis was placed on a practical rather than a theoretical solution; and one should have regard to the net result of a trader's transactions (*paragraphs 31, 46 and 47 of the Court's Decision*).

68. Although these authorities were discussed at length at the Hearing, there is really no dispute here about the identification of the consideration and how it should now be calculated. It **was** calculated on a *game by game basis*. It has been re-calculated on a *session* basis. The figures are not in dispute.

Regulation 38

69. Drawing the line at session level means that there is or at least may be a change in the consideration for the right to participate in each game and each session and a consequent and equal change in the stake money. This arises, as we have explained, because set off applies within each session (*intra session*). It does not seem to us to matter how the change in consideration arises as long as it does arise. Regulation 38, which implements Article 11C.1, applies *inter alia* where there has been a decrease in consideration evidenced by a credit note. Any change in the consideration is bound to be retrospective in nature. The Appellant has, in accordance with the administrative directions of HMRC, changed the consideration for the supply of the right to participate in cash bingo sessions over the period between 1996 and 2003. On the face of it, such a change falls within the scope of regulation 38. It is not an error. The regulation does not restrict its application by reference to the means by which the consideration changes. Thus, a change might arise by operation of law, agreement of the parties to a transaction e.g. a subsequent reduction in the price due to customer dissatisfaction or coupon schemes under a sales promotion campaign (as in *Elida Gibbs*), or by reason of administrative direction by HMRC.

70. The first calculation of the consideration (on a *game by game* basis) was in accordance with the HMRC administrative directions and was therefore correct and valid. The sums properly attributable to the participation fees were correctly calculated. Calculation on a *session* basis would have infringed those administrative directions because of the prohibition on including participation fees or charges used as additional prize money.

71. The second calculation (on a *session* basis) was also in accordance with HMRC administrative directions and must also be correct and valid. The sums properly attributable to the participation fees were also correctly calculated. That basis of calculation has been accepted and settled in relation to different return periods. On

this basis, there must have been a decrease in the consideration properly attributable to the supply of the right to participate in a bingo session.

72. The fact that the amount paid by the customer has not changed is irrelevant because we are examining a payment consisting of two components; one component is the consideration for a supply which falls within the VAT regime; the other component is stake money which falls outwith the scope of the VAT regime. The amount of each component has changed. The stake money becomes greater and the consideration becomes less by equal amounts. This analysis and the application of regulation 38 to the circumstances of this appeal are consistent with the general principle that a trader should not pay VAT on a sum which is greater than the consideration ultimately received for the supply in question (*Elida Gibbs paragraphs 19-24 and 29-31*).

73. On one view, the circumstances could be said to be similar to those in *Elida Gibbs*. The Business Brief and Notice of 2007 are equivalent to the presentation to the manufacturing company of money off and cash back coupons which led to a reduction in the consideration received for the right to participate in the activity of bingo supplied by the Appellant. The sums received by Elida from the wholesalers to whom they supplied the goods did not change. Here, the sums received from the bingo customers did not change either but the consideration for the taxable supply was reduced and the out of scope element (the stake) increased by identical amounts. Although we are concerned with *deemed* considerations that does not affect the principles applied in *Elida Gibbs*. These principles are that (i)the taxable amount collectable by the tax authorities cannot exceed the consideration paid by the final consumer, and (ii) the principle of neutrality borne out by article 11C.(1) of the Sixth Directive which provides that where the price is reduced after the supply takes place, the taxable amount is to be reduced accordingly.

74. We therefore conclude that the implementation of the 2007 Business Brief and the later Notice have brought about a decrease in the consideration for the right to participate in bingo sessions and that therefore regulation 38 is applicable.

Credit Note

75. Regulation 24 of the 1995 Regulations requires an increase or decrease in consideration to be evidenced by a credit or debit note or any other document having the same effect.

76. *GMAC* (*2002 Chairman Stephen Oliver Q.C.*) concerned hire purchase transactions relating to motor cars. For VAT purposes such a transaction is equated to a sale and so the consideration for the supply is the total price due on the assumption that the customer elects to purchase (excluding finance charges). Where a customer elects not to buy but returns the car, GMAC was entitled, in principle, to a VAT adjustment on that part of the purchase price which ceased to be payable. One of the issues was whether GMAC satisfied the credit note requirements of regulation 38. The Tribunal observed, at paragraph 43, that the expression *credit note or other document having the same effect* had to be construed in a way that produced a result

which complied with Article 11C.(1). Otherwise, GMAC would be able to rely on their Community law rights. These rights could not be cut down by conditions imposed by Member States. The Tribunal in GMAC considered that a document had to come into being at the time or after the decrease in consideration; it was not essential that the document passed from issuer to the person receiving the credit; the VAT element need not be identified in the document evidencing the decrease in price (*paragraph 44*). The Tribunal concluded that the documents produced did evidence a decrease in consideration for the purposes of regulation 38 adjustments, having regard to the definition of that expression in regulation 24 (Paragraph 50).

77. The Tribunal's decision on that issue was upheld on appeal by Field J (*2004 STC 577*) who endorsed the reasoning summarised above (at page 593, paragraph 38) and observed that the purpose of regulation 24 is (i) to ensure that increases in the consideration are duly recorded by the taxable person, (ii) to guard against fictitious claims for adjustments and (iii) to enable the commissioners to verify adjustment entries in the taxable person's VAT account by inspecting that person's books and records.

78. We have described the internal credit note and the accompanying letter prepared by the Appellant in December 2009. These record and explain the adjustments. HMRC understood what the Appellant had done and were able to verify the adjustment entries by inspection of the Appellant's books and records. They were able to agree the figures as such (subject to minor modification). There is no suggestion that this is a fictitious claim.

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

80. Having regard to the facts as we have found them to be, it is difficult to envisage what more the Appellant could have done to comply with the requirement to produce evidence of the decrease in consideration in accordance with regulation 38 and 24. It was not possible to identify individual customers; it was therefore not possible to issue the credit note to any such customers. It seems to us to be somewhat unlikely that any of the customers would have been taxable persons, so regulation 38(5) [recipient of supply to make appropriate entry in his VAT account] cannot be relevant. If Field J's analysis is sound, then the purposes of the regulation 24 have been met. The change in consideration has been recorded. There is no suggestion of a fictitious claim being made. The entries have been verified by inspection by HMRC. There was no difficulty about that. An arithmetical correction was required and that was given effect to by the internal debit note referred to above.

81. To conclude that the requirements of regulation 24 have not been met would be to construe that regulation in an unduly technical manner. It would be impossible for traders dealing with essentially anonymous final consumers to comply with the regulation. Such a construction is not necessary to meet the purposes of the regulation, which in turn is to give effect to the general principle in Article 11C.(1) of

the Sixth Directive that where the price is reduced after the supply takes place, the taxable amount is to be reduced accordingly (see *Societe Generale at paragraph 30 of the Court's Decision; CR Smith Glaziers at paragraphs 27-28 and 51*).

82. HMRC referred to *McMaster,* but it seems to us to be dealing with a different point which does not directly or indirectly assist in the determination of the issues we have to resolve. In *McMaster*, one of the issues was whether an adjustment to a VAT return complied with the predecessor of regulation 38. The taxpayer had elected to waive exemption from VAT and charged VAT on rent payable by its tenants; and accounted therefor to HMRC. However, it failed to notify HMRC of the election, rendering the election invalid. The company's receiver, on discovering the true position, issued credit notes to the tenants, and intimated that the tenants would be treated as unsecured creditors for the amounts in the credit notes. The receiver sought to make appropriate adjustments in the company's VAT return. In the alternative, he claimed repayment under what is now s80 VATA. The Inner House held that the regulation was concerned only with the making of adjustments to the value added tax account to reflect an increase or decrease in consideration which *included* an amount of tax chargeable on the supply. As the supply was exempt, no VAT was due on the supply. Accordingly, the regulation had no application. The claim was treated as being based on error to which what is now s80 VATA applied. An argument based on unjust enrichment failed and the receiver's claim for repayment succeeded.

83. We conclude therefore that the evidential requirements of regulation 38 (read with regulation 24) have been met.

Alternative Credit Note Argument

84. As we have decided that there has been a change in consideration (and not an error on the part of the Appellant) and that regulation 38 has been complied with, the Appellant's fall-back argument on the credit note does not arise.

85. The fall-back argument for the Appellant proceeds on the basis that there has been an error and not a change in consideration. Accordingly, for the purposes of this argument regulation 38 is not relevant. The Appellant relied on paragraph 4.10 of HMRC Notice 700/45/2009 which relates to the correction of errors on a return already submitted. It is said that the issue of credit notes is commonplace and that the regular functioning of the VAT system depends on such a straightforward way for corrections to be made. S80 VATA makes provision for reclaiming overdeclared or overpaid output tax. It sets out time limits for making claims and provides statutory defences to such claims. A similar time limit applied, at one stage to regulation 38, but it was repealed.

86. This aspect of the appeal was not explored in detail by counsel for the parties. We are reluctant to give a concluded view on an issue which may have wide reaching ramifications which have not been fully discussed. While it strikes us as odd that s80 could be elided by the issue of an internal credit note, as we do not need to decide the point, we decline to do so.

Juridical Nature of sums returned by HMRC

87. We asked counsel to address us on this topic. Neither counsel put forward a positive submission with any degree of confidence. We were informed that the moneys returned under settled claims have been treated as income for corporation tax purposes. Although unnecessary for our decision, our tentative view, for what it may be worth, is that any overpaid VAT returned to the Appellant would fall to be added to turnover for VAT purposes. Such sums would be an addition to the participation fees and would be VAT inclusive. Accordingly, a portion (presumably one sixth [applying the standard VAT rate of 20%] would have to be accounted for in the return for the period in which the overpaid VAT was repaid to the Appellant. The money returned cannot be regarded as stake money. It could never be distributed to winning customers. More importantly, winning customers have already received all that was due to them. Where the stake money for any particular game fell short of the prize money paid out, the shortfall, as we have seen, was topped-up from participation fees.

Additional Matters

88. We have discussed only those cases on which we were addressed at the Hearing. The other cases mentioned above were referred to in written submissions but were not referred to in any detail at the Hearing.

89. At the conclusion of the Hearing, the Tribunal drew parties' attention to *Wadlewski v CC&E 1995 No 13340,* an appeal concerning retrospective change of VAT liability under retail schemes. We invited parties to submit short written submissions on the possible relevance of the case to the issues we had to resolve. We received written submissions from HMRC and a copy of *Lesley & Jayne Lewis 1996 No 14085* which discusses *Wadlewski.* The Appellant also produced short written submissions and referred to *James Roy Buckley (MAN/91/793 Case No 7644,* noted in *Wadlewski*

90. Subject to certain restrictions, a retailer may choose which scheme to adopt or may agree a bespoke scheme with HMRC. The general purpose of the schemes is to enable the retailer properly to account for tax due on supplies without having to calculate the tax separately for each individual supply or to issue a VAT invoice to each customer. The Commissioners interpreted the relevant regulations as giving them a discretion to allow a retrospective change of scheme. Their policy on this aspect was set out in an administrative Notice. Such a discretionary decision could be the subject of appeal. The Tribunal, on appeal, exercised a supervisory rather than a full appellate jurisdiction. These appeals arose because the retailer, with hindsight, considered that he should have adopted a different retail scheme which would have led to a reduced tax liability. The question at issue for the tribunal was the reasonableness of the exercise of the Commissioners' discretion.

91. Having considered the additional submissions and these three decisions, we are of the view that this line of authority has, after all, no direct relevance to the present appeal. HMRC have suggested that *Wadlewski* illustrates a flaw in the Appellant's arguments, namely that as no one scheme provided the correct amount for which the

taxpayer was liable, a change to another scheme did not mean that the taxpayer had overpaid VAT; thus the change from the *game by game* basis to *session* basis, although advantageous to the Appellant, did not constitute a change in consideration.

92. We are unable to accept this argument. We have already concluded that the pre-2007 Notices directed, in effect, that the *game by game* basis of calculation be adopted, otherwise, if the *session* basis had been deployed, the prohibition on setting off additional prize money would have been infringed. The 2007 Business Brief and the subsequent Notice directed that a *session* basis of calculation be adopted and invited retrospective claims. That basis of calculation resulted in a change (namely a decrease) in the consideration attributable to the right to participate in a bingo session.

93. These cases do, however, provide some indirect support for the decision we have reached because, as the Appellant has pointed out, it is difficult to see how the exercise of discretion to allow a retrospective change of a retail scheme could have resulted in repayment on the basis of error under s80 VATA. None of the cases indicate that would have been the basis on which repayment would have been made. In similar vein, there is no need to classify the claim in the present appeal as arising through error.

Summary and disposal

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

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

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

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

98. **The appeal is therefore allowed.**

99. 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.

J GORDON REID, QC, F.C.I.Arb.,
TRIBUNAL JUDGE

RELEASE DATE: 9 AUGUST 2011

APPENDIX

Mainstage Cash Bingo - VAT Accounting

Example of a session

Based on 100 admissions paying £10 for a combined book of tickets

Game	Ticket (£)	Gross ticket sales (£)	Stake (£) per ticket	Par Fee (£) per ticket	Gross stakes (£)	APM (£)	Total Prizes (£)	Gross Par Fee (£)
1	2.00	200.00	1.75	0.25	175.00	25.00	200.00	25.00
2	1.50	150.00	1.00	0.50	100.00	-	100.00	50.00
3	1.50	150.00	1.00	0.50	100.00	-	100.00	50.00
4	2.00	200.00	1.75	0.25	175.00	25.00	200.00	25.00
5	1.00	100.00	0.75	0.25	75.00	25.00	100.00	25.00
6	2.00	200.00	1.75	0.25	175.00	25.00	200.00	25.00
	10.00	1,000.00			800.00	100.00	900.00	200.00

VAT calculation on a game by game basis

VAT would have been calculated on the gross par fee generated by each game. APM would not have been deducted prior to the issue of Business Brief 07/2007

The Gross Par Fee is taken to be VAT inclusive, and we have taken VAT to be 17.5%, the standard rate in force during the period in question

£200 x 7/47 = £29.79

VAT calculation on a sessional basis

VAT would have been calculated on a "cash in - cash out" basis.

Par Fee is calculated by deducting Gross ticket sales per session less Total Prizes for the session

£1,000 - £900 = £100

£100 x 7/47 = £14.89

Appendix 2

Legislation

Section 19 of VATA provides *inter alia* as follows:-

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

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

The Value Added Tax Regulations 1995 provide *inter alia* as follows:-

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

38 (1) This regulation applies where-
(a) there is an increase in consideration for a supply, or
(b) there is a decrease in consideration for a supply,
which includes an amount of VAT and the increase or decrease occurs after the end of the prescribed accounting period in which the original supply took place.
…….
(3)…….the maker of the supply shall
(a) in the case of an increase in consideration, make a positive entry; or
(b) in the case of a decrease in consideration, make a negative entry,
for the relevant amount of VAT in the VAT allowable portion of his VAT account
……..
(5) Every entry required by this regulation shall, except where paragraph (6) below applies, be made in that part of the VAT account which relates to the prescribed accounting period in which the increase or decrease is given effect in the business accounts of the relevant taxable person.

Appendix 3

Cases Referred to or cited in the Authorities Bundle

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CR Smith Glaziers (Dunfermline) Ltd v Customs and Excise Comrs [2003] UKHL 7, [2003] STC 419, [2003] 1 WLR 656, [2003] 1 All ER 801.

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First National Bank of Chicago v Customs and Excise Comrs (Case C-172/96) [1998] STC 850, [1998] ECR I-4387, [1990] QB 570, [1998] All ER (EC) 744, ECJ.

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Goldsmiths (Jewellers) Ltd (Case C-330/95) [1997] STC 1073

HJ Glawe Spiel-und Unterhaltungsgerate Aufstellungsgesellschaft mbH & Co KG v Finanzamt Hamburg-Barmbek-Uhlenhorst (Case C-38/93) [1994] STC 543, [1994] ECR I-1679, [1995] 1 CMLR 70, ECJ.

HMRC v Noor [2013] STC 998

HMRC v Vodaphone Group Services Ltd [2016] All ER (D) 241

International Bingo Technology SA (Case C-377/11) [2013] STC 661

James Roy Buckley v Customs and Excise Comrs (1992) VAT Decision 7644.

Jorion, née Jeunehomme v Belgium (Joined cases 123/87 and 330/87) [1988] ECR 4517, ECJ.

Kraft Foods Polska SA (Case C-588/10) [2003] STC787

Leeds City Council [2016] All ER (D) 52

Levob (Case C-41/04) [2006] STC766

Littlewoods Retail ltd v HMRC [2012] STC 1714

Madgett and Baldwin (Joined Cases C-308/96 and C-04/97)[1998] STC 1189

Marleasing SA v La Commercial Internaacional de Alimentacion SA (Case C 106/89) [1990] ECR I-4135

Marks & Spencer plc v Customs and Excise Comrs (Case C-62/00) [2002] STC 1036, [2002] ECR I-6325, [2003] QB 866, [2002] 3 CMLR 213, ECJ.

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Société Générale des Grandes Sources d'Eaux Minérales Françaises v Bundesamt für Finanzen (Case C-361/96) [1998] STC 981, [1998] ECR I-3495, ECJ.

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