



TC08190

VAT – exemption - betting and gaming – whether taxation of supplies of slots games on certain slot machines when supplies of slots games on other machines and online were exempt breached EU principle of fiscal neutrality - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Appeal number: TC/2013/04417
TC/2010/08268**

BETWEEN

THE RANK GROUP PLC

First Appellant

2016 G1 LIMITED

Second Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Jonathan Peacock QC and Valentina Sloane QC, instructed by Deloitte LLP, for the Appellants

George Peretz QC and Eric Metcalfe, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

The hearing took place on 9, 10, 11, 13, 16 and 17 November 2020. With the consent of the parties, the form of the hearing was V (video) using the Tribunal's video hearing service. The hearing was attended by up to 25 participants and nine observers. A face to face hearing was not held because a remote hearing was appropriate and more convenient during a time of restrictions on travel and social interaction.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

DECISION

INTRODUCTION

1. During the period 18 December 2005 to 31 January 2013 ('the Relevant Period'), the Rank Group plc ('Rank') and the Gala Leisure Limited ('Gala') VAT groups operated gaming machines ('slot machines') installed in bingo clubs, casinos and gaming machine arcades. Supplies of slots games on those machines were chargeable to VAT at the standard rate during the Relevant Period while supplies of slots games on certain other machines and online were exempt.

2. In Joined Cases C-259/10 and C-260/10 *HMRC v The Rank Group plc* [2012] STC 420 ('*Rank CJEU*'), which concerned slot machines, the Court of Justice of the European Union ('CJEU') confirmed that the principle of fiscal neutrality precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes. The CJEU considered how the national court should approach the question of whether two games are similar for the purpose of the principle of fiscal neutrality. I discuss the approach in more detail below but, in summary, two supplies of services are similar where they have similar characteristics and meet the same needs from the point of view of a typical or average consumer and any differences between them do not have a significant influence on the decision of the average consumer to use one service rather than the other.

3. *Rank CJEU* concerned slot machines which were known as section 16/21 machines and section 31/34 machines by reference to the provisions of the Gaming Act 1968 and the Lotteries and Amusements Act 1976 that applied to them. With effect from 1 September 2007, the Gambling Act 2005 introduced new categories for gaming machines. Both Rank and Gala operated section 16/21 machines and section 31/34 machines before 1 September 2007 and Rank operated Category B1, B3, C and D machines from that date. Rank and Gala accounted for VAT on their supplies of games on those slot machines ('the Taxed Games') during the Relevant Period. At the same time, supplies of slots games on electronic lottery ticket vending machines ('ELTVMs')/B3A lottery machines and online ('the Exempt Games') were exempt from VAT.

4. Rank and Gala made claims, by way of voluntary disclosures, for VAT accounted for on their supplies of the Taxed Games. The basis of the claims was that the difference in VAT treatment of the Taxed Games and the Exempt Games during the Relevant Period was contrary to the EU principle of fiscal neutrality. HMRC rejected the voluntary disclosures on the ground that there were material differences between the Taxed Games and the Exempt Games, in particular those offered online, and any differential treatment did not breach the principle of fiscal neutrality.

5. Rank and Gala appealed to the First-tier Tribunal ('FTT'). Gala subsequently assigned its rights in the appeal to the Second Appellant, 2016 G1 Limited ('G1').

6. Part of Rank's claim related to supplies of games on fixed odds betting terminals, later known as Category B2 machines, (together 'FOBTs') operated by Rank in its Grosvenor casinos between 2011 and 2013. In *Done Brothers (Cash Betting) Ltd & Ors v Revenue & Customs* [2018] UKFTT 406 (TC) ('*Done Brothers FTT*'), the FTT decided that, during the Relevant Period, slots games on FOBTs were similar to and should be given the same exempt VAT treatment as slots games online and on Category B3A machines. That decision was upheld by the Upper Tribunal in *HMRC v The Rank Group PLC, Done Brothers (Cash Betting) Ltd and Ors* [2020] UKUT 117 (TCC) ('*Rank Done Brothers UT*'). HMRC did not appeal the Upper Tribunal's decision.

7. HMRC accept that, following *Rank Done Brothers UT*, supplies of slots games and roulette on FOBTs operated by Rank in its Grosvenor casinos between 2011 and 2013 were exempt and, to that extent, Rank's appeal must be allowed. In the rest of this decision, 'Taxed Games' does not refer to the games played on FOBTs in Grosvenor casinos between 2011 and 2013 in respect of which the appeal is allowed. From 1 September 2007, slots games became available to play on FOBTs and, following *Done Brothers FTT*, games played on FOBTs were also Exempt Games.

8. I am not asked to determine the amounts that would be repayable if the appeals succeed. The parties agree that determination of the quantum of the claims can be deferred until after the issue of the VAT treatment of the Taxed Games has been determined.

9. Accordingly, the primary issue in this appeal is whether, during the Relevant Period, the Taxed Games were 'similar', within the meaning given by the CJEU *Rank CJEU*, to the Exempt Games, such that the different VAT treatment of the former is contrary to the principle of fiscal neutrality.

10. On the basis of the facts found and for the reasons set out below, I have decided that the Taxed Games were materially similar to the Exempt Games during the Relevant Period and supplies of the Taxed Games should have been treated as exempt for VAT purposes. Accordingly, subject to the quantum of the claims being agreed or determined by the Tribunal, the appeals by Rank and G1 are allowed.

APPLICABLE LAW

11. There was no dispute between the parties at the hearing as to the applicable law. Before the hearing, the parties had produced an agreed note which helpfully set out relevant legislation and case law relevant to the determination of these appeals and which were common ground between the parties. What follows is taken from that note.

Legislative framework

12. Article 13B(f) of Directive 77/388 ('the Sixth VAT Directive') required Member States to exempt from VAT "betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State". With effect from 1 January 2007, the exemption is found in Article 135(1)(i) of Directive 2006/112 ('the Principal VAT Directive').

13. Throughout the Relevant Period, the exemption was implemented in the United Kingdom by section 31 and Group 4 of Schedule 9 to the VAT Act 1994 ('VATA94'). With effect from 6 December 2005, the Notes to Group 4 were amended and, in particular, the definition of 'gaming machine' changed so that supplies of gambling by means of FOBTs were excluded from the exemption and made subject to VAT at the standard rate.

14. With effect from 31 January 2013, the relevant provisions of Group 4 of Schedule 9 to the VATA were amended to exempt all gaming machines from VAT. From that date, gaming machines were subject to Machine Games Duty.

European case law

15. The CJEU considered the application of the principle of fiscal neutrality to supplies of gambling in Joined Cases C-453/02 and C-462/02 *Finanzamt Gladbeck v Linneweber and Finanzamt Herne-West v Akritidis* [2008] STC 1069 ('*Linneweber*'). Mrs Linneweber operated gaming machines in restaurants and amusement arcades. German law at the time provided that supplies through gaming machines in licensed public casinos were exempt from VAT while supplies through such machines in other places were taxable. Mrs Linneweber contended that the exemption should apply generally to supplies made through all gaming machines and not just those located in licensed public casinos. The tax authority argued that the principle of fiscal neutrality did not require gaming machines situated in casinos and those

not in casinos to be taxed in the same way because the stakes and winnings in the case of gaming machines installed in casinos were significantly higher than those in other establishments so that there was no competition between the two types of machine. Mr Akritidis ran a casino in which he organised card games which did not comply with the rules laid down by the authorities who assessed him to VAT on the income from the card games. Mr Akritidis appealed on the ground that income from organising lawful card games was exempt and distinguishing between lawful and unlawful card games was contrary to the principle of fiscal neutrality.

16. The CJEU stated, in paragraphs 23 and 24 of *Linneweber*, that while Member States have the power to lay down the conditions and limitations in relation to the exemption for gambling, they must comply with the principle of fiscal neutrality which precludes treating similar goods and supplies of services differently for VAT purposes. The CJEU ruled in paragraph 25, that the identity of the manufacturer or the provider of the services and the legal form by means of which they exercise their activities are, as a rule, irrelevant in assessing the comparability of the products or services. The CJEU then addressed the issue of whether a distinction based on whether the games of chance were provided in licensed public casinos or other establishments breached the principle of fiscal neutrality. In paragraph 26, the CJEU stated:

“As the Advocate General pointed out in points 37 and 38 of her Opinion, in order to determine whether the activities at issue in the case leading to the judgment in [Case C-283/95 *Fischer v Finanzamt Donaueschingen* [1998] STC 708 (*Fischer*)] were comparable, the Court only examined the comparability of the activities at issue and took no account of the argument that the games of chance differed for the purposes of the principle of fiscal neutrality, for the simple reason that they are organised by or in public casinos”

17. The CJEU accordingly ruled that treating games of chance and gaming machines operated by licensed public casinos and those operated by traders other than such casinos differently for VAT purposes was unlawful.

18. The comments of the Advocate General (Stix-Hackl) in paragraphs 37 and 38 of her Opinion in *Linneweber* referred to by the CJEU in paragraph 26 were as follows:

“37. ... the proposition that games of chance differ for the purposes of the principle of fiscal neutrality for the simple reason that they are organised by or in public casinos must, however, also be refuted on the basis of the *Fischer* judgment. For the court ruled in that judgment that a member state may not impose VAT on a game of chance - albeit one that is organised outside a licensed public casino - if the organisation of such a game of chance by a licensed public casino is exempt ...

38 The court could not have given this ruling if it were indeed true that the games of chance offered by public casinos already differed significantly from those offered by commercial operators because of the difference in accessibility, the gambling environment, the ‘gambling culture’ or the different circle of user.”

19. It is clear from *Fischer* and *Linneweber* that, in assessing the similarities between the games, the focus is on the nature or character of the game itself and not the location and setting in which it takes place. Also, factors such as accessibility, the gambling environment, the gambling culture and the different circle of user are to be disregarded unless they affect the nature or character of the game itself.

20. The leading CJEU authority on the application of the principle of fiscal neutrality in the context of machine-based gambling is *Rank CJEU* which was released in 2011. In that case,

the CJEU considered questions referred by the Court of Appeal and the Upper Tribunal in two separate sets of proceedings relating to mechanised cash bingo and slot machines. At the time, mechanised cash bingo was exempt if the stake was 50 pence or less and the prize was no more than £25 but if one of the conditions was not met then the game was subject to VAT. As the amount of the prize in mechanised cash bingo depended on the number of players in a particular game, it could change during a game or block of games and was not necessarily known by the players when they placed their stakes. The slot machines in the case were gaming machines under Part III of the Gaming Act 1968 which were subject to VAT whereas FOBTs, which the CJEU regarded as a type of slot machine and were comparator machines for the purposes of the appeal, were exempt from VAT.

21. In paragraph 32 of *Rank CJEU*, the CJEU confirmed that the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes. The CJEU then set out some principles for national courts to apply when assessing whether two supplies are similar for the purpose of the principle of fiscal neutrality.

22. In paragraphs 33 to 36, the CJEU observed that, when invoking the principle of fiscal neutrality, it is not necessary to establish the existence of competition between two supplies of services and distortion of that competition as independent and additional conditions. This is because it follows from the fact that the supplies are identical or similar from the consumer's point of view that they are in competition and differential tax treatment generally gives rise to distortion of that competition.

23. The CJEU set out how the national court should assess whether the two supplies of services are similar in paragraphs 43 – 44 and how that should be applied in relation to games of chance in paragraphs 53 – 57.

24. Paragraphs 43 – 44 of the CJEU's judgment in *Rank CJEU* are as follows:

“43. In order to determine whether two supplies of services are similar within the meaning of the case-law cited in that paragraph, account must be taken of the point of view of a typical consumer ... avoiding artificial distinctions based on insignificant differences ...

44. Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other ...”

25. The CJEU also set out, in paragraphs 45 – 49 and 55, a number of factors that are irrelevant in considering whether two games of chance are similar for the purpose of the principle of fiscal neutrality. The factors that should not be taken into account are:

- (1) the lawful or unlawful nature of the operation of a game of chance (paragraph 45);
 - (2) the identity of the operators of the games and the legal form by means of which they exercise their activities (paragraph 45);
 - (3) differences in the setting in which games of chance are made available and, in particular, accessibility in terms of location and opening times and atmosphere (paragraph 47);
 - (4) differences in the application of other taxes (paragraph 48);
 - (5) the legal regimes relating to control and regulation of the games (paragraph 49);
- and

(6) differences in the details of the structure, the arrangements or the rules of games which all fall within a single category of game, such as slot machines (paragraph 55).

26. The CJEU held, in paragraph 53, that betting, lotteries and other games of chance cannot be considered to be similar services for the purposes of the principle of fiscal neutrality. It follows that a Member State can treat certain types of game of chance differently from other types without infringing the principle of fiscal neutrality. In paragraph 54, the CJEU held that taxing slot machines differently from horse-race betting, fixed-odds bets, lotteries and draws did not infringe the principle of fiscal neutrality.

27. In paragraph 55, the CJEU made the point that differences in the details of the structure, the arrangements or the rules of the games which fall within a single category of game, such as slot machines, should not be taken into account. The CJEU said that such differences cannot justify treating supplies in the same category of game differently for VAT purposes as that would deprive the principle of fiscal neutrality of meaning and allow distortions in the VAT system.

28. The CJEU regarded FOBTs as a type of slot machine and part of the same category as other slot machines (see paragraphs 20 and 22 of *Rank CJEU*). Even though the machines under consideration in *Rank CJEU* were used to play different games they were regarded as falling within a single category even where the games differed in the details of their structure, their arrangements and their rules. At the same time, the CJEU did not rule out treating machines that fell into the same category differently for VAT purposes where they were distinguished by differences other than details of the structure, the arrangements or the rules of the games concerned.

29. In paragraphs 56 and 57 of *Rank CJEU*, the CJEU described the factors that should be considered when assessing whether two games of chance are similar for the purpose of the principle of fiscal neutrality. Mr Justice Norris in *HMRC v The Rank Group Plc* [2012] UKUT 347 (TCC) at [19] pointed out that the French, Spanish and German texts showed that the word “evidence” in paragraph 56 of the English language version of the CJEU’s judgment in *Rank CJEU* must mean “elements” or “circumstances”. It is clear from paragraph 22 of the judgment that, when it used the word “formats”, the CJEU meant an event or a virtual game on the machines. Accordingly, the CJEU’s guidance in paragraphs 56 and 57 should be read as follows:

“56. It is apparent from paragraphs 43 and 44 of the present judgment that the determination whether games of chance which are taxed differently are similar, which it is for the national court to make in the light of the circumstances of the case ... must be made from the point of view of the average consumer and take account of the relevant or significant [elements or circumstances] liable to have a considerable influence on his decision to play one game or the other.

57. In that regard, differences relating to the minimum and maximum stakes and prizes, the chances of winning, the [events or games] available and the possibility of interaction between the player and the slot machine are liable to have a considerable influence on the decision of the average consumer, as the attraction of games of chance lies chiefly in the possibility of winning.”

Domestic case law

30. In *Done Brothers FTT*, the FTT summarised the guidance of the CJEU in *Rank CJEU* as follows:

“38. The CJEU’s guidance in *Rank* on assessing the similarity of games of chance for the purposes of the principle of fiscal neutrality may be summarised

as follows. The national court should consider whether gambling games, which are taxed differently, are similar from the point of view of a typical or average consumer. Supplies of services are similar where they have similar characteristics, which we interpret as meaning that they fall within the same category, and meet the same needs from the point of view of a typical consumer. The fact that gambling games can be described as betting, lotteries or other games of chance does not, by itself, mean that they have similar characteristics or fall within the same category. Two supplies meet the same needs where their use is comparable and the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other. In relation to gambling games, the national court must take account of the relevant or significant elements or circumstances that are liable to have a considerable influence on the consumer's decision to play one game rather than the other, avoiding artificial distinctions based on insignificant differences. As the attraction of gambling games lies chiefly in the possibility of winning, the matters that are liable to have a considerable influence on the decision of the average consumer to play one game rather than another are differences in the minimum and maximum stakes and prizes, the chances of winning, the events or games available and the possibility of interaction between the player and the game.”

31. The FTT then set out the correct approach towards applying the principle of fiscal neutrality as follows:

“40. In determining whether the different VAT treatment of the supplies of games played on FOBTs and supplies of comparator games during the Claim Period was contrary to the principle of fiscal neutrality, we must consider whether the games were similar from the point of view of a typical or average consumer.

41. First, we must consider whether, taking account of their characteristics and avoiding artificial distinctions based on insignificant differences, the games can be grouped into a single category or categories. The CJEU has already decided, in paragraph 55 of *Rank*, that FOBTs and the machines in that case were a single category of game, namely slot machines. That is so notwithstanding the fact that there may have been differences in the details of the structure, the arrangements or the rules of the games available for play on those machines. Whether games played on FOBTs and all or some of the comparator games are in the same category is a question of classification according to our findings of fact in relation to the characteristics of the games. There were points of agreement as well as differences between the parties in relation to this issue. We set out which games the parties agreed fell into a single category below when we discuss the games.

42. We must then consider whether the separate games in each category met the same needs from the point of view of the typical consumer. In the absence of any direct evidence as to the needs of the average consumer and whether those needs were met, we approach the question of whether any particular element had a significant influence on the decision of the average customer to use one machine rather than another as a question of fact. Our evaluation is based on the evidence that was available to us which we discuss below. We must determine whether the differences between the FOBT games and the comparator games were liable to have a significant influence on the decision of the average consumer to play one or the other. We must take account of the relevant or significant elements or circumstances that are liable to have a considerable influence on the consumer's choice to play a game and not make distinctions based on insignificant differences. The elements or circumstances

that are likely to have a considerable influence on which game of chance a consumer chooses to play include those set out by the CJEU in paragraph 57 of *Rank*.

43. In assessing similarity for the purposes of the principle of fiscal neutrality, we must first identify the characteristics of the individual games. That is a question of fact to be determined on the basis of the evidence presented to us. We describe below the relevant characteristics in relation to each type of game. The relevant characteristics are those that would have been apparent to the typical consumer and are likely to have a considerable influence on the consumer's choice to play one game rather than another. They include (but are not necessarily limited to) those identified by the CJEU in paragraph 57 of *Rank*. Those elements are differences in the minimum and maximum stakes and prizes, the chances of winning, the events or games available for gambling and the possibility of interaction between the player and the game.”

32. In *The Rank Group PLC v HMRC* [2018] UKFTT 405 (TC) (*'Rank FTT'*), the FTT set out the same principles and summary of the guidance on the legal principles as in *Done Brothers FTT*.

33. On appeal from those two decisions, in *Rank Done Brothers UT*, the Upper Tribunal recorded that:

“25. It was common ground between the parties that the FTT had correctly identified the approach to the question of fiscal neutrality set out in *Rank CJEU*. So, the task before the FTT in each appeal was to determine whether the relevant supplies were sufficiently similar to supplies with a different VAT treatment during the relevant claim periods. That evaluation was to be carried out taking into account the needs and point of view of the average consumer. We see no material distinction for this purpose between the words ‘average’ and ‘typical’ or between the words ‘consumer’ and ‘customer’.”

34. The Upper Tribunal stated that the assessment of the needs and points of view of the average consumer in any case is to be assessed by the fact-finding tribunal or court on the basis of all the relevant evidence. That is made clear in *Rank CJEU* at paragraph 56 of the decision. The Upper Tribunal stated in relation to that paragraph:

“43. This passage does not set out any prescribed methodology which must be adopted or evidence which must be available in making the necessary determination. If there is evidence available to the tribunal of actual behaviour by consumers, such as the bin distribution data in these appeals, then it is for the FTT to decide whether to admit it and, if so, what weight to give it.”

35. The Upper Tribunal rejected the argument that evidence of the actual behaviour of average consumers of the supplies being compared is inherently unreliable. The Upper Tribunal stated in [47]:

“47. A tribunal tasked with determining the needs and point of view of average consumers is fully entitled to give the weight which it considers appropriate to the available evidence of actual behaviour. Since the determination of fiscal neutrality requires the tribunal to assess whether differences in the relevant characteristics of the compared supplies have a significant influence on the decisions made by average consumers of those supplies, evidence of the decisions which they have actually made in that regard (their actual behaviour) is undoubtedly relevant. As we have said, if in fact evidence is in any particular case available of the actual needs or point of view of consumers, then it is for the tribunal to determine what weight should be given to that evidence. The critical assessment in determining whether a

differing VAT treatment between two supplies offends against the principle of fiscal neutrality is not an assessment of the needs of average consumers, let alone individual consumers. It is whether the two compared supplies are sufficiently similar, from the point of view of the average consumers and their needs”.

36. HMRC did not appeal the decision of the Upper Tribunal in *Rank Done Brothers UT*. Those proceedings confirm that the following machines were exempt from VAT for the following periods:

- (1) Section 31/34 machines in the period 1 October 2002 to 5 December 2005;
- (2) Section 16/21 machines in the period 1 October 2002 to 5 December 2005;
- (3) FOBTs, except those games (not including “Spoof”) within the category of “Other Games” (see [108] – [110] of *Done Brothers FTT*) in the period 6 December 2005 to 31 January 2013.

37. In *Leisure, Independence, Friendship and Enablement Services Ltd v HMRC* [2020] EWCA Civ 452, the Court of Appeal rejected an argument that the Upper Tribunal had not been entitled to reach a particular conclusion in its determination of fiscal neutrality in the absence of certain types of evidence. It stated, at paragraph 70:

“70. Counsel for LIFE submitted that this assessment was not open to the UT because there was no evidence to support it. There is no indication in any of the judgments of the CJEU in this field, however, that a national court requires evidence such as a consumer survey or expert report in order to determine whether services are regarded as similar by consumers for these purposes. While the case law does not rule out such evidence being admitted in cases of difficulty, it is clear that in most cases the national court is expected to make an assessment using its own experience of the world.”

SUMMARY OF THE CORRECT APPROACH TO DETERMINING WHETHER THERE HAS BEEN A BREACH OF THE PRINCIPLE OF FISCAL NEUTRALITY

38. In light of the above, the parties agree (as do I) that, in determining whether the different VAT treatment of the supplies of games is contrary to the principle of fiscal neutrality, I must consider whether the games are similar from the point of view of a typical or average consumer. There is no material distinction for this purpose between the words “average” and “typical” or between the words “consumer”, “customer” and “player”.

39. In assessing similarity for the purposes of the principle of fiscal neutrality, I must first identify the characteristics of the individual games and then consider whether, taking account of their characteristics and avoiding artificial distinctions based on insignificant differences, the games can be grouped into a single category or categories. In this case, all the games are slots games. In *Rank CJEU*, the CJEU classified slot machines as a single category even though the machines under consideration were used to play different games. The fact that some games are played on physical machines and some are played online does not preclude the slots games being in a single category. There was no dispute that both the Taxed Games and the Exempt Games fall within a single category, ie slots games. The conclusion that slots games are a single category does not determine the issue in this appeal. The CJEU in *Rank CJEU* did not rule out treating supplies in the same category differently for VAT purposes where there were differences, eg in minimum and maximum stakes and prizes, chances of winning, events or games available and the possibility of interaction between the typical player and the slot machine, which are liable to have a considerable influence on their decision to play one game or the other.

40. I must consider whether the individual games meet the same needs from the point of view of the typical player. In the absence of any direct evidence from an average player, I will decide whether any particular element has a significant influence on the decision of the average player to play one game rather than another on the basis of the evidence presented to me. I must then determine whether any differences between the games are liable to have a significant influence on the decision of the typical player to play one game or another or the same game on a machine rather than the same game online. In doing so, I take account of those elements or circumstances that are liable to have a significant influence on the consumer's choice to play a game and disregard insignificant differences. The elements or circumstances that are likely to have a significant influence on which game of chance a consumer chooses to play include those set out by the CJEU in paragraph 57 of *Rank CJEU*.

AGREED FACTS AND ISSUES

41. The parties helpfully produced a statement of agreed facts and issues in the appeals for the purposes of the hearing. In addition, HMRC produced a document setting out which matters of fact in the Appellants' witness statements were agreed and which were disputed. What follows is taken from those documents and was, unless otherwise stated, common ground.

The Appellants, the disputed decisions and the appeals

Rank

42. Rank is the representative member of a VAT group that includes Mecca Bingo Limited ('Mecca'), Grosvenor Casinos Limited ('Grosvenor') and Rank Leisure Limited ('Leisure'). Mecca operates a number of bingo clubs throughout the United Kingdom. Grosvenor operates a number of casinos throughout the United Kingdom and Leisure operates separately licensed gaming machine arcades within bingo clubs and casinos. Rank's bingo clubs, casinos and arcades had on their premises at all material times a number of slot machines used by customers.

43. By a letter dated 24 June 2010, Rank submitted a voluntary disclosure for overpaid VAT for the period from 1 April 2006 to 31 March 2009 in relation to its supplies of games on gaming machines. The basis of the voluntary disclosure was that the taxation of gaming machines breached the principle of fiscal neutrality. The conclusion contended for in this voluntary disclosure was that all gaming machine experiences are similar and should be taxed in the same way.

44. An appendix to the voluntary disclosure provided further details of the income that Rank contended should be exempt. This included:

- (1) Section 21 machine income (bingo and "fruit machine" content);
- (2) Category B1 machine income (slots content);
- (3) Category B3 machine income;
- (4) Category C and D machine income.

45. Income from games of skill has been excluded from the claims in this appeal.

46. By a decision dated 15 February 2011, HMRC rejected the claim. By a Notice of Appeal dated 8 March 2011 (TC/2011/02001), Rank appealed against the decision dated 15 February 2011.

47. On 29 May 2011, Rank submitted a further voluntary disclosure for overpaid VAT relating to gaming machines for the period from 1 April 2009 to 31 January 2013 on the same basis as its voluntary disclosure dated 24 June 2010.

48. By a decision dated 12 June 2013, HMRC rejected the claim on the basis that its position on such claims had not changed since the issue of Business Briefs 11/10 and 39/11. By a Notice of Appeal dated 28 June 2013 (TC/2013/04417), Rank appealed against the decision of 12 June 2013.

49. On 19 November 2018, the FTT directed that Rank's appeals be consolidated and progress under appeal reference TC/2013/04417.

2016 G1 Limited

50. At all material times, the Gala VAT group operated, inter alia, bingo clubs and casinos throughout the United Kingdom which had on their premises a number of slot machines which were used by customers.

51. By a letter dated 26 March 2010, Gala submitted a voluntary disclosure for, inter alia, overpaid VAT by the Gala Bingo and Gala Casino businesses for the period from 18 December 2005 to 31 March 2006. The basis of the voluntary disclosure was that the taxation of gaming machines breached the principle of fiscal neutrality. The contention reached in this voluntary disclosure was that all gaming machine experiences are similar and should be taxed in the same way.

52. By a decision dated 22 July 2010, HMRC rejected Gala's claim. By a Notice of Appeal dated 22 October 2010, Gala appealed against this decision. Gala later assigned its rights in the appeal to 2016 G1 Limited ('G1'). On 19 November 2018, the FTT directed that G1's appeal be heard at the same time as the Rank consolidated appeals.

Categories of gaming prior to 1 September 2007

FOBTs

53. FOBTs are slot machines on which games (such as roulette) can be played. In FOBTs, the '*element of chance*' is provided by an electronic random number generator ('RNG') situated, for regulatory reasons, in premises other than those in which the playing terminal is located. Prior to the Gambling Act 2005, they could be located only in licensed betting offices ('LBOs').

54. FOBTs began to appear in the UK in the 1990s. When roulette was offered on FOBTs within LBOs, the Gaming Board brought a legal action, claiming that roulette constituted gaming. Bookmakers, led by the Association of British Bookmakers, contended that it was betting. In November 2003, the legal action was settled by way of a voluntarily agreed Code of Practice that applied to FOBTs in LBOs. It was agreed as part of this settlement that bookmakers would not have any casino games other than roulette on FOBTs, that a maximum of four machines of a combination of FOBTs and amusement with prize machines ('AWPs') could be in each LBO (with two AWP's being the legally permitted maximum) and that maximum stakes and prizes would be voluntarily applied (£15 maximum stake and £500 maximum prize).

Section 31/34 machines

55. Section 31/34 machines are slot machines on which games can be played. They are also known as 'Part III machines' by reference to the part of the Gaming Act 1968 which applied to them.

56. Section 31 machines could be played in clubs, bingo halls and casinos. The maximum stake was 50p and the maximum pay-out varied by location (£250 in a club, £500 in a bingo hall and £2000 in a casino).

57. Section 34 machines could be played anywhere with a permit. The maximum stake was 30p (50p with effect from 27 October 2006) and the maximum pay-out varied from £5 to £25 (£35 with effect from 27 October 2006).

Section 16/21 machines:

58. Section 16/21 machines were slot machines on which games could be played. The maximum stake was 50p per chance and the maximum prize was £25 per chance (£500 in aggregate).

59. In the case of multi-terminal machines, as in the case of FOBTs, the RNG served a number of terminals and communicated randomly generated numbers to each terminal, which operated independently of the other terminals. The settled view in the gaming industry (as adopted by the Gaming Board, as it then was) was that such machines were not “gaming machines” within Part III of the Gaming Act 1968 as the element of chance was not provided by means of the machine (being instead provided by the remote RNG). That interpretation (in the identically worded VAT legislation) was rejected by the Supreme Court in its judgment of 8 July 2015 in *HMRC v The Rank Group Plc* [2015] UKSC 48 (*Rank SC*).

Online gaming

60. Online gaming was on offer throughout the Relevant Period. There was no regulatory maximum stake or prize.

Categories of gaming under the Gambling Act 2005

61. The Gambling Act 2005, which came into force on 1 September 2007, replaced previous gambling legislation and defined each of the terms ‘betting’, ‘gaming’ and ‘lotteries’, while recognising that the concepts are not mutually exclusive (for example, a transaction may satisfy the definition both of ‘betting’ and ‘gaming’). The Gambling Act 2005 introduced a new definition of ‘gaming machine’. In broad terms, pursuant to that Act, a machine used by individuals to gamble on a virtual (as opposed to a real) event (be that via betting, gaming or a lottery) is classified as a gaming machine. A machine used by individuals to gamble on real events is not classified as a ‘gaming machine’ within the Gambling Act 2005. As a result, FOBTs are gaming machines (all games played on FOBTs being virtual).

62. The Gambling Act 2005 provides for different categories of gaming machines which can be played in different premises with different stake and prize limits. The categories are Categories A, B, C, D with category B subdivided into 5 sub-categories B1, B2, B3, B3A and B4. The maximum stakes and prizes at the time the Gambling Act 2005 came into force were as follows:

Category A	Any machine which is not a Category B, C or D machine	Only permitted in casinos
Category B1	Max stake - £2 Max prize - £4000	Only permitted in casinos Similar to old s.31 machine in casinos
Category B2	Max stake - £100 Max prize - £500	Permitted in casinos and LBOs (up to 4 in an LBO) Also known as FOBTs

Category B3	Max stake - £1 Max prize - £500	
Category B3A	Max stake - £1 Max prize - £500	For provision of lotteries in members' clubs or miners' welfare institutes only
Category B4	Max stake - £1 Max prize - £250	
Category C	Max stake - £0.50 Max prize - £35	Similar to old s.34 machines
Category D	Non-money prizes (max stake £0.30, max prize value £8) Money prizes (max stake £0.10, max prize £5)	

VAT treatment of various forms of gambling

Online games

63. Throughout the Relevant Period, online gaming was exempt from VAT.

Roulette played at a table or via a machine in casinos

64. Throughout the Relevant Period, playing roulette at a table or via a machine in casinos was exempt from VAT.

ELTVMs

65. In *Oasis Technologies v HMRC* [2010] UKFTT 292 (TC) ('*Oasis*'), the FTT decided that takings from supplies of slots games played on ELTVMs/B3A lottery machines were not subject to VAT, even though they were gaming machines, as they benefited from the exemption for lotteries. Unusually, there was no assessment or claim for repayment at issue in *Oasis* but the decision concerned supplies of games played on ELTVMs/B3A machines during the Relevant Period. HMRC did not appeal *Oasis* but made clear before me that they did not necessarily accept the correctness of that decision for the purposes of these proceedings. Nevertheless, Mr George Peretz QC, who appeared for HMRC, acknowledged that *Oasis* was heard by an experienced and respected Tribunal judge who ruled in detail on the point. Mr Peretz accepted that my natural inclination would be to follow such a decision unless there is a good reason not to do so, such as a subsequent legal development, which there is not in this case. Mr Peretz was right. I respectfully agree with and adopt the analysis of Judge Berner in *Oasis* and can see no reason (nor was any suggested) to distinguish the ELTVMs/B3A lottery machines in that case from the ELTVMs/B3A machines in this one. Accordingly, I accept that slots games played on ELTVMs/B3A lottery machines are Exempt Games for the purposes of the appeals by Rank and G1.

FOBTs/B2 machines

66. Prior to 6 December 2005, supplies of gambling by means of FOBTs were exempt from VAT. On 6 December 2005, the UK legislation was amended to make all supplies of gambling by means of a FOBT chargeable to VAT. Slots games became available to play on FOBTs

from 1 September 2007. With effect from 31 January 2013, the UK legislation was amended again to exempt all supplies of gambling by means of FOBTs.

67. In *Done Brothers FTT*, the FTT considered whether treating supplies of slots games on FOBTs as subject to VAT during the Relevant Period breached the EU principle of fiscal neutrality. The evidence about the slots games on FOBTs in *Done Brothers FTT* was either the same or strikingly similar to the evidence on the point in this case (indeed, Mr Mountney appeared as a witness in both cases). The FTT in *Done Brothers FTT* found at [83] – [84]:

“83. As we have already stated, the evidence was that the format of the slots games was the same on FOBTs, B3A machines and online. HMRC contended that the possibility of interaction between the player and the game, including the ability of the player to influence the outcome of the game by their play, was not the same. Mr Peretz pointed out that Mr Martin had said that, when playing FOBT slots, the player’s only option was to spin the wheels on each turn because they could not hold or nudge them. He also said that, within bonus features, the customer’s only option was to either play on or not and the customer could not influence the outcome. HMRC submitted that the Appellants had not put forward any evidence or legal or technical argument to justify any suggestion that nudge and hold features would not have been available during the Claim Period in online slots games as they were on B3A machines. We do not consider that this point carries any weight. First, there was no evidence to suggest that a particular game, eg Rainbow Riches, included the ability to hold or nudge when played on a B3A machine or online but not on a FOBT. There was no evidence that any customer regarded the ability to hold or nudge as a significant factor in choosing whether to play one version of a slots game rather than another. In any event, we do not regard the ability to hold or nudge one or more of the wheels as a core feature. It seems to us that the core features of the slots games are that they have a number of wheels which the customer causes to spin and the outcome of the game is determined by the sequence of images, symbols or numbers displayed on the win line when the wheels stop spinning.

84. We have found that, in many cases, the elements or circumstances identified by the CJEU in [*Rank CJEU*] as likely to exert a significant influence on the average consumer’s decision to play were identical in the versions of the same games whether played on FOBTs, online or on a B3A machine. There were differences in the maximum stakes and prizes available for slots games on FOBTs and online but we consider that the fact that the stake exceeded £2 (which was the limit on FOBTs) in only 5% or 6% of plays on online slots games showed that the ability to place a stake in excess of £2 was not a significant influence on customer choice. In conclusion, we consider that slots games on a FOBT were similar to the same games played online. We also consider that, although there was less evidence, it is also likely to be true of slots games played on a B3A machine. Accordingly, our view is that the slots games all met the same need from the point of view of the customer and treating slots games played on FOBTs and slots games played online or on B3A machines differently for VAT purposes during the Claim Period breached the principle of fiscal neutrality.”

68. Following an appeal by HMRC, the FTT’s decision was upheld by the Upper Tribunal in *Rank Done Brothers UT*. HMRC did not seek to appeal against the Upper Tribunal’s decision. It follows that slots games played on FOBTs between 1 September 2007 and 31 January 2013 should be regarded as Exempt Games for the purposes of the appeals by Rank and G1.

Section 31/34 machines

69. These were purportedly excluded from the VAT exemption at all relevant times until 31 January 2013.

70. In *Rank FTT*, the FTT found that the purported exclusion of section 31/34 machines from VAT exemption during the period from 1 October 2002 to 5 December 2005 was in breach of EU law since section 31/34 machines were similar to exempt FOBTs. Thus, during that period, section 31/34 machines fell within the exemption from VAT. HMRC appealed the FTT's decision which was upheld by the Upper Tribunal in *Rank Done Brothers UT*. HMRC did not seek to appeal against the Upper Tribunal's decision.

Section 16/21 machines

71. In the case of multi-terminal machines, as in the case of FOBTs, the RNG served a number of terminals and communicated randomly generated numbers to each terminal, which operated independently of the other terminals. During the period until 5 December 2005, the multi-terminal machines were regarded by HMRC as exempt as a matter of law. That view was consistent with the settled view (as adopted by the Gaming Board - as it then was) of materially identical provisions in the legislation regulating gambling, namely Part III of the Gaming Act 1968.

72. In accordance with the settled view of the legislation, Rank and G1 accounted to HMRC for VAT on services supplied by means of section 31 and 34 machines but did not account for VAT on section 16/21 machines.

73. HMRC subsequently adopted the view that section 16/21 machines should have been treated as taxable gaming machines on the domestic legislation in force during the period until 5 December 2005, properly interpreted. In *Rank SC*, the Supreme Court upheld that interpretation of the legislation.

74. Section 16/21 machines were therefore purportedly excluded by UK law from the VAT exemption at all relevant times until 31 January 2013.

75. In *Rank FTT*, the FTT found that the purported exclusion of section 16/21 machines from VAT exemption by UK law during the period from 1 October 2002 to 5 December 2005 was in breach of EU law since section 16/21 machines were similar to exempt FOBTs. Thus, during that period, section 16/21 machines fell within the exemption from VAT. Following an appeal by HMRC, the FTT's decision was upheld by the Upper Tribunal in *Rank Done Brothers UT*. HMRC did not seek to appeal against the Upper Tribunal's decision.

B1, B3, C and D machines under the Gambling Act 2005

76. These were purportedly excluded from the VAT exemption during the Relevant Period.

THE DISPUTE

77. During the Relevant Period, supplies of the Exempt Games, ie online games; roulette played at a table or via a machine in a casino; games on FOBTs and B2 machines; games on ELTVMs/B3A lottery machines were (or have since been confirmed to be) exempt from VAT.

78. The Appellants contended that the Exempt Games and the Taxed Games were similar from the point of view of a typical or average player. Accordingly, the different VAT treatment of supplies of Taxed Games and Exempt Games during the Relevant Period breached the principle of fiscal neutrality. It followed that the supplies of the Taxed Games should also have been exempt for VAT purposes.

79. In summary, HMRC contended that there were real differences between the Taxed Games and the Exempt Games, and online slots games in particular, during the Relevant Period in terms of:

- (1) their availability to the average consumer;
- (2) the maximum stakes and prizes available;
- (3) the process for placing a bet and receiving prizes; and
- (4) the possibility of interaction between the player and the machine.

80. Mr Peretz submitted that the availability of access to the internet throughout the Relevant Period and differences in the maximum stakes and prizes available on physical slots machines and in online slots games influenced the decision of the average player to play a physical slots machine as opposed to an online slots game. He also maintained that the different processes for placing a bet and receiving a prize for physical slots machines and online slots games (principally the need to make payment by a debit or credit card for online games) and differences in the interaction that a player experienced with physical slots machines and with online slots games also influenced the average player's choice of which game to play.

MATTERS FOR DETERMINATION

81. It follows that I must decide whether, during the Relevant Period, the Taxed Games were 'similar' to the Exempt Games such that the different VAT treatment of the Taxed Games was contrary to the principle of fiscal neutrality. I must determine whether the Appellants, who bear the burden of proof, have established, on the balance of probabilities, that the Taxed Games during the Relevant Period were viewed by players as being similar to the Exempt Games. In particular, I must consider whether any of the matters relied on by HMRC (see [79] above) had a significant influence on the decision of the average customer regarding which games they chose to play during the Relevant Period. Although HMRC's submissions focused in particular on the alleged differences between the Taxed Games and exempt online slots games, that is not a complete answer to the Appellants' case. To put it another way, if the Appellants can establish that, during the Relevant Period, the Taxed Games were similar to any of the Exempt Games, whether played on a machine or online, from the point of view of a typical or average player then the appeals must succeed.

82. I start by summarising the evidence, with particular emphasis on the evidence that bears upon the differences identified and relied on by HMRC, and my findings of fact.

EVIDENCE

83. Rank and G1 served statements from six witnesses. All six witnesses gave evidence at the hearing. Their witness statements stood as their evidence in chief and they answered questions put by Mr Peretz in cross-examination. I found the witnesses to be credible and fully accept their factual evidence which I have taken into account and described in more detail where relevant in the discussion below.

Witnesses for Rank and G1

84. In brief, the evidence of the witnesses for Rank and G1 was as follows.

Peter Hannibal

85. Peter Hannibal is director of a management consultancy business called NewGen Leisure Limited. He is also Chief Executive of the Gambling Business Group which comprises representatives from most sectors of the UK gaming industry and which provides a strategic voice for that industry. He was an employee of Gala between 1996 and 2008. He explained, by reference to the Relevant Period:

- (1) the different types of machines that Gala had in its casinos and bingo clubs, which were operated by Gala Casino and Gala Bingo respectively;

(2) the games that Gala offered to customers in its casinos and bingo clubs via its machines; and

(3) based on his experience and the data and evidence made available to him, whether differences between games supplied by Gala and certain comparator games relied on by HMRC were liable to have had an influence on the average consumer's decision as to which game to play.

Andrew Sackey

86. Andrew Sackey is Head of Electronic Gaming and New Product Development across Rank's casinos, bingo clubs and adult gaming centres ('AGCs'). He explained, by reference to the Relevant Period:

(1) the different types of machines that Rank placed in its bingo clubs, which were operated by Mecca Bingo Limited ('Mecca'), and its AGCs, which were operated by Rank Leisure Limited ('Leisure');

(2) the games that Mecca and Leisure offered to customers in their bingo clubs and AGCs via their machines; and

(3) based on his experience and data and evidence made available to him, whether differences between the games supplied by Mecca and Leisure and certain comparator games relied on by HMRC are liable to have had an influence on the average consumer's decision as to which game to play.

87. Mr Sackey had a broad experience of the machines and games which were being played in bingo clubs, AGCs, LBOs and online throughout the Relevant Period. His evidence was that, whether played on FOBTs in LBOs, or on gaming machines in bingo clubs and AGCs, or online, the characteristics which fundamentally "make a slot a slot" are:

(1) they involve a set of spinning reels showing various symbols;

(2) to play the game, the customer stakes (bets) a sum of money to spin the reels;

(3) on pressing the game start button, the reels are shown to spin;

(4) the objective is to win prizes through matching symbols to one of the win lines; and

(5) a winning combination of symbols results in the customer winning money or money's worth or getting access to a game feature.

88. Mr Sackey's evidence from his experience in and around bingo clubs was that the typical bingo player tended to be female and that bingo players generally played gaming machines as interval games between bingo sessions.

89. Mr Sackey's evidence, based on many years of watching the behaviour of slots players and talking to them about their experiences, was that, for the majority of slots' players, the machines were all just slots machines, offering slots games at different stakes, for different prizes. He said that the electro-mechanical and video gaming machines had their differences: for example, the electro-mechanical reels tended to have compensated pay-outs, nudges and holds and not many features; and the majority of video slots had no nudges and holds, lots of features and random outcomes. He maintained, however, that although technology had moved on and electro-mechanical reels had moved towards video reels, the fundamental characteristics which make a slot a slot, described above, have stayed the same.

90. He said that slots players tended to regard the machines as all being slots machines, with some being a bit cheaper to play, and others having higher jackpots. In his experience, players

were aware of how much it would cost to play a particular machine and how much they could win on it. He thought that some players would gravitate towards those machines which offered bigger wins. He said that Mecca offered a whole range of machines with different staking options and prizes to cater for all their customers.

91. Mr Sackey also made the following comments regarding the similarities between B3 slots played on FOBTs in LBOs and on B3 machines in bingo clubs and AGCs. He said that the games worked in the same way and shared the same features as the B3 slots in bingo clubs and AGCs in that they had the characteristics of a slot described above. He further said that, in some cases, the same B3 slots games were available on FOBTs and on B3 machines in different premises. He stated that he was aware that, during the Relevant Period, 'Rainbow Riches Pots of Gold' and 'Rocky' were available on FOBTs in LBOs and B3 terminals in bingo clubs and AGCs.

92. Mr Sackey also referred to the requirement that the RTP had to be stated on the machines but said that, in his experience, the majority of players would not be aware of the RTP or even understand what it was. He also said that, in his experience, players generally did not know if they were playing a game with a compensated or random outcome or, if they were aware, what the difference was between the two.

Angus Nisbet

93. Angus Nisbet is the Managing Director for online bingo at Playtech plc ('Playtech'). Playtech is a gambling software development company founded in 1999. The company provides software for online casinos, online games, online sports betting and mobile gaming.

94. Mr Nisbet provided an overview of what Rank and Gala offered on www.meccabingo.com (as regards Rank), www.galabingo.com (as regards Gala) and www.grosvenor.com (the Rank group "Casino Website"). He described the games they and other online gaming providers offered to customers before, during and after the Relevant Period.

95. Between 2007 and 2012, Mr Nisbet worked at Rank. During that time, Rank's objective was to provide a single bingo and casino experience that could be played online or on a machine and, during the period, the retail and online businesses became more closely aligned.

96. By the time Mr Nisbet moved to work for Coral in 2012, the retail and online gaming worlds had become extremely closely aligned. Coral, however, took this a step further when it offered customers a combined 'wallet' for retail and online. This was known as "Coral Connect" and allowed players to deposit cash online and spend it in retail or online. This generated a huge amount of additional player loyalty and so was extremely beneficial to the business.

97. Mr Nisbet described the typical bingo player, both online and in retail, as aged 45-55, female and in socio-economic group C2/D/E. He said this was true during the Relevant Period and remained true today.

98. Mr Nisbet also described the nature of the slots content provided online during the Relevant Period and today. Mr Nisbet's evidence was that the slots content available online and on machines located in premises during the Relevant Period was very similar. He said this was because all slots games, whether online or on a machine had certain features in common. His description of the characteristics of a slots game was the same as Mr Sackey's (see [87] above). He stated that some online games, such as Crazy Monkey, Neptune's Kingdom, Gold Rally, Triple Money and Fish-orama, were also configured to look like the older electro-mechanical three-wheel slot machines. Further, many of the slots games had similar or identical themes for both online and machine versions. During the Relevant Period, a number

of slots titles were available on machines and online in identical or similar versions, such as Rainbow Riches, Cleopatra, Da Vinci Diamonds, Reel King, Clockwork Orange, Book of Ra and Wolf Run. Mr Nisbet said that the only difference between the online and machine versions in many of the games was that the maximum stake and prize would be higher online. Otherwise, the game worked in the same way, had the same appearance and its maths model would have been similar.

99. Mr Nisbet said that, during the Relevant Period, Rank, Gala and others in the industry did not consider that the fact that access to the internet was required in order to play online slots was a material barrier to players. He said that Office of National Statistics (ONS) data showed that the majority of households had internet access during the Relevant Period. In 2005, 55% of households had access to the internet and this rose each year so that by 2013, 83% of households had access. He stated that many people would also have had access to the internet outside the home, eg at work or elsewhere.

100. Mr Nisbet acknowledged that, during the Relevant Period, players would also usually have required a debit or credit card in order to play online. Mr Nisbet said that this was also not considered by Rank, Gala or others in the industry to be a significant bar to customers gambling online. He produced evidence from the UK Cards Association showing that, in the Relevant Period, over 80% of the population over 16 had a debit card and around 60% had a credit card.

Simon Beacham

101. Simon Beacham is a gaming machine consultant but, during the Relevant Period and until October 2017, he was an employee of Rank. Mr Beacham has spent his entire career working in casinos, with a particular focus on gaming machines. From October 2000 until around March 2004, he was responsible for Grosvenor's slot machine estate which, at the time, was approximately 280 section 31 machines. Between April 2004 and June 2007, Mr Beacham was Gaming Systems Manager and focused on the casino side. From July 2007 until the end of the Relevant Period, Mr Beacham was Head of Electronic Gaming for Grosvenor.

102. Mr Beacham said that, essentially, all slots are played in the same way: a player bets on the outcome of a series of reels, which contain various characters (numbers, symbols etc.) which the customer causes to spin by pressing a button to start the game. Where the reels stop spinning is dictated by the machine and the customer cannot influence the outcome. Once the reels have stopped spinning, the customer will typically have various options, including:

- (1) collecting a prize (usually cash) based on the order of the reels, (for example, if three identical symbols were shown in a row, the player would win £5 etc);
- (2) choosing to hold or nudge certain reels in place for the next spin;
- (3) in certain cases, choosing to enter into a bonus feature or features; or
- (4) in a losing spin, betting again.

103. Mr Beacham said that, in his experience, slots players were drawn to a game by its theme, ie what it looked and sounded like. He stated that, in all his time at Grosvenor, the same or similar themes kept coming up in popular games, for example Ancient Egypt (Cleopatra and Pharaoh's Fortune), luck (Lucky Lady's Charm, Lucky Lemmings and Lucky Landings), wealth and luxury (Da Vinci Diamonds, Jewels of Africa and Golden Hammer) and wild animals (Wolf Run and Coyote Moon).

104. Mr Beacham said that he had not seen any evidence during his years of working with gaming machines at Grosvenor to suggest that the restrictions of the maximum stakes and prizes that applied to section 21, section 31 and Category B1 machines during the Relevant

Period was a factor that affected customers (or certainly the vast majority of their customers). Mr Beacham said that, in his view, the vast majority of customers would not have bet any higher stakes or consequently won higher prizes had the restrictions not applied. To support this, Mr Beacham produced stakes, prizes, number spins and average stake data for slots games played on Grosvenor's machines during the period 2008 – 2012. The average stake for each year was less than the regulatory maximum of £2 and reflected the fact that customers generally chose to play at stakes that were lower than the maximum.

Crys Terry

105. Crys Terry is employed by International Gaming Technology plc ('IGT'). He currently heads Sales Operations for IGT's interactive gaming (iCasino) operations. During the Relevant Period, IGT provided Rank and others offering gaming in the UK market with slots content to offer online customers.

106. His evidence was that most customers are not generally aware of the RTP of any particular slot or what 'RTP' actually refers to. He stated that IGT had tested different RTPs on the same game theme to see if there was any noticeable difference/pattern in player behaviour or game performance. He said that all the tests were inconclusive and showed no obvious change in behaviour.

107. In relation to the physical process for placing a stake and receiving a prize, Mr Terry said that to play slots online a customer will typically use a debit or credit card to pay. He said that, in the Relevant Period, IGT did not regard this requirement as a constraint to its online business.

Richard Mountney

108. Richard Mountney is Director of Content Development at Global Draw Limited which trades as SG Gaming ('SG'), a part of Scientific Games Corporation. He gave his evidence in his personal capacity and not as a Director of SG. He started in the gaming industry in 1989 and worked for Barcrest, a leading provider of games content and terminals, for 16 years until 2005 when he moved to William Hill. In 2008, he joined SG. Barcrest was subsequently purchased by SG in 2011.

109. He explained how, after 1 September 2007, when the changes brought about by the Gambling Act 2007 were introduced, the same Category B3 games were played on both Category B3 (under the Gambling Act 2005) terminals in bingo clubs and AGCs and on FOBTs in LBOs.

110. He described T7 machines which were dual screen terminals developed by Barcrest. They were situated in bingo clubs and AGCs. They could have either Category B3 or Category C or a mix of both categories of games on them. Mr Mountney said that he and his team have been directly involved in the process of converting B3 games played on a T7 terminal in a bingo club to B3 games played on a FOBT in a LBO. There was no difficulty in converting the games because the critical, fundamental features of the games did not change: each game had the same game specification, the same features and sounds whether it was played on a FOBT or a T7. He stated that the games which were converted had the same stakes and prizes, volatility and returns to player options, ie the same maths model. Even though the critical, fundamental features of the games did not change when they crossed over, it took Barcrest on average, around 9 - 12 months to convert games from a format that would be played on a T7 to a FOBT because of the technical issues created by having different platforms.

111. Mr Mountney said that, during the Relevant Period, SG supplied a limited number of FOBTs to Grosvenor casinos. He stated that SG did not develop any bespoke slots content for the FOBTs which it supplied to casinos. It followed that the games on the FOBTs in

Grosvenor's casinos would have been the same as the games on the FOBTs which SG supplied to LBOs.

Appellants' witness evidence agreed by HMRC

112. HMRC agreed the following matters of fact as set out in the Appellants' witness statements:

- (1) In general, and subject to (3) below, factual statements as to what machines were operated by the operators concerned, and as to details of their manufacture, supply to the operator, location in premises, operation, content (games played and description of those games), and regulatory classification (though, for the avoidance of doubt, this concession does not include statements as to the similarity of different machines or games from the point of view of the average consumer or as to the impact of differences between them on the average consumer's choice of machine or game);
- (2) Witnesses' biographical details and career history;
- (3) When online slots games were first introduced and thereafter, suppliers and operators sought online slots games which were similar in theme, sound and appearance to games on physical slots machines because it was very difficult for operators to predict which games players would like;
- (4) Differences in the Return to Player ('RTP') between physical slots machines, on the one hand, and online slots games, on the other hand, across the Relevant Period did not influence the decision of the average player regarding which games they chose to play;
- (5) Differences in the availability of compensators between physical slots machines, on the one hand, and online slots games, on the other hand, across the Relevant Period did not influence the decision of the average player regarding which games they chose to play;
- (6) The average player would not notice differences in the volatility of different games; and
- (7) The majority of slots players were not aware that machines were in different regulatory categories.

Table of Comparators

113. The Appellants produced a Table of Comparators which, by reference to the witnesses' evidence, described features of the different categories of slot machines, both pre and post the coming into effect of the Gaming Act on 1 September 2007, and compared them with online slots and ELTVMs during the Relevant Period. The table set out the core features of the games, which were all slots games such as Rainbow Riches, which was available on all platforms. The table also showed that some electro-mechanical machines had the ability to nudge or hold which was a feature of some online games, which sought to mimic the machines, but was not available on the ELTVMs. The table showed that the regulatory stake and prize limits differed according to the Category of the machine which were as described in [53] – [62] above and how the different versions were physically played. The Table referred to the decision in *Oasis* and included slots played on ELTVMs as Exempt Games. The Table also referred to the fact that the FTT in *Done Brothers FTT* found, at [83] – [84], that the format of slots games was the same on FOBTs, online and on B3A machines during the Relevant Period although slots only became available on FOBTs from 1 September 2007 so cannot be regarded as one of the Exempt Games in the period 18 December 2005 to 31 August 2007. I accept the facts presented in the Table of Comparators as correct.

HMRC's evidence

114. HMRC did not produce any witness evidence but they relied on the following documents in support of the matters relied on by HMRC (see [79] above):

- (1) National Centre for Social Research, *British Gambling Prevalence Survey 2007* (September 2007);
- (2) National Centre for Social Research, *British Gambling Prevalence Survey 2010* (February 2011);
- (3) Gambling Commission, *Gambling participation: activities and mode of access* (April 2013);
- (4) National Centre for Social Research, *Gambling behaviour in England and Scotland: Findings from the Health Survey for England 2012 and Scottish Health Survey 2012* (June 2014);
- (5) Gambling Commission, *Trends in Gambling Behaviour 2008-2014* (May 2015);
- (6) National Centre for Social Research, *Gambling behaviour in Great Britain in 2015: Evidence from England, Scotland and Wales* (August 2017);
- (7) Gambling Commission, *How do machine gamblers feel about tracked play?* (January 2018); and
- (8) National Centre for Social Research, *Gambling behaviour in Great Britain in 2016: Evidence from England, Scotland and Wales* (September 2018).

DISCUSSION

115. I have already concluded that the Taxed Games and the Exempt Games in this case all fall into a single category of slots games. That, however, does not determine the outcome of this appeal. The CJEU in *Rank CJEU* did not rule out treating machines that fell into the same category differently for VAT purposes where they were distinguished by differences other than details of the structure, the arrangements or the rules of the games concerned. It is clear from [31] – [33] of Case C-219/13 *K Oy* (2014), which concerned books published in paper form and books published on other physical supports, that the question is whether the different methods of providing the content, eg a book or a game, have a significant influence on the consumer's decision to choose one version rather than the other.

116. In this case, HMRC contended that the average consumer of slots games during the Relevant Period did not play slots games online and that was likely to be because they preferred to play slots on a machine. If the physical format had a significant influence on the decision of the average consumer to play a slots game on a machine rather than online slots then that would justify treating the games differently for VAT purposes notwithstanding that they fell within the same category of slots games.

117. HMRC also submitted that the Appellants had failed to show that Taxed Games were available, or available in a materially similar form, online prior to 2008 (or on FOBTs or on ELTVM/B3A machines). In relation to ELTVMs/B3A machines, HMRC also argued that the Appellants had not established that, during the Relevant Period, Exempt Games on ELTVMs/B3A machines were materially similar to Taxed Games.

118. HMRC also submitted that the average player of slots games during the Relevant Period regarded playing Taxed Games and Exempt Games (ie games online, B3As/EVLTMs and, after 31 August 2007, FOBTs) as materially different in the following respects:

- (1) maximum stakes and prizes available; and

- (2) the possibility of interaction between the player and the machine, specifically the availability of nudge-and-hold features on slots games played on electromechanical machines.

119. Before dealing with HMRC's first contention it is necessary to consider what is meant by the 'average consumer' in this case.

Average consumer of slots games in the Relevant Period

120. HMRC contend that their evidence from the Gambling Commission showed that the average player of physical slots games in the Relevant Period was:

- (1) single;
- (2) white;
- (3) unemployed;
- (4) male;
- (5) under 35 years old;
- (6) without a university degree; and
- (7) playing in a pub.

121. HMRC contrast this with the evidence of the Appellants' witnesses which, HMRC say, showed that that the average player of slots games in this time was an older woman playing slots between games of bingo. HMRC submit that the typical or average consumer for these purposes did not play online slots games. They submit that the survey conducted for the Gambling Commission in 2010 showed that playing online slots games was much less popular than playing physical slots machines with only 3% of people who engaged in gambling playing online as opposed to 13% of people playing on machines. HMRC contend that the low rates of playing online slots games strongly suggest that the average player did not view online slots games as similar to physical slots machines in the Relevant Period.

122. It is necessary to identify who is meant by the 'average consumer' because whether the Taxed Games and the Exempt Games are materially similar must be assessed from the point of view of the average consumer. Clearly, the consumer for these purposes is not just a member of the general population who buys goods and services for personal use but a player of the games in question, ie slots games. In my view, it is not appropriate to focus, as HMRC did, on the players of slots games on a particular format, ie physical machines or online. Slots games are a single category for these purposes and how they are played does not affect that categorisation unless the format had a significant influence on the player's choice to play one rather than the other (see *K Oy* referred to in [115] above). I consider that the average or typical player of slots games for these purposes must be a representative amalgam of persons who play such games on machines or online or both.

123. It is clear from paragraph 55 of *Rank CJEU* (see [27] above) that differences which would deprive the principle of fiscal neutrality of meaning and allow distortions in the VAT system cannot justify treating supplies in the same category of game differently for VAT purposes. The CJEU referred to differences in the details of the structure, the arrangements or the rules of the games which fall within a single category. In my view, the same approach should be applied in determining the characteristics of the average or typical consumer. It follows that the fact that particular demographic groups played slots games in certain locations, such as bingo clubs or pubs, or in particular ways, such as online or on physical machines, cannot be the basis for identifying the average player of slots games. Differences between consumers based on age, gender, educational attainment or employment status must be treated with

caution. Applying such specific characteristics to exclude certain persons from the average risks introducing artificial distinctions to a single category of supply by the back door which would undermine the principle of fiscal neutrality. I consider that the mere fact that a greater number of people played slots games on machines cannot justify treating players of online slots games, which are part of the same category of supply for the purposes of the principle of fiscal neutrality, as a different class of consumer for VAT purposes during the Relevant Period. HMRC did not put their argument that way but it seemed to me that was the effect of asking me to conclude that the lower take up of online games during the Relevant Period indicated that the average player (by which they meant a player of slots games on machines) did not regard the online slots games as similar to the slots games played on machines.

124. As stated above, I consider that the average consumer for these purposes is the typical player of slots games on all formats, ie on machines and online. The fact that some players may have been unable to access the internet to play online slots games or that some may not have lived near a bingo club, LBO or casino so could not access machines to play slots games should not affect the description or attributes of the average player.

Availability of slots games on different machines and online

125. HMRC contended that the Appellants had failed to establish, on the balance of probabilities, that the Taxed Games available on their section 16/21 machines and section 31/34 machines (later B1, B3, C and D machines) were available online prior to 2008 or on FOBTs/B3As as Exempt Games. They also contended that the Appellants had failed to adduce any or any sufficient evidence to demonstrate that the Taxed Games were materially similar to slots games on ELTVMs/B3A machines. There was no dispute that there were no slots games available on FOBTs before 1 September 2007.

126. As I have already observed at [81] above, the Appellants will succeed in their appeals if they can show that, during the Relevant Period, the Taxed Games were similar to any of the Exempt Games, from the point of view of the average player, whether played on FOBTs or on ELTVM/B3A machines or online. As has already been stated at [81] above, it is not necessary for Rank and G1 to show that a particular slots game, eg Rainbow Riches, was available on all platforms in order to establish that the principle of fiscal neutrality has been breached. In this case, both the Taxed Games and the Exempt Games are slots games and fall within the same category. It is enough for the Appellants to establish that some slots games were taxed while another slots game on a different platform, which was materially similar from the point of view of the average player, was exempt throughout the Relevant Period. Unless the different games can be treated as falling in different categories or meeting different needs of the average player, the appeals must succeed.

127. Essentially, HMRC's submission was that Rank and G1 had not shown that the same or materially similar (from the point of view of the average player) slots games were available as both Taxed Games and as Exempt Games and specifically that similar games were available online prior to 2008. I have already accepted the evidence of the Appellants' witnesses that shows that many of the slots games available to players at different times during the Relevant Period on machines in different categories, online and on FOBTs were identical or substantially similar. For example, throughout the Relevant Period but at different times, 'Rainbow Riches Pots of Gold' was played as a Taxed Game on section 16/21 machines and subsequently on Category B3 machines while it was also available as an Exempt Game online, on ELTVMs/B3A machines and, from 1 September 2007, on FOBTs.

128. For completeness, I find that whether the online slots games were accessed by using a CD-ROM or simply through a browser is an irrelevant distinction for these purposes as both were simply means to access slots games remotely via the internet. In any event, the evidence

showed that, in 2005, more than half of households in Great Britain had access to the internet. Although I accept that different devices, eg tablets with touch screens, introduced at different times during the Relevant Period offered different ways of interacting with the online slots games, I do not consider that the differences were material enough to change the fundamental nature of the slots game from the point of view of the average player.

Differences between Taxed Games and Exempt Games

129. HMRC contended that the average player of slots games during the Relevant Period regarded playing slots games online, on ELTVMs/ B3A machines and, from 1 September 2007, on FOBTs, ie Exempt Games, as materially different from playing those games on section 16/21 machines, section 31/34 machines and, from 1 September 2007, Category B1, B3, C and D machines, ie Taxed Games, because of differences in:

- (1) maximum stakes and prizes; and
- (2) the possibility of interaction between the player and the machine, specifically the availability of nudge-and-hold features on slots games played on electro-mechanical machines.

130. In relation to the maximum stakes and prizes, there was no dispute that different amounts could be gambled and won in the different games (see [53] – [62] above for details of stakes and prizes in relation to different machines and online). The issue is whether such differences had a significant influence on the decision of the average player to play one game rather than another.

131. HMRC did not produce any evidence that any differences between the stakes and prizes in different slots games had any impact on the average player's choice of which game to play. HMRC submitted that it was clear that the differences were liable to have a considerable influence on players' choice and the Appellants had not produced sufficient evidence to show otherwise.

132. I do not accept that the level of maximum stakes and prizes had such an influence. Such evidence as there was on the subject (eg Mr Hannibal in cross examination on the first day) suggested that the level of stakes and prizes was not a factor that influenced the average player's choice of where they played, eg in a pub or a bingo club. The evidence (eg Mr Beacham at [104] above) also tended to show that, where there were maximum stakes, most players placed bets below the maximum. In any event, there was no difference between the maximum stakes and prizes for B3 machines (ie Taxed Games) and B3 slots games played on FOBTs (ie Exempt Games).

133. HMRC also submitted that the differences in the ability of a player to interact with the game on the different machines and online would have had a significant influence on the decision of the average player to play a particular version of a game. This submission focused on the fact that nudge-and-hold features were principally available on the older electro-mechanical machines and not on the newer machines and online versions of the game.

134. The Appellants' witnesses accepted that, on some of the older machines and possibly some later ones, the player might believe that they could influence their chances of winning by using the nudge and hold feature. However, the evidence (eg Mr Hannibal and Mr Nisbet in cross-examination) showed that some online games, such as Bar X, that were conversions of older electro-mechanical games replicated the nudge and hold feature on screen.

135. It seems to me that the availability of the nudge and hold feature may have influenced a player to choose to play a particular game rather than a game that did not have that feature which is why some online slots games that had been converted from a machine version retained it. As the evidence shows that nudge and hold was available on some Taxed Games and some

Exempt Games, eg different versions of Bar-X, I do not consider that the feature is relevant in this case. If it were a relevant factor then that would lead to the conclusion that there was a breach of the EU principle of fiscal neutrality where slots games had a nudge and hold feature in both their Taxed Games and Exempt Games versions. There would also, on that view, be a breach where versions of Taxed Games and Exempt Games had never had a nudge and hold feature. That would leave only those versions of games that had a nudge and hold feature in one version, eg the Taxed Games version, but not in the other version as justifying a differential tax treatment. The absurdity of such a position suggests to me that the presence or absence of a feature such as nudge and hold cannot, in principle, be a relevant distinction. Unless it can be shown (which is not the case here), that Taxed Games as a class are differentiated from Exempt Games in the mind of the average player by the presence or absence of a nudge and hold feature, I do not consider that it relevantly influences the decision of that player to play one and not the other.

CONCLUSION

136. The evidence provided by Rank and G1 shows that the supplies of slots games on different machines and online, which were treated as Taxed Games and Exempt Games according to the method by which they were provided, were similar from the point of view of the average player. Two supplies meet the same needs where their use is comparable and the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other. None of the factors identified by the CJEU as relevant considerations in *Rank CJEU* exerted a significant influence on the average player's decision to play a Taxed Game rather than an Exempt Game. I consider that the evidence shows that the average player viewed Taxed Games and Exempt Games as similar and interchangeable because they all met the same need from the point of view of that player which was to gamble by playing a slots game for money with a view to winning more than they staked. Accordingly, treating Taxed Games and Exempt Games differently for VAT purposes during the Relevant Period breached the principle of fiscal neutrality.

DISPOSITION

137. For the reasons given above, the appeals by Rank and G1 are allowed. However, the quantum of the claims has not been agreed and remains an issue in this appeal. If the parties cannot reach agreement within 56 days of the date of release of this decision, they may apply to the Tribunal for further directions for the determination of the amounts payable.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**JUDGE GREG SINFIELD
CHAMBER PRESIDENT**

Release date: 30 June 2021