FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 78
XA98/17

Lord President
Lord Drummond Young
Lord Tyre

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Appeal against
a decision of the Upper Tribunal

by

THE ADVOCATE GENERAL REPRESENTING THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

against

KE ENTERTAINMENTS LIMITED

Respondents

Appellants: DM Thomson QC, Roxburgh; Office of the Advocate General
Respondents: Ghosh QC; DLA Piper Scotland LLP

13 December 2018

Introduction

[1] This appeal concerns whether a taxpayer is entitled to a refund of Value Added Tax, which was paid over many years, following a change in HMRC's approach to the assessment of VAT on the game of bingo. This, to a large extent, turns on whether the change resulted in a "decrease in consideration" under Regulation 38 of the Value Added

Tax Regulations 1995. Regulation 38 implements Article 90 of the Principal VAT Directive, which refers instead to a reduction in "price". Article 90 superseded Article 11C of the Sixth Council Directive.

Legislation

[2] Article 11A of the Sixth Council Directive (77/388/EEC of 17 May 1977 on the ... Common system of value added tax: uniform basis of assessment) provided, in relation to VAT, that:

> "1. The taxable amount shall be:
>
> (a) in respect of supplies of goods and services ... everything which constitutes the consideration which has been ... obtained by the supplier from the ... customer ... for such supplies ...".

Article 11C provided:

> "1. ... [w]here the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly ...".

[3] The Sixth Directive was recast in the Principal VAT Directive (2006/112/EC of 28 November 2006 on the Common system of value added tax). Article 73 of the latter, which replaced Article 11A of the former, provides that:

> "In respect of the supply of goods or services ... the taxable amount shall include everything which constitutes consideration obtained… by the supplier, in return for the supply, from the customer…".

Article 90, which is in identical terms to Article 11C, states that:

> "… [w]here the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly…".

[4] Article 90 is translated into the United Kingdom regime by Regulation 38 of the Value Added Tax Regulations 1995 as follows:

> "Adjustments in the course of business
>
> (1) This regulation applies where -
>
> … (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."

Regulation 24 states that an increase in contribution is:

> "an increase in the consideration… which is evidenced by a credit or debit note or any other document having the same effect".

"[D]ecrease in contribution" is to be interpreted in the same way. Regulation 38 continues by stating that, where it applies:

> "(3) ... the maker of the supply shall ...
>
> (b) in the case of a decrease in consideration, make a negative entry;
>
> for the relevant amount of VAT ... in ... his VAT account".

[5] Section 19 of the Value Added Tax Act 1994, which is derived from Article 73, provides that:

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

[6] Section 80, which deals with, *inter alia*, overpayments of VAT, provides that HMRC are liable to credit a person who "has brought into account as output tax an amount that was not output tax due". However, the person must make a claim and HMRC are not liable unless the claim is made within four years of the end of the relevant accounting period.

Bingo and its VAT element

[7] Bingo is a gambling game of remarkable simplicity and enduring popularity, at least in its on-line form. It continues to be played in a decreasing number of bingo halls. In the bingo hall version, the players pay a fixed fee to participate not in a single game but in a session of several games lasting for about two hours in total. Although there are several variants, each game generally involves the players having pre-printed or electronic cards containing columns of numbers. A caller will draw and announce random numbers and the players will, over time, mark off these numbers, if they appear on his or her card. The end of a game occurs when one of the players has marked off all of his or her numbers. That player will receive a cash prize.

[8] For all its simplicity, bingo has a Value Added Tax regime of some complexity. The fee, which is paid by a player for a session, requires to be divided into two components for each game. The first is called the participation fee, which is that part attributed to the supply of the game to the player. It is subject to VAT. The second is the stake money; being the part said to contribute to the cash prize paid out to the winner. This is not subject to VAT. A problem arises because the value of each component can vary from session to session according to the number of players. It varies also because the promoter may only decide on the prize money at the start of a session, once he or she has reviewed the ticket sales; albeit that the amount is likely to be similar to that selected for the same session during the previous week. The prize money may not be directly related to the number of participants. There may be a guaranteed minimum for particular, or all, games. The promoter may therefore require to top up the prize money, where there is a dearth of custom, in respect of one game from the general pool of participation fees in the session.

[9] The amount of VAT payable will vary, depending upon whether it is assessed on a game by game or session basis. If it is the former, the calculation is relatively straightforward, since the level of the participation fee for each game will have been decided at the start of the session. The VAT will be the sum of that element multiplied by the number of players. This is so even if the participation component might theoretically have been reduced, if the prize money required to be topped up. If it is the latter, the total prize money paid out during a session is deducted from the gross receipts for that session in order to calculate the participation fees upon which VAT is levied. The contribution to the VAT exempt prize or stake money is higher and hence the VAT payable is lower. It is the mode of assessment, and by whom and how it is determined, which lies at the heart of the appeal.

The Leaflets, Notices, Business Brief and Carlton Clubs

[10] It has long been recognised by HMRC that in gambling transactions the payment of stake money, all of which is returned as winnings, is not a payment for a supply or service. It is thus outside the scope of the VAT regime. It is incumbent upon the promoters of the particular game to work out in the first instance what constitutes the stake money and what is the participation fee in order to determine the amount of VAT which is due. Prior to 2007, HMRC's leaflets and notices had advised promoters of bingo to make their calculations on a game by game basis (Leaflets Nos. 701/27/84; 701/27/90; and Notice 701/27/97).
Notice 701/27, in March 2002, repeated HMRC's desired method of calculation as involving a totalling of receipts for a session and a deduction of the stake money, but, critically not under deduction of any participation fee for one game which is used as additional prize money in another.

[11] HMRC's Business Brief 07/07 changed this. It stated:

> "…[T]he 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… paid by players to participate in that same session. Where money from other sources is added to the stake money… in order to meet guaranteed prizes, that additional money cannot be used to reduce the value of the VAT…".

The Brief invited promoters, who had been calculating the VAT on a game by game basis, to make a claim for a repayment. This was subsequently clarified as meaning that HMRC would accept claims under section 80 of the 1994 Act, thus restricting the retrospectivity of the Brief to four years.

[12] In *Carlton Clubs* v *Revenue and Customs Commissioners* [2011] SFTD 1209, a First Tier Tribunal reviewed the historical relationship between bingo and VAT in some depth. HMRC had argued that Business Brief 07/07 had not involved a change in consideration and that accordingly Regulation 38, which permitted adjustment where a decrease in consideration had occurred, was not engaged. There had been no change in policy regarding the manner in which the promoter should apportion the participation fees and the stake money. The First Tier Tribunal disagreed.

[13] The FTT said:

> "[53] ... [T]he 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. ...
>
> [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. ...
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> ...
>
> [58] The activity of playing bingo over say a two-hour period can be analysed as a single supply for each game – ie 15 supplies to each individual customer ... 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.
>
> ...

> [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.
>
> ...
>
> [62] There is no dispute that the 2007 Business Brief and subsequent notice required the VAT payable to be calculated on a session basis. [T]hat is a change of policy rather than a clarification of existing policy."

[14] The FTT considered: Case C-38/93 *HJ Glawe Spiel-und Unterhaltungsgerate* v *Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] STC 543 (slot machines); Case C-283/95 *Fischer* v *Finanzamt Donaueschingen* [1998] STC 708 (roulette); and Case C-172/96 *First National Bank of Chicago* v *Customs and Excise Commissioners* [1999] QB 570 (foreign exchange dealing), in relation to the period of the supply. The FTT concluded that there was no principle or rule which provided a definitive answer for every situation. Rather, emphasis was to be placed on a practical rather than a theoretical solution. Regards should be had to the net result of the transactions. The FTT continued:

> "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 ... because set-off applies within each session (intra session). It does not ... matter how the change in consideration arises as long as it does arise. Regulation 38 ... applies *inter alia* where there has been a decrease in consideration evidenced by a credit note. ... The [promoter] has, in accordance with the administrative directions of HMRC, changed the consideration for the supply of the right to participate in cash bingo sessions ... [S]uch a change falls within the scope of reg 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 ... (as in [Case C-317/94] *Elida Gibbs* [v *Customs and Excise Commissioners* [1997] QB 499], 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. ... 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. ... 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 reg 38 ... 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* (*supra*))."

The Tribunal decisions

[15] The First Tier Tribunal's decision of 18 July 2016 allowed the taxpayers' appeal against HMRC's decision, dated 21 March 2013, declining to accept the taxpayers' adjustment of £460,630.36 for the period ending in December 2012, which they had made in light of *Carlton Clubs* (*supra*), and assessing the taxpayers for approximately the same amount. The taxpayers' claim had been made not as an overpayment under the time limited section 80 of the 1994 Act but as an adjustment under regulation 38 of the 1995 Regulations. The FTT identified the principal issue as:

> "Whether or not a recalculation of the value of the participation fees paid by [the taxpayers'] customers on a session by session basis rather than game by game basis, as stated by [HMRC] to be the correct approach in their Business Brief 07/07, results in a 'decrease in consideration for a supply' ... which occurred after the end of the prescribed accounting period in which the original supply took place, within the meaning of Regulation 38 ...?"

The FTT followed the reasoning in *Carlton Clubs,* whereby the position prior to Business Brief 07/07 had drawn the line on a game by game rather than a session basis. This affected the calculation of the consideration, which in turn affected the calculation of the taxable amount and consequently the VAT. The amount of VAT was reduced, when using the

session basis, by enabling a recoupment of the part of the participation fees used to top up prizes within the session. The FTT reasoned:

> "98. ... a reduction in the amount of VAT payable ... increased the participation fee amount actually obtained by [the taxpayers] ... from its customers in return for its supplies of bingo and as the amount of VAT had reduced so had the taxable consideration".

[16] The FTT considered that, although there was no change in the payments made by the players, there was a change in the participation fee obtained by the taxpayers from the players and consequently a price reduction in terms of Article 90. Interpreting Regulation 38 in a manner which required "decrease in consideration" to mean that the player had to pay less was too narrow an approach. Both game by game and session bases had been in accordance with HMRC's administrative directions. Where the calculation was changed, there was a decrease in the consideration properly attributable to the supply of the right to participate. The FTT reasoned:

> "111 ... 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. ... [T]he consideration for the supply in question is the amount which [the taxpayers] can take for [themselves]. It is that which changed and not the stake money."

The taxpayers had not made an error in using the game by game basis and then the session basis. Section 19 of the Act meant that it was necessary to carry out a deeming process to apportion payments by the players into the two parts. The deemed consideration using the session basis had led to a decrease in consideration, which the taxpayers gave effect to using a credit note in the December 2012 period.

[17] On 14 August 2017, the Upper Tribunal refused the appeal against the First Tier Tribunal's decision ([2017] UKUT 328 (TCC)). The UT had regard to the *dicta* in *Elida Gibbs*

(*supra*, at para 19) that, because the basic principle was to tax the final consumer, the taxable amount could not exceed the consideration paid by that consumer. Following *HJ Glawe* (*supra*, at para 9), the consideration consisted only of the proportion of the fee which the taxpayers could actually take for themselves. The taxable amount did not include winnings (*International Bingo Technology* v *Tribunal Económico-Administrativo Regional de Cataluña* [2013] STC 661 at para 29). The consideration was the amount which the taxpayers could apply to their own use; being the net result of transactions over time (*First National Bank of Chicago* (*supra*) at para 47). The UT concluded:

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

[18] The UT rejected an argument that, given that the fee paid by the player was the same, "there had been no change in the real world." The consideration was not the amount paid, but the sum which the taxpayers could keep. The Business Brief had instructed taxpayers to stop using the game by game basis and to start using the session basis. The calculation of VAT in this way reduced the amount which the taxpayers could take for themselves and this constituted a decrease in consideration. The taxpayers had not made an error. Neither the game by game nor the session basis had been unlawful. There had been "a retrospective change as to which lawful basis was to be used". Accordingly, the

recalculation resulted in a "decrease in consideration for a supply, which includes an amount of VAT" within the meaning of Regulation 38.

Grounds of Appeal and Submissions

HMRC

[19] The core submission was that the Upper Tribunal had erred in its interpretation of what constituted a decrease in consideration (Regulation 38) or a price reduction (Article 90). The Business Brief had been no more than a clarification of how VAT should be calculated. It was not a direction to recalculate VAT for previous accounting periods on a session basis. It had expressed only HMRC's view. It invited claims for overpayments, over the previous four years, where this might be attributed to error or mistake (section 80), but not indefinitely on the basis that the consideration had decreased. The UT had attributed to the Business Brief a status which it did not have and an effect which it could not achieve. The taxpayers were attempting to circumvent the four year time bar, in relation to which section 80 provided a complete code. Regulation 38 was properly only engaged when there had been an actual reduction in the price after the supply had taken place. The re-apportionment exercise did not fall within Regulation 38 at all. HMRC's statement that there was a more favourable method of apportionment did not amount to a reduction.

[20] The Business Brief had not been issued under any provision of the 1994 Act. It was therefore simply HMRC's interpretation of the legal position (see De Voil: *Indirect Tax Service* paras V1.236, 240). None of the European cases (*supra*) supported the proposition that a change in attribution made after the supply amounted to a decrease in consideration. The various leaflets, notes and briefs were not law. HMRC's interpretation was not infallible and could be challenged (*Leeds City Council* v *Revenue and Customs Commissioners* [2016] STC

2256 at paras [4] and [43]). All that had happened was that HMRC had changed their position. Before that, the FTT could have decided that they were wrong. It was not open to the taxpayers to recover sums which they could have claimed earlier (*Iveco* v *Revenue and Customs Commissioners* [2018] STC 364).

[21] In relation to the proper scope of Regulation 38 (derived from Article 90, formerly Article 11C), the general principles were set out in *Elida Gibbs* (*supra* at para 28; see also Case-310/11 *Grattan* v *Revenue and Customs Commissioners* [2013] STC 502). A taxpayer who had refunded the value of coupons to a consumer ultimately received a sum corresponding to the sale price paid less that value. The VAT would be chargeable only on the net sum; the consideration received (Case C-330/95 *Goldsmiths (Jewellers)* v *Customs and Excise Commissioners* [1997] STC 1073 at paras 15 and 16; Case C-86/99 *Freemans* v *Customs and Excise Commissioners* [2001] STC 960 at paras 31 and 35). This protected the principle that the tax was borne by the consumer and not the supplier. There had to be a "real world reduction" and not just a change in the manner of apportionment (see *Inventive Tax Strategies* v *Customs and Excise Commissioners* [2017] UKFTT 667 (TC) at para 36; *Iveco* (*supra*) at paras [44], [48] and [51-54]). It was not open to a taxpayer to determine when he will make a claim and to do so decades later. All the circumstances had been known at the point when the supply was completed. Invoking Regulation 38 years later was not legitimate. It had to be done there and then. If it was not, section 80 permitted the only remedy for overpaid tax. Regulation 38 was about a failure to receive a price. The adjustment fell to be made in the next return.

[22] The test in section 19(4) was objective. It did not provide for apportionment to be revisited. There may be more than one method of apportionment. It was for the taxpayer to make a choice. He could choose a different method for the future. He could not recalculate

except when he had made a mistake. If he had not been compelled to calculate VAT in a particular way, he could make a claim under section 80. This is what HMRC had invited promoters to do (see *Victoria and Albert Museum Trs* v *Customs and Excise Commissioners* [1996] STC 1016 at 1024). The UT had made three key errors. The Business Brief did not result in a price reduction. Its effect was not retrospective. It had been a mistake to have accounted for VAT in terms of the earlier guidance. There was no basis for the view taken by the Tribunals that a price reduction occurred when a taxpayer decided to carry out a new method of apportionment. If matters were not clear, one option was to refer the case to the CJEU.

The taxpayers

[23] In 2007 there had been a change from a game by game to a session basis. The change had been mandatory. The Business Brief was directive not permissive. It was retrospective and told taxpayers to make section 80 claims. Both bases were compliant with the legislation. One replaced the other. The fact that the change had been done by notice was irrelevant. The deeming provision in section 19(4) had been altered. The time limit argument was a new one. There was no time limit for a Regulation 38 claim. The case was not characterised by the taxpayers picking a method. The opposite was the case. The taxpayers had done what they had been told to do. When HMRC had changed their minds, and told the taxpayers to do something else, there was no reason for them not to receive their money back.

[24] The default position was that each supply to each customer was to be assessed separately. The consideration, being the taxable amount on which a charge was made, was what the taxpayer kept. For some services, the charge depended on the time period for, or

the type of, services. There was no right answer in every case. The taxable amount in certain cases had to be assessed over time. *Carlton Clubs* (*supra*) determined that the CJEU guidance pointed to the applicability of certain principles. VAT was a proportional tax on turnover. The law was non-discriminatory. The domestic law principles of proportionality and legitimate expectation had to be respected. The selection of the time period could be done by administrative technique rather than statute. Changing the basis inextricably changed the consideration kept by the taxpayers. The Business Brief substituted one correct method by another; hence Regulation 38, but not section 80, was engaged. There was no need for a reference to the CJEU. The propositions were all well established. There was no EU law to grapple with.

[25] There did not need to be a return of money to the player. The whole point was that there had been a return to the winner. The essence of the session fee basis was that part of the participation fee was going back to a person who was not the taxpayer. *Elida Gibbs* (*supra*); *Freemans* (*supra*); *Inventive Tax Strategies* (*supra*); *Iveco* (*supra*); and *Leeds City Council* (*supra*) were all distinguishable. *First National Bank of Chicago* (*supra*) had stressed that the "spread" was relevant (paras 45-48). The taxable amount in the context of buying and later selling different foreign currencies was the net result of transactions over a period of time (*ibid* para 50). There was no right answer but the taxpayer could work it out on a rough basis. A tax practice of using monthly cash receipts, which depended upon the winnings and losses of players as the basis of assessment in relation to gaming machines, was not unlawful simply because of a lack of correlation with the VAT which might be charged to individual players (Case C-440/12 *Metropol Spielstäffen* v *Finanzamt Hamburg-Bergedorf* [2014] STC 505 at para 39). In *Metropol* and in *Commissioners for Revenue and Customs* v *Imperial College* [2016] UKUT 278 (TCC) an intelligible period had to be found, but it was not selected

by the taxpayer. The analysis in *Carlton Clubs* (*supra*) was correct. The fact that there was no re-imbursement to the players was neither here nor there. That was the same in *First National Bank of Chicago* (*supra*). Both the game by game and session bases had been good in law. The only error which the taxpayers had made was in treating the original basis as legally compulsory.

Decision

[26] VAT is chargeable on the "consideration" for the supply of goods or services (Value Added Tax Act 1994, s 4(2)); the supply being for that part of the consideration "properly attributable to it" (*ibid* s 4(4)). The particular supply has to be identified. When it occurs over a period, or periods, of time, the relevant time unit must be determined. It may be that a number of options present themselves. They did so for bingo (ie *Carlton Clubs* v *Revenue and Customs Commissioners* [2011] SFTD 1209) and in foreign exchange dealings (Case C-172/96 *First National Bank of Chicago* v *Customs and Excise Commissioners* [1999] QB 570). However, it will seldom be open to one bingo promoter or foreign exchange trader to calculate definitively his VAT accountability or, perhaps more important, to be assessed by HMRC on one basis and for another promoter or trader to calculate or be assessed on another basis. There ought generally to be consistency in relation to accounting for VAT in respect of a particular type of supply. Although in a particular case it may be open to the parties to argue that one method is as reasonable as another, where conflicts arise over time, the matter will require to be resolved in a relatively uniform manner. There will normally only be one correct answer. That answer must depend upon a proper construction of the relevant legislation. There may be different arguments and options but, in the event of a dispute, normally one answer will be provided by the tribunals or, ultimately, the courts. It

cannot be determined by HMRC, although they may have their own views on the correct interpretation of the statutory and other relevant material. They may have expressed these views in notices, leaflets or business briefs, but their views are not law (*Leeds City Council* v *Revenue and Customs Commissioners* [2016] STC 2256, Lewison LJ at paras [4] and [43]).

[27] *Carlton Clubs* (*supra*) is in error when it states that the pre-Business Brief 07/07 notices and leaflets "required" VAT to be calculated on a game by game basis and the Business Brief "required" something different. This view is correct if it is interpreted only as meaning that HMRC were demanding that VAT should be calculated in a particular way. Such a demand is a far cry from a conclusion that the demand has the force of law. It is a matter for any taxpayer to decide if he wishes to accept the demands of HMRC, whether or not these demands are in accord with published Guidance. Thus, if the taxpayers had considered that the correct or desirable basis for accounting for VAT was on a session rather than a game by game basis, they could, at any time, have challenged HMRC's view and any subsequent assessment made on a game by game basis. They would have had a strong case for doing so based upon the legislation itself, as interpreted, if necessary, in light of the Directives, and upon both Case-38/93 *HJ Glawe Spiel-und Unterhaltungsgerate* v *Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] STC 543 (slot machines) and Case C-283/95 *Fischer* v *Finanzamt Donaueschingen* [1998] STC 708 (roulette). HMRC may have argued in favour of the game by game basis, but, at least if the Upper Tribunal in this case had heard the case, they would probably have been unsuccessful. As the UT reasoned, following Case C-317/94 *Elida Gibbs* v *Customs and Excise Commissioners* [1997] QB 499, the taxable amount could not exceed the consideration actually paid by the player. That consideration could not include sums returned as winnings (*HJ Glawe* (*supra*)) and was to be understood as the amount which the promoter could take for himself. This was the net result of transactions over a period of

time (Case C-172/96 *First National Bank of Chicago* v *Customs and Excise Commissioners* (*supra*) (foreign exchange dealing)) (see [2017] UKUT 328 (TCC) at paras 38-48). On this reasoning, the session basis ought, as Business Brief 07/07 ultimately conceded, to be used in preference to the game by game method. A tribunal asked to determine the matter would have had to have selected one basis. It could not have left it to the preference of HMRC. For this reason, Business Brief 07/07 did not change the basis which ought to be used, it simply altered HMRC's view of that.

[28] There was no decrease in the contribution (Regulation 38) or a reduction in price (Article 90). The contribution and price remained the same. All that occurred was that HMRC changed their minds on how VAT ought to be calculated. The legal position remained the same. This did mean that the taxpayers had overpaid VAT in the pre-Business Brief 07/07 years. That allowed them to make a claim under section 80 of the 1994 Act, but only in respect of the four years prior to the claim.

[29] For these reasons and those of Lord Drummond Young, with which I agree and lead to the conclusion that Article 90 and Regulation 38 are of limited scope and concerned with actual reductions in price or its equivalent, the appeal should be allowed. The effect is that the appellant's assessment is re-instated. The questions posed in the grounds of appeal, concerning whether the Tribunals had erred in law should be answered in the affirmative.

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Lord President
Lord Drummond Young
Lord Tyre

OPINION OF LORD DRUMMOND YOUNG

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THE ADVOCATE GENERAL REPRESENTING THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

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[30] The respondent carries on business as an operator of bingo clubs. As such it is registered for value added tax. The calculation of value added tax on bingo can be carried out using either of two methods, known as the session basis and the game-by-game basis. On 1 February 2007 HMRC issued HMRC Brief 07/07 Cash Bingo: Accounting for VAT on Participation and Session Fees. Prior to the issuing of that document the respondent

taxpayer (and other operators of bingo clubs) had calculated value added tax on a game-by-game basis; this accorded with previous guidance given by HMRC. The Brief, however, stated that the amount of value added tax due on the participation and session charges imposed by an operator of bingo games should be calculated on a session basis. For reasons that I will discuss, the session basis is more favourable to the operator of bingo games than the game-by-game basis. The Brief invited bingo promoters who had previously calculated value added tax on a game-by-game basis to make claims for the repayment of any past over-declarations, that is to say for the difference between the tax that had actually been paid, calculated on a game-by-game basis, and the tax that would have been paid had it been calculated on a session basis.

[31] The taxpayer made a claim for value added tax that had been overpaid during the four years prior to 1 February 2007 under section 80 of the Value Added Tax Act 1994. That claim was accepted by HMRC. Claims under section 80 are, however, limited by subsection (4) to the period of four years prior to the making of the claim, and the tax recovered under the section 80 claim was so restricted. The taxpayer accordingly made a further claim under regulation 38 of the Value Added Tax Regulations 1995 for the whole amount of tax that it alleged to have been overpaid since it began trading in 1996. The issue in this appeal is whether that claim is well founded. The issue was set out by the First-tier Tribunal, in a direction of 16 June 2014, in the following terms:

> "Whether or not 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 to place within the meaning of Regulation 38 of the Value Added Tax Regulations 1995".

That definition of the issue was adopted by the Upper Tribunal (in paragraph [1] of its own decision). We were informed that the matter is of general importance extending well beyond the present case. The Upper Tribunal was informed by counsel for HMRC that 14 cases were affected, with a total value of approximately £40 million; these are mostly related to bingo but some of the cases relate to telecommunications, where a similar issue arises.

[32] I will begin by explaining the two bases on which VAT may be charged in relation to bingo operators, and the manner in which they apply to the payments that are typically made in respect of bingo games. Thereafter I will set out the applicable legislation, which is found both in the relevant European Council Directives and in the Value Added Tax Act 1994 and the Value Added Tax Regulations 1995, and will examine the case law that exists on that legislation, at both a European and the United Kingdom level. For reasons to be discussed subsequently, I am of opinion that the critical issue in this case is the application of regulation 38 of the Value Added Tax Regulations 1995, and I will accordingly analyze the requirements of that provision and its application to the facts of the present case.

VAT and bingo games

[33] The manner in which VAT is charged on bingo games is set out by the Upper Tribunal (at paragraphs 3-11 of its decision), and in the earlier decision of the First-tier Tribunal in *Carlton Clubs PLC* v *Revenue and Customs Commissioners*, [2011] SFTD 1209; [2011] UKFTT 542 (TC) (at paragraphs [4]-[15] of its decision). A bingo club of the sort operated by the taxpayer pays cash prizes to those who participate in games of bingo and win a particular game. A customer pays a fixed sum, known as the session fee, to participate in a bingo session. The session lasts for approximately two hours and usually consists of

15 games of bingo. In exchange for the session fee the customer receives cards containing lists of numbers for each game of bingo.

[34] Although the customer pays a single session fee to participate in a session of bingo, the sum paid has two components: first, the participation fee, which is the consideration received by the taxpayer for the supply to its customer of the right to play bingo for cash prizes; and secondly the stake, which is the contribution that each customer makes towards the cash prizes paid out to the winner of each game in the session. VAT is payable on the participation fee, but the stake money is outside the scope of the VAT regime, as it is returned to customers. The session fee will, from the standpoint of the customer, generally be the same fixed sum, but the split between the participation fee and the stake for each game will vary depending on the number of customers who participate in a session and the amount of prize money to be paid out for each game. The fewer the customers in a session, the lower will be the total stake available for the winner. In such a case the taxpayer will top up the stake money to enable any advertised or guaranteed cash prize for a game to be paid out.

[35] An example is given in *Carlton Clubs*, in the following terms:

> "[10] Thus, if there were 100 customers each paying £10 for a session of 15 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] (the 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 crew's 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 (the 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 comprise 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 of 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*".

As is apparent from the foregoing example, the session basis of calculation is more beneficial to the taxpayer than the game-by-game basis. The difference, in short, is that on the session basis the whole of the prize money paid out by the operator during the session is deductible in calculating its VAT, whereas on the game-by-game basis it is only the prize money collected in that game that is deductible; any sum that is added by the operator to that prize money using participation fees collected in other games is not deductible.

[36] Prior to 2007, bingo operators calculated VAT on their turnover on the game-by-game basis; it was generally understood that that was required by HMRC. The taxpayer was established in 1996 as an operator of bingo games at various premises in Scotland, and it calculated its VAT liability on the game-by-game basis. HMRC had in fact published a succession of leaflets and notices which supported that conclusion. These began with the VAT leaflet 701/27/84, entitled Bingo, which had effect from 1 January 1984, and which was replaced by a subsequent leaflet 701/27/90 with effect from 1 March 1990 and a VAT Notice 701/27/27, published in June 1997. These indicated that stake money was outside the scope of VAT, but the 1997 Notice directed that the value of the exempt output should exclude

participation charges which were used as additional prize-money. That had the effect of directing calculation on a game-by-game basis. The advice was repeated in a subsequent VAT Notice, Notice 701/27, issued in March 2002, which was in similar terms.

[37] On 1 February 2007 HMRC published a further Business Brief, HMRC Brief 07/07, which directed bingo operators that they should calculate VAT on a session basis. The material parts of the Brief are as follows:

> "**CASH BINGO: ACCOUNTING FOR VAT**
>
> This brief is about participation and session fees paid by cash bingo players. It clarifies HM Revenue & Customs' policy on how to calculate those fees for VAT purposes.
>
> **BACKGROUND**
>
> Participation and session fees charged for taking part in bingo played for cash prizes on premises licensed or registered under Part II of the Gaming Act 1968… are consideration for standard-rated supplies. Stake money – the amount risked by the player, all of which must be returned as winnings – is not payment for a supply and so is outside the scope of VAT.
>
> Where participation and session fees and stake money are received together in one composite amount charged to players, bingo promoters must work out how much of the payment is stake and how much is the participation and session fee in order to determine how much VAT is due. …
>
> We have received enquiries from some bingo promoters performing the VAT calculation on a game-by-game basis, asking whether they are acting correctly and these have prompted the issue of this clarification.
>
> **CALCULATING THE VAT DUE**
>
> When a player pays to participate in all or part of a bingo session, the supply made by the promoter is the right to participate in the number of games during that session for which they have received payment. As a player cannot participate in further sessions unless they make further payments, 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 made for taking part in that session.
>
> …

> **MAKING CLAIMS OR ADJUSTMENTS**
>
> Bingo promoters that have calculated the VAT due on participation and session charges on a game-by-game basis, and who now find that they have done so incorrectly, may make a claim to HMRC for repayment of any resulting overdeclaration, subject to the conditions set out in Notice 700/45 *How to correct VAT errors or make adjustments or claims*. …".

The paragraph headed "Calculating the VAT due" amounts to a clear indication that the session basis should be used in calculating VAT on bingo games.

[38] In accounting periods following the issuing of the Business Brief, the taxpayer and other bingo operators calculated their VAT on a session basis, as directed in the Brief. The question arose, however, as to whether and if so how an adjustment should be made for VAT that had previously been calculated on a game-by-game basis, in excess of the amount that would have been properly due had the calculation taken place on a session basis. The last paragraph quoted above from the Business Brief indicates that bingo promoters were entitled to claim repayment of tax that had been overdeclared. In subsequent correspondence HMRC made it clear that they would accept claims for repayment of overdeclared tax that were made under section 80 of the Value Added Tax Act 1994. Section 80, which is set out subsequently, entitles a taxpayer to credit or repayment for amounts of output tax that have been paid but are not properly due, but it is subject to a time limit of four years from the end of the accounting period during which the tax was overpaid. In the present case, the taxpayer made a claim under section 80 for repayment of tax that had been overdeclared during the period from 2004 onwards, and that claim was accepted by HMRC. The taxpayer had, however, been calculating its VAT liability on a game-by-game basis since 1996, and it sought to recover the whole of the VAT that had been overdeclared since then. It accordingly submitted a claim under regulation 38 of the Value Added Tax Regulations 1995 for repayment of the overpaid VAT during the period from

1996 to 2004, arguing that the effect of the Business Brief 07/07 was to decrease the consideration that had been paid by customers for the taxable supplies made to them. For regulation 80 to be applicable it is necessary that there should be an increase or decrease in consideration for a supply after the end of the accounting period in which the original supply took place, and the taxpayer contended that the Business Brief gave rise to a retrospective decrease in consideration.

Legislation

The Principal VAT Directive

[39] Certain provisions of Council Directive 2006/112/EC, 28 November 2006, on the common system of value added tax (the Principal VAT Directive), are material for present purposes. First, article 73 defines the taxable amount in wide terms:

> "In respect of the supply of goods or services… the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply".

Article 73 is in generally similar terms to article 11A.1(a) of the Sixth Directive, EC Council Directive 77/388, which covered the collection of VAT prior to 2006. Article 73 forms the basis for section 19 of the Value Added Tax Act 1994.

[40] Secondly, article 90 of the Principal VAT Directive provides for the repayment of tax in respect of increases or decreases in the price of a supply. It is in the following terms:

> "1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.
>
> 2. In the case of total or partial non-payment, Member States may derogate from paragraph 1".

Article 90 is in almost identical terms to article 11C of the Sixth Directive, and it forms the basis for regulation 38 of the Value Added Tax Regulations 1995.

Value Added Tax Act 1994

[41] Two provisions of the Value Added Tax Act 1994 are relevant for present purposes. First, section 19 defines the value of a supply of goods or services. It provides as follows:

> "(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section…
>
> …
>
> (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".

[42] Secondly, section 80 deals with credit for repayment of overstated or overpaid VAT. So far as material, it is in the following terms:

> "(1) Where a person –
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount".

Subsections (1A) and (1B) provide for crediting or repayment of such amounts. The section continues:

> "(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> …
>
> (4) The Commissioners shall not be liable on a claim under this section –
>
> (a) to credit an amount to a person under subsection (1) or (1A) above, or
>
> (b) to repay an amount to a person under subsection (1B) above,
>
> if the claim is made more than 4 years after the relevant date.

(4ZA) The relevant date is –

(a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection…".

Value Added Tax Regulations 1995/2518

[43] As previously indicated, the critical legislative provision in the present case is regulation 38 of the 1995 Regulations, which is headed "Adjustments in the course of business". Article 90 of the Principal VAT Directive, and its predecessor, article 11 C. 1 of the Sixth Directive, require Member States to reduce the taxable amount in a number of cases, including a reduction in price after the supply takes place. This forms the basis for regulation 38 of the 1995 Regulations. So far as material, regulation 38 is in the following terms:

"(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.

…

(2) Where this regulation applies, both the taxable person who makes the supply and a taxable person who receives the supply shall adjust their respective VAT accounts in accordance with the provisions of this regulation.

(3) [T]he nature of the supply shall –

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

(b) in the case of a decrease in consideration, make a negative entry,

for the relevant amount of VAT in the VAT payable portion of his VAT account.

…

(5) Every entry required by this regulation shall… 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 of accounts of the relevant taxable person".

[44] The critical question for present purposes is the meaning of the expression "decrease in consideration" found in paragraphs (1) and (3) of regulation 38. Regulation 24 defines these expressions in the following terms:

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

Application of the legislation

[45] Two provisions may potentially cover the repayment of VAT that has been incorrectly accounted for to HMRC. The first and more general of these is section 80 of the 1994 Act; the second, which is much more specific in its terms, is regulation 38 of the Value Added Tax Regulations 1994. Section 80 was originally enacted by the Finance Act 1989, following the decision of the House of Lords in *Customs and Excise Commissioners* v *Fine Art Developments*, [1989] AC 914, where it was held that the taxpayer had a legal right to make deductions from his current tax liability in respect of past declarations made in error. Customs and Excise explained, in a News Release No 34/89 dated 13 April 1989, that they accepted that the decision in that case overrode any exercise of discretion on their part, and that taxpayers were therefore entitled to make adjustments on the VAT return to put right previous errors in calculating the amount of tax due. It had been decided nevertheless that the right should be placed on a statutory footing, in large measure to ensure that a defence was available to Customs and Excise that the taxpayer would be unjustly enriched by a claim. (That defence is now contained in subsection (3) of section 80). Such claims were originally subject to a time limit of six years, but this was subsequently reduced to four years with effect from 1 April 2009 (Finance Act 2008, Schedule 39, paragraph 36).

[46] Section 80 is very general in its application, as it covers any case where a person in accounting for VAT for a prescribed accounting period has brought into account as output tax an amount that was not output tax due. It is subject to two important limitations: the time limit of four years and the defence of unjust enrichment that is available to HMRC. The existence of those two limitations, however, can be said to emphasize the generality of the remedy provided. As I have already noted, it is conceded by HMRC in the present case that a claim under section 80 is available for the four years prior to the issuing of Business Brief 07/07.

[47] Regulation 38 is significantly more limited in its scope. It was enacted to give effect at a United Kingdom domestic level to article 11C of the Sixth Directive, the forerunner of article 90 of the Principal VAT Directive; the legislative background is discussed by Newey LJ in *Iveco Ltd* v *Revenue and Customs Commissioners*, [2017] EWCA Civ 1982; [2018] STC 364, at paragraphs [6] *et seq*. It follows that the regulation must be interpreted against the background of article 90 and the general principles of European Union law.

[48] Unlike section 80, regulation 38 does not refer to the bringing into account of output tax that was not due. Instead, it is confined to cases where there is an increase or decrease in consideration for a supply which includes an amount of VAT, where that increase or decrease occurs after the end of the accounting period in which the original supply took place. The notion of an increase or decrease in consideration is defined, in regulation 24, as meaning an increase or decrease evidenced by a credit or debit note or any other document having the same effect. A credit or debit note is a document that is normally issued by a supplier to its customer, because the increase or decrease in consideration relates to the consideration passing as between supplier and customer; that is the consideration on which the VAT payable by the supplier is ultimately based. Furthermore, paragraph (2) of the

regulation requires both the taxable person who makes the supply and a taxable person who receives the supply to adjust their respective VAT accounts in accordance with the regulation. Paragraph (3) specifies that, in the case of a decrease in consideration, a negative entry is to be made in the VAT payable portion of the supplier's VAT account. These provisions indicate that regulation 38 is aimed at straightforward changes in the consideration payable as between a supplier and its customer, and is not of wider import.

The meaning of "consideration"

[49] The point made in the last paragraph, that regulation 38 is intended to deal with changes in the consideration passing between a supplier and its customer, is of importance because of an ambiguity in the meaning of the word "consideration" and the corresponding word that is used in article 90, "price". In ordinary legal usage, "consideration" signifies the performance required of one party to a contract in exchange for the performance required of the other party, and "price", at a general level, means consideration that consists of the payment of money. In relation to VAT, however, it is apparent from the case law of the Court of Justice that "consideration" normally has a more specialized meaning. Rather than applying to the whole of one party's performance under a contract, it relates only to the part of that performance that the other party is entitled to keep for itself. In the case of a payment, "consideration" for VAT purposes does not include any part of the payment that is returned by the supplier to the customer, or to a range of customers. This is necessary to preserve the fiscal neutrality of VAT, generally regarded as one of the most important features of the tax, because it is only the part of the amount paid to a supplier that actually accrues to its benefit that is intended to be subject to VAT; that part represents the value "added" by the supplier.

[50] This feature has given rise to significant difficulties in gambling and foreign exchange transactions, and the treatment of stake money in bingo is merely one example of this phenomenon. Gambling transactions were considered by the Court of Justice in *HJ Glawe Spiel-und Unterhaltungsgeraete Aufstellungsgesellschaft mbH & Co KG* v *Finanzamt Hamburg-Barmbek-Uhlenhorst* (Case C-38/93), [1994] STC 543, a case which concerned the incidence of VAT on coin-operated gambling machines which divided the amounts introduced by customers into two deposits, a cash box, where the operator was entitled to keep the money, and a reserve, which was paid out as winnings. The Court held (at paragraphs 9-13) that VAT was only payable on the proportion of the stakes which the operator of the machines could actually take for itself. That is the basis for HMRC's concession that prize money is not in principle subject to VAT, and it reflects the general principle that it is only the ultimate benefit to a supplier that is subject to VAT. In *Glawe Spiel* it was easy to determine the division between the sums that the operator was entitled to keep and the prize money, but as the present case illustrates in other types of gambling transaction the division is much less straightforward.

[51] Analogous difficulties may arise in the field of foreign exchange transactions, where a currency supplied by the trader may be acquired through a complex series of transactions, involving the acquisition and disposal of a range of different currencies and currency derivatives at constantly varying rates of exchange. In *Customs and Excise Commissioners* v *First National Bank of Chicago* (Case C-172/96), [1998] STC 850, the Court of Justice held (at paragraphs 44-47):

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

> 45. In this regard the spread representing the difference between the bid price and the offer price is only the notional price which the bank would obtain if it were to conclude, at the same instant and on similar conditions, two corresponding purchase and sale transactions for the same amounts and the same currencies.
>
> 46. However, these are simply theoretical considerations, since the bank carries out a large number of transactions relating to different amounts and involving different currencies, the rates of which are in constant fluctuation. A trader cannot normally foresee, when concluding one particular transaction, at what moment and at what price he may subsequently effect one or more transactions enabling him to eliminate or fix, at a specific amount, the risk of a change in rate to which he is exposed following the first transaction.
>
> 47. So, the consideration, that is to say the amount which the bank can actually apply to its own use, must be regarded as consisting of the net result of its transactions over a given period of time".

This passage starts from the proposition that the consideration is confined to the amount that the taxpayer is entitled to keep for its own use, but, largely as a matter of practicality, the conclusion is that that amount can only be determined over a set period. It is the net amount taken by the supplier over that period that represents the consideration available for the supplier's own use.

[52] The Upper Tribunal relied on the foregoing cases to support the proposition that the consideration received by a supplier such as the taxpayer is the amount which the taxpayer can take for itself: paragraph 48. In a bingo transaction, that is the participation fee, and it does not matter that the net participation fee is the result of a series of transactions over a period of time. So far I agree with the Tribunal's reasoning, which I think is vouched by the two cases relied on. Those cases relate, however, to the calculation of the VAT payable by a supplier of particular services. They demonstrate that determining the taxable amount may require an apportionment of the payments made by customers between the part that the supplier is entitled to keep for itself and the other parts that are returned to customers, as in the case of gambling transactions, or form part of what is paid to suppliers for their services, as in foreign exchange transactions. As a matter of United Kingdom domestic law, such an

apportionment exercise is authorized by section 19(4) of the 1994 Act, which permits the consideration to be attributed between the taxpayer's supply of goods and services and other matters.

Case law applicable to article 90 and regulation 38

[53] The foregoing cases nevertheless have no direct bearing on the application of article 90, or its equivalent in United Kingdom domestic law, regulation 38. The predecessor of article 90, article 11C(1) of the Sixth Directive, was considered at length in two leading cases. First, in *Goldsmiths (Jewellers) Ltd* v *Customs and Excise Commissioners* (Case C-330/95), [1997] STC 1073, the Court of Justice required to consider the case of a manufacturer and supplier of jewellery who had concluded a contract with a customer whose business consisted of arranging exchanges of goods for services supplied by it. The jewellery supplier agreed to supply the customer with goods in exchange for certain advertising services. The goods supplied came to a particular value, which included VAT, and in exchange the supplier became entitled to advertising services to exactly the same value, including VAT, from its customer. When the customer had only supplied part of the services contracted for it became insolvent and was wound up. That left advertising services with a specified value outstanding, including VAT. The taxpayer company adjusted its VAT declaration by reducing the net amount of VAT due to reflect the loss of the advertising services. That claim was rejected by Customs and Excise on the ground that bad debt relief was only available where the consideration was due in money, and not for the value of unperformed services. The Court of Justice held that no such distinction was drawn in article 11C(1). Its reasoning is contained in the following passage (at paragraphs 14-16):

> "14. [It] should be borne in mind that article 11A(1)(a) of the Sixth Directive provides, with a view to harmonising the taxable amount, that within the territory of the country the amount chargeable in respect of supplies of goods is 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.
>
> 15. That provision embodies one of the fundamental principles of the Sixth Directive, according to which the basis of assessment is the consideration actually received… and the corollary of which is that the tax authorities may not in any circumstances charge an amount of VAT exceeding the tax payable by the taxable person…
>
> 16. In accordance with that principle, the first sub-paragraph of art 11C(1) of the Sixth Directive defines the cases in which the member states are required to ensure that the taxable amount is reduced accordingly, under conditions which are to be determined by the member states themselves. That provision therefore requires the member states to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever after a transaction has been concluded, part or all of the consideration has not been received by the taxable person".

What is important in that passage is the emphasis for the purposes of what is now article 90 on the consideration actually received by the supplier. That echoes the general emphasis in EU law on practicality and effectiveness. In effect, article 90 is concerned with cases when part or the whole of the price is not in fact paid, or the price is in fact reduced, after the supply takes place. Thus it is not concerned with the general adjustment of the supplier's tax liabilities. Nor is it concerned with the attribution of tax liabilities, in the manner discussed in *Glawe Spiel* and *First National Bank of Chicago*; article 90 deals with non-payment or price reductions in respect of the consideration actually due or actually received.

[54] Article 11C(1) was further considered by the Court of Justice in *Freemans PLC* v *Customs and Excise Commissioners* (Case C-86/99), [2001] STC 960. The taxpayer in that case sold goods by mail order, and its customers paid for purchases in instalments under an in-house financing scheme. The customers then acted as agents to sell goods on to other members of the public. Each time that an agent made a payment, a sum equal to 10% of the amount of the payment was credited to a separate account maintained in the name of the

agent; the monies in that account could either be withdrawn or used to make further purchases or to defray any sums owed by the agent. A considerable part of the sums so credited was not claimed and was retained by the taxpayer. The taxpayer was assessed to VAT on these sums on the ground that the catalogue price was reduced after the supply took place, when the 10% discount was credited to an agent's account. On that basis, it was said, article 11C(1) was applicable. The Court of Justice held (at paragraph 31) that article 11C(1) should be interpreted as meaning that, in a scheme such as that under consideration, "the taxable amount constituted by the full catalogue price must be reduced as soon as the agent withdraws or uses in another way the amount with which her separate account has been credited". The Court continued (at paragraph 33):

> "[T]he wording of art 11C(1) of the Sixth Directive does not presuppose… a subsequent modification of the contractual relations in order for it to be applicable. In principle, it requires the member states to reduce the taxable amount whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person…".

On the facts of the case, therefore, it was when the customer used the discount that the discount was actually paid, at which point the amount subject to VAT must also be reduced (paragraph 35-36). Once again, the emphasis is on the making of actual payments as between the taxpayer and its customer/agents.

[55] The two foregoing decisions thus demonstrate that article 90 of the Principal VAT Directive and regulation 38 of the 1995 Regulations are concerned with cases involving an actual reduction in price or its equivalent, for example the actual use of a credit in such a way as to reduce the consideration. This is reflected in the wording of regulation 38 itself, discussed at paragraph [48] above; the regulation is confined to cases where there is an increase or decrease in consideration for a supply that includes VAT, where the increase or decrease takes place after the end of the accounting period in which the original supply took

place. The need for an actual increase or decrease in consideration is reflected in the requirement, found in regulation 24, that it should be evidenced by a credit or debit note or an equivalent document. Thus regulation 38, and also article 90 of the Principal VAT Directive, are concerned with the consideration that actually passes between supplier and customer, rather than the notion of consideration that is otherwise relevant for VAT purposes – the part of the consideration for a supply that the supplier is entitled to keep for itself.

[56] This does not undermine the system of VAT, or its fiscal neutrality. Regulation 38 and article 90 are not concerned with the incidence of VAT as such – the extent to which it falls upon a particular supplier of goods and services – but rather with the question of whether in carefully defined circumstances an adjustment should be made to two parties' VAT accounts to reflect commercial reality. That commercial reality takes the form of, in the words of regulation 38, an increase or decrease in consideration after the end of the prescribed accounting period; in the case of article 90 it takes the form of "cancellation, refusal or total or partial non-payment" of the price, or a reduction in the price, after the supply takes place. Fundamentally, these provisions are concerned with defined changes in a commercial relationship that take place after the end of the relevant accounting period. As *Goldsmiths* and *Freemans* both indicate, there must be an actual reduction in the price, or an actual reduction in the amount that the trader can keep for its own benefit, in an accounting period after the one in which the supply took place.

Further considerations relating to article 90 and regulation 38

[57] One further feature of article 90 calls for comment. It refers to the cancellation of a refusal of payment or total or partial non-payment, or a reduction in the price. The word

"consideration" is not used. Article 90 should be contrasted with article 73, which provides that the general rule in relation to the supply of goods or services is that the taxable amount shall include "everything which constitutes consideration obtained or to be obtained by the supplier". The difference in wording is I think of some significance as indicating that article 90 is not intended to apply to "consideration" in the technical VAT sense of the word – what the supplier is entitled to keep for itself. Article 73 must apply to consideration in the technical sense, not merely because of the use of that word but because of its wide scope and very general significance in the assessment and calculation of VAT. Article 90, by contrast, serves a more limited function, of adjusting the taxable amount in defined circumstances. In view of that background, I am of opinion that the difference in wording is probably deliberate. The concepts of payment and the "price" point clearly towards the reality of a commercial transaction, in the form of the payment of – or failure to pay – the price of goods or services supplied. Thus the wording of article 90, especially in the context of the Directive as a whole, seems to support the construction suggested above, that it refers to actual price reductions or actual failures to make payment.

[58] Moreover, so far as the legislation in force in the United Kingdom is concerned, regulation 38 stands in sharp contrast to section 80, which provides a general means of adjusting VAT liability with retrospective effect. The background to section 80 is discussed at some length in *Leeds City Council* v *Revenue and Customs Commissioners*, [2015] EWCA Civ 1293; [2016] STC 2256. The history of the section is set out at paragraphs [13] *et seq* of the decision; in paragraph [13] it is stated that "Section 80 of the VAT Act is intended to be a complete statutory code for the repayment of the overpaid VAT". As might be expected with such a provision, its history is somewhat complex, and involves various alterations to the time limit within which a claim could be made and differing provisions as to the

relevance of a mistake in calculating VAT. In *Leeds City Council* the application of the time limits contained in section 80 was challenged on a number of grounds, largely based on EU law, but none of these challenges was successful. It is not necessary for present purposes to consider the detail of the decision. The case makes it clear that limitation periods of a robust nature are fully consistent with EU law, and the time limit in section 80 must accordingly be applied generally. It is perhaps worth mentioning that one of the arguments put forward for the taxpayer in that case was that HMRC had advanced a view of the law which was subsequently conceded to be wrong, and it was submitted that that should delay the running of the limitation period. That argument was rejected, on the ground that the taxpayer was able to form its own view as to what the true state of the law was, and should have asserted that against HMRC: see paragraph [43].

[59] The time limit placed on claims under section 80 is, however, significant in the construction of regulation 38, as is the existence of an express defence of unjust enrichment in section 80(3). Those features are wholly absent from regulation 38. If regulation 38 were intended to provide a general remedy for tax adjustments, going beyond actual increases or reductions in the consideration for a supply, it would be expected that similar limitations would be placed on it. The policy reasons for such limitations are obvious, and a precedent is available in the form of section 80, which has been heavily amended (and litigated over) in the course of its existence. In these circumstances I am of opinion that the absence of any comparable limitations provides a significant indication that regulation 38 was not intended to apply beyond its strict terms, and that in particular it was not intended to provide any form of general remedy to enable the adjustment of tax liability or to re-attribute sums in tax calculations.

Carlton Clubs

[60] Before leaving general discussion of the law, I should say something about the decision of the First tier Tribunal in *Carlton Clubs PLC* v *Revenue and Customs Commissioners*, *supra*, issued on 9 August 2011. This decision was relied on in the present case by both the First tier Tribunal and the Upper Tribunal, and it provides a clear account of the underlying problems relating to the payment of VAT by operators of bingo games. In *Carlton Clubs* the First-tier Tribunal found, in summary, that the proper interpretation of notices and leaflets issued by HMRC prior to Business Brief 07/07 was that VAT should be calculated on a game-by-game basis, but that the Business Brief had required the calculation to be on a session basis. That, it was held, amounted to a change of policy rather than a clarification of existing policy. The consequence was that there was or might 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 paid. That amounted to a decrease in consideration for the supplies made by the taxpayer. The result was that regulation 38 of the Value Added Tax Regulations 1995 was applicable, and the taxpayer was therefore entitled to reclaim VAT that it had paid prior to 2007 on a game-by-game basis that would not have been payable had the calculation been on a session basis (paragraphs 94-97). HMRC did not appeal against the decision of the First tier Tribunal in *Carlton Clubs*; we understand that this may have been the result of inconclusive policy discussions.

[61] The decision in *Carlton Clubs* and the reasoning supporting that decision are contrary to the interpretation of regulation 38 that I have suggested. In particular, the Tribunal assumed that the recalculation of tax liability on the basis of a retrospective shift from a game-by-game calculation to a session calculation amounted to a decrease in consideration for the purposes of regulation 38. In my opinion that is not so. What is involved in such a

case is not a decrease in consideration in the real world, as between a supplier and its customer, but is rather a re-attribution of tax liability within the taxpayer's internal accounts. I accordingly consider that the decision in *Carlton Clubs* was erroneous.

The taxpayer's operations and its claim for repayment of VAT

[62] As already noted, the taxpayer carried on business as an operator of bingo games during the period from 1996, when it was established, until the issuing of the Business Brief 07/07 on 1 February 2007. The taxpayer's operations were carried out in the manner described above at paragraphs [33] *et seq*. Like other bingo operators, the taxpayer calculated and accounted for VAT on a game-by-game basis. Following the issuing of the Business Brief by HMRC, like other bingo operators, the taxpayer switched to a session basis for the calculation of VAT. It is common ground that, if the taxpayer (and other bingo operators) had used the session basis during the period prior to February 2007, their VAT liability would be substantially reduced. This has been recognized in part by HMRC, in conceding that the taxpayer, together with other bingo operators, has a valid claim under section 80 of the Value Added Tax Act 1974 in respect of the period of approximately four years prior to the issuing of the Business Brief; during that period the taxpayer had brought into account output tax that was not properly due. The claim is, however, time limited by subsection (4) of section 80.

[63] On 29 January 2013 the taxpayer submitted a VAT return for December 2012 in which it claimed repayment of VAT amounting to £425,630. 40. The basis for that claim was set out in a letter of the same date from the taxpayer's accountants to HMRC. The letter referred to the two methods of accounting for output tax on bingo games, and referred to the Business Brief 07/07 which, it was said, recognized that output tax should correctly have

been accounted for on a session basis as against a game-by-game basis. Reference was made to the decision of the First-tier Tribunal in *Carlton Clubs*, which was cited as authority for the view that an operator of bingo games was entitled to reduce the consideration paid for participation fees. The claim made on behalf of the taxpayer represented a recalculation of the taxpayer's liabilities for output tax during the period from 1996 to September 2004. The basis for the claim was said to be regulations 38 and 24 of the Value Added Tax Regulations 1995, together with guidance that had been issued by HMRC. Regulation 24 required that any increase or decrease in consideration should be evidenced by a credit or debit note. Consequently the taxpayer had issued an internal credit note to adjust the VAT liability. This bore to be an "adjustment of consideration for the supply of rights to participate in bingo sessions between 1996 and 2004". For obvious reasons, it was not issued to the persons who were the taxpayer's customers during that period.

[64] I should observe at this point that the function of the credit note required by regulation 24, read in the context of regulation 38, appears to be to establish that the price charged to a customer has been increased or decreased in a subsequent accounting period. The credit note thus represents a debt due by the taxpayer to its customer, and any debit note represents a debt due by the customer to the taxpayer. This is the normal function of a credit note or debit note; these documents are issued to record any claims that the parties may have against each other in relation to goods or services supplied. It is difficult to understand how an internal credit note fits into this pattern; it merely represents internal accounting changes, and has no direct relationship to changes in indebtedness in the outside world. For the reasons previously stated, I consider that it is the latter with which regulation 38 is concerned.

[65] The taxpayer's claim was rejected by HMRC by letter dated 21 March 2013, and the corresponding assessment was issued. The taxpayer has appealed against the rejection of that claim and corresponding assessment. That appeal was upheld by the First-tier Tribunal in a decision dated 18 July 2016. HMRC appealed to the Upper Tribunal, which refused the appeal by decision dated 14 August 2017. It is against the latter decision that HMRC has now appealed to the Court.

Analysis of the claim for repayment of VAT

Application of regulation 38

[66] The taxpayer's claim to recover overpaid VAT beyond the four-year period permitted by section 80 is based ultimately on the rights conferred by regulation 38 of the Value Added Tax Regulations 1994. The critical issue is accordingly whether that provision applies to the claim that has been made by the taxpayer for repayment of VAT. In my opinion regulation 38 does not apply to the taxpayer's claim.

[67] My reasons for that conclusion are set out at paragraphs [48] and [53]-[56] above. The wording of regulation 38 is quite specific, and much narrower than the wording of section 80 of the 1994 Act: it refers to cases where there has been an increase or decrease in consideration for a supply which includes an amount of VAT and where the increase or decrease occurs after the end of the accounting period of the original supply. The increase or decrease must be evidenced by a credit or debit note, as specified in regulation 24. That indicates that the commercial context is the standard case of a transaction between a supplier and its customer in which, at some time after the original VAT transaction, the consideration paid or payable has either increased or decreased.

[68] That view, that regulation 38 is of relatively limited scope, is further supported by its legislative context. Section 80 provides a general power to adjust VAT liabilities in the light of factors such as errors in calculating VAT or subsequent changes of circumstances. It is, however, limited to a period of four years, for reasons that are perhaps obvious: as a general rule, and excluding cases of fraud, tax liabilities must be definitively assessed within a restricted period both to ensure finality and to protect the national revenue from unanticipated claims. Section 80 is also subject to a defence of unjust enrichment. In this context it is in my opinion very obvious that regulation 38 is intended to serve the limited function of permitting adjustments for increases or decreases in consideration that had actually taken place as between a taxable supplier and its customer. Moreover, such an approach is in my opinion clearly supported by the case law of the Court of Justice, in decisions such as *Goldsmiths* and *Freemans*; those cases make it clear that article 90 of the Principal VAT Directive and its predecessor, article 11C(1) of the Sixth Directive, deal with consideration actually paid and received, and not with the general adjustment of a supplier's VAT liabilities. Thus article 90 and regulation 38, its domestic equivalent, are concerned with transactions and payments in the real commercial world, involving the obligations and liabilities as between a supplier and its customer, and not with any wider aspects of the supplier's VAT liabilities.

[69] The taxpayer's claim to recover VAT allegedly overpaid in consequence of its use of a game-by-game basis of calculation rather than a session basis prior to 2004 does not in my opinion meet the foregoing requirements of regulation 38. It does not involve any change in the consideration that passed between the taxpayer and its customers; those customers each paid a set amount to the taxpayer as the price of participation in a bingo session, and in exchange they received the right to participate in the session and, if a customer won a game,

to receive a prize. The change in the basis of calculation of VAT does not in any way affect the rights and obligations of the customers. Nor does it affect the rights and obligations of the taxpayer in relation to its customers. The taxpayer provided bingo games, and paid out prize money as appropriate. None of that is altered by the change in the basis of VAT calculation. This is, in essence, because article 90 and regulation 38 are concerned with rights and obligations in the real world, and the price or consideration referred to in those provisions are obligations and payments in the real world, due as between a supplier and its customer. In relation to the taxpayer's present claim, all that is involved is a readjustment of the manner in which the taxpayer calculates its VAT. That cannot in my opinion be considered to be a decrease in consideration for a supply within the meaning of regulation 38, or its equivalent under article 90. For that relatively straightforward reason, by itself, I am of opinion that the taxpayer's claim fails.

The taxpayer's reliance on section 19(4) of the Value Added Tax Act 1994

[70] For the taxpayer it was contended that "consideration" within the meaning of regulation 38 meant the taxable amount on which output tax is based, and in the case of gambling transactions meant what the trader kept for its own free use. Normally determining that amount was straightforward, but in some cases, such as foreign exchange, the practical difficulties meant that judgment had to be used as to what the taxable amount was, along the lines described by the Court of Justice in *First National Bank of Chicago*, *supra*, at paragraphs 44-47 (see paragraph [51] above). In these cases there was no right answer as to what the taxable amount was. As a practical matter, the assessment of the taxable amount had to be carried out over a given period of time. The appropriate period had to be determined by the national tax authorities of a member state. Within the United Kingdom,

power to make an assessment of this nature was contained, it was said, in section 19(4) of the Value Added Tax Act 1994. That subsection did not confer an unlimited discretion on HMRC. In assessing the appropriate period it was necessary that the tax authorities should observe a number of well-established principles of EU law. They should respect the fact that VAT is a proportionate tax on turnover and should respect and apply general principles of EU law, notably non-discrimination and fiscal neutrality. They should in addition respect domestic public law principles, such as proportionality. The argument was that HMRC had exercised the power in section 19(4) to determine the relevant period for bingo transactions through a series of notices. Before 2007 these required tax returns to be submitted on a game-by-game basis; after 1 February 2007 the session basis was to be used. That, it was said, was the use of a statutory power in such a way as to bring about a decrease in the consideration received by a bingo operator for the supplies that it made.

[71] This argument is dependent on the proposition that "consideration" as used in regulation 38 has the specialized meaning that is used in normal VAT contexts, namely the part of the sum received by a supplier that the supplier is entitled to keep for its own benefit. For the reasons that I have already stated I am of opinion that that is not the correct construction of regulation 38. The taxpayer's argument must accordingly fail on that ground alone. Moreover, regulation 38 does not contain a general power to alter retrospectively the taxpayer's internal financial transactions, or the way in which they are recorded in its accounts, in such a way as to alter tax liabilities. If the taxpayer's argument based on section 19(4) were upheld, that is what would be involved; in effect, HMRC would be instructing a reattribution for tax purposes of the sums received by the taxpayer from its customers. A new method of attribution of the sums received within the taxpayer's accounting system does not involve any actual reduction in the price or consideration

received by the taxpayer in accounting periods following the supply. Consequently regulation 38 is inapplicable.

Conclusion

[72] In addition to the foregoing analysis, I am in agreement with the reasons put forward by your Lordships for rejecting the arguments presented on behalf of the taxpayer. I am accordingly of opinion that the decisions of the First-tier Tribunal and the Upper Tribunal cannot be supported, and that the questions asked following the grounds of appeal should all be answered in the affirmative.

[73] I would accordingly allow the present appeal and reinstate the assessments originally made by HMRC.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 78
XA98/17

Lord President
Lord Drummond Young
Lord Tyre

OPINION OF LORD TYRE

in the Appeal against
a decision of the Upper Tribunal

by

THE ADVOCATE GENERAL REPRESENTING THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

against

KE ENTERTAINMENTS LIMITED

Respondents

Appellants: DM Thomson QC, Roxburgh; Office of the Advocate General
Respondents: Ghosh QC; DLA Piper Scotland LLP

13 December 2018

[74] I agree with your Lordships that the appeal should be allowed and wish only to add the following observations.

The factual context

[75] One of the key facts, as it appears to me, is that before the beginning of each of the

games in a session, the manager will have decided how much prize money there will be for that game. If the prize he decides upon (or has undertaken in advance to offer) is less than the proportion of the sums received from customers that constitutes stake money, the difference will be topped up out of the proportion of sums received as participation fees. The manager therefore knows before every game how much of the total sums received from customers is going to be allocated to prizes, and how much the taxpayer is going to be able to retain from that game. Equally, the manager knows at the end of each session how much of the total sums received has been allocated to prizes, and how much the taxpayer is going to be able to retain from that session. Looked at from the point of view of the payments made by the customers, the amount that they collectively have had to pay to participate in a particular game is also known before that game starts: it is simply the difference between the total takings for that game and the amount of the stake money. The same applies to the total amount that the customers as a whole have had to pay to participate in a session of games.

[76] From both perspectives, the allocation of the total sum received, as between (a) the price paid (or consideration) to take part in a game – and indeed to take part in a session – and (b) the contribution of the players to the stake, is determined at the time of the game or session, as the case may be. There is no later time when any alteration of that allocation takes place.

Article 90 and regulation 38

[77] There is no doubt that the predecessor of regulation 38 was enacted in order to implement the Sixth Directive by transposing article 11C(1) thereof (now article 90 of the Principal VAT Directive) into national legislation: see eg *Iveco* v *Revenue & Customs Commissioners* [2018] STC 366, Newey LJ at paragraphs 7-9. I find no support for the

taxpayer's assertion that regulation 38 (or its predecessor) was partly intended to enact article 11A(1) (a) (now article 73 of the Principal VAT Directive). Regulation 38 should therefore be interpreted to accord with what is now article 90. It follows that "decrease in consideration" should be interpreted as meaning the same as "the price is reduced" unless there is some compelling reason to interpret it otherwise. None has been identified in this appeal.

[78] When the taxpayer altered its VAT account (by issuing a credit note) after publication of the decision of the First-tier Tribunal in *Carlton Clubs plc* v *Revenue and Customs Commissioners* [2011] SFTD 1209 concerning the effect of Business Brief 07/07, it did not alter the price that its customers had paid to participate in any game or session. Nor, in my opinion, can it be said that the credit note decreased the consideration that they paid to participate. The respective total figures per game and per session for participation fees and stake money remained the same. What happened was that the Business Brief advised a different treatment for VAT purposes of at least some of the participation fees which had been used to top up prizes. The methodology of the VAT calculation changed, but the consideration did not. There was no re-allocation of the sums paid by customers as between taxable participation fees and non-taxable stake money; there was simply a revision of the calculation of the amount of participation fees that would be treated as taxable, with top-up and cross-subsidising participation fees now being excluded from the calculation whereas previously they were not. But the participation fees themselves, ie the price (in the language of article 90) or consideration (in the language of regulation 38), remained the same as they had been when the game was played. There was therefore no decrease in consideration for the purposes of regulation 38, nor any reduction in price for the purposes of article 90.

The status of the Business Brief

[79] Neither Business Brief 07/07 nor its predecessor notices has or had any force of law. They provide a statement of HMRC's interpretation of the law as applied to particular factual circumstances, in this case the treatment of payments by participants in games of bingo where an apportionment has to be made between the taxable fee on the one hand and the stake money, which is outside the scope of VAT, on the other. In so doing they perform a valuable function in providing guidance on official interpretation, but a taxpayer is at liberty to agree or disagree with that interpretation. The taxpayer has the reassurance of knowing that if he chooses to follow HMRC's guidance, his self-assessment is unlikely to be challenged. If, on the other hand, he chooses to proceed otherwise than in accordance with the guidance, he must be aware that he may have to appeal to an independent tribunal against a refusal by HMRC to accept his self-assessment on that basis. It is not accurate, as the taxpayer contended, despite its use of the word "should", to read the Business Brief as creating an obligation.

[80] On the other hand, I consider that senior counsel for the taxpayer was correct in his submission that repayment claims made by traders in response to the invitation at the end of the Business Brief were not made to correct "errors". The Business Brief deals with a situation in which there is no single correct answer. There is nothing in either EU or national legislation to prohibit the use of either a session basis or a game-by-game basis. The question that would come before a tribunal or court for determination would not be whether one or other basis was right and the other wrong, but rather whether the basis used by the taxpayer in its VAT self-assessment constituted a proper attribution of the consideration, as required by section 19(4) of the Value Added Tax Act 1994. The invitation in the Business Brief amounted to no more than an intimation by HMRC that if a taxpayer

who had used the game-by-game basis wished to recalculate its VAT liability on a session basis and make a claim for repayment of overpaid output tax, the claim would (subject to the statutory time bar) be accepted. A claim under section 80 does not in terms require an error to have been made: section 80(1) refers rather to the trader having brought into account as output tax an amount that was not output tax due.

The decision in *Carlton Clubs*

[81] It follows from the above analysis that *Carlton Clubs* was wrongly decided. The error, as it appears to me, is in paragraph 71 of the decision, where it is noted (in my view correctly) that both methods of calculation (ie game-by-game and session bases) were correct and valid. The conclusion is then drawn that there must have been a decrease in consideration properly attributable to the supply of the right to participate in a bingo session. In my view the tribunal erred in drawing that conclusion. Contrary to what is said by the tribunal in paragraph 72, there had not been a change in the two components of the supply; rather there had been a change in the VAT treatment of part of one of them. As I have observed, the components themselves were fixed before the game was played and had not changed. For these reasons the tribunal erred in holding at paragraph 74 that regulation 38 was applicable.