06TACD2023

Between/

█████████████████

Appellant

-v-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Introduction

1. This matter comes before the Tax Appeals Commission by way of an appeal against VAT assessments issued pursuant to section 23 in respect of the periods from July/August 20██ to November/December 20██ inclusive, January/February 20██ to November/December 20██ inclusive and January/February 20██ to September/October 20██ inclusive. The amount of tax under appeal was €103,809 at the time the appeal was made, but this was subsequently reduced as a result of correspondence exchanged between the parties during the course of the appeal.

2. The matter was heard on two occasions by Appeal Commissioner Ronan Kelly and was adjourned on both occasions to allow further information and submissions to be

furnished by the parties. Following the retirement of Commissioner Kelly, I reheard the appeal pursuant to the provisions of section 28 of the Finance (Tax Appeals) Act 2015.

B. Factual Background

3. The Appellant was incorporated in August of 20[redacted] and carries on the business of operating a gambling club for its members and guests. The Appellant took over the business of an existing card club operated by a company named [redacted] Limited when the latter company [redacted]. The Appellant offers blackjack, roulette, cash games and poker tournaments to its members.

4. The Appellant submitted VAT returns to the Respondent subject to an expression of doubt, made by letter dated the 29th of March 20[redacted], in relation to the Appellant's liability to VAT on its surpluses arising from club members betting with the Appellant. That liability forms the core issue in this appeal.

C. Grounds of Appeal

5. The grounds of appeal originally advanced by the Appellant were that:-

(a) the VAT assessments were invalid as, *inter alia*, gambling does not constitute the provision of goods and/or services, and

(b) the assessments are excessive and not in accordance with the facts.

6. The original grounds of appeal were then expanded upon and clarified in written submissions made on behalf of the Appellant dated the 1st of November 2013. Those submissions indicated that there were 8 issues which required to be determined, namely:-

   (a) Did the State have the power to bring "*betting*" within the charge to VAT following the transposition of the E.U. Sixth Council Directive 77/388/EEC of the 17th of May 1977, and in particular Article 13.B(f) thereof (now Article 135(1)(i) of Directive 2006/112/EC) into Irish law?

   (b) Was it sufficient to remove the word "*betting*" from the list of VAT-exempt activities detailed in section 1(xvii) the First Schedule to the Value Added Tax Act 1972, by the enactment of section 82 of the Finance Act 1980, to bring the profits from betting within the charge to VAT?

   (c) Does the placement of a bet or wager by a club member with the appellant constitute in whole or in part consideration for the supply of a good or a service provided by the Appellant within the meaning of section 2 of the Value Added Tax Act 1972, or section 3 of the Value Added Tax Consolidation Act 2010?

   (d) Did the Appellant receive any consideration from club members for the facility provided by the Appellant by which members place bets with the Appellant within the meaning of section 2 of the Value Added Tax Act 1972, or section 3 of the Value Added Tax Consolidation Act 2010?

   (e) Did the gambling activities between the club members and the Appellant come within the provisions of section 2 of the Value Added Tax Act 1972, or section 3 of the Value Added Tax Consolidation Act 2010, which require goods and services to be supplied "*for consideration*"?

   (f) If the Appellant is found to be in receipt of consideration received from the supply of goods or services arising from bets placed with the Appellant by club members, how is the consideration which is liable to VAT to be determined?

(g) If the Appellant is in receipt of consideration subject to VAT arising from bets placed by the Appellant with club members, does this offend against the principle of fiscal neutrality and/or the principle of direct effect in circumstances where bets placed with bookmakers are not liable to VAT? and,

(h) Does the application of the VAT Act to the contribution made by club members playing poker out of the 'pot' to the Appellant offend against the principle of fiscal neutrality, as similar amounts received by bookmakers are not liable to VAT?

D. Relevant Legislation

7. Article 13.B of the Sixth Council Directive (77/388/EEC) (hereinafter **"the Sixth Directive"**) provides that:-

> *"Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:*
>
> *…*
>
> *(f) betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State…"*

8. Article 135(1) of Directive 2006/112/EC, which repealed the Sixth Directive, now provides:-

> *"Member States shall exempt the following transactions:*
>
> *…*
>
> *(i) betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State…"*

TAX APPEALS COMMISSION

9. Section 2(1) of the Value Added Tax Act 1972, as amended by section 84 of the Finance Act 2008, provided that:-

> *"With effect on and from the specified day, a tax, to be called value-added tax, shall, subject to this Act and regulations, be charged, levied and paid –*
>
> *(a) on the supply of goods and services effected within the State for consideration by a taxable person acting as such, other than in the course or furtherance of an exempted activity…"*

10. Section 10(1) of the 1972 Act provided that:-

> *"The amount on which tax is chargeable by virtue of section 2(1)(a) shall, subject to this section, be the total consideration which the person delivering goods or rendering services becomes entitled to receive in respect of or in relation to such delivery of goods or rendering of services, including all taxes, commissions, costs and charges whatsoever, but not including value-added tax chargeable in respect of the transaction."*

11. Regulation 5 of the European Communities (Value-added Tax) Regulations 2009 (S.I. No. 520/2009) amended section 2 so that it read:-

> *"Except as expressly otherwise provided by the Act, a tax called value-added tax is, subject to and in accordance with this Act and the Regulations, chargeable, leviable and payable on the following transactions:*
>
> *(a) the supply for consideration of goods by a taxable person acting in that capacity when the place of supply is the State;*
>
> *…*
>
> *(c) the supply for consideration of services by a taxable person acting in that capacity when the place of supply is the State…"*

12. The above wording was repeated in section 3 of the Value Added Tax Consolidation Act 2010, which repealed the 1972 Act.

13. The activities exempted from VAT were listed in the First Schedule to the Act, and section 1(xvii) thereof exempted "*betting*".

14. The wording of that exemption was retained as section 1(xv) in the amended First Schedule inserted by the Value-Added Tax (Amendment) Act 1978. Section 1(xv) was then amended by section 82 of the Finance Act 1980 which, as amended in 1994 and 2000, provided that the activity exempt thereunder was:-

> *"the acceptance of bets subject to the duty of excise imposed by section 24 of the Finance Act, 1926, of bets of the kind referred to in section 89 of the Finance Act, 1994, of bets of the kind referred to in section 75 of the Finance Act, 1996, and of bets where the event which is the subject of the bet is either a horse race or a greyhound race and the bet is entered into during the meeting at which such race takes place and at the place where such meeting is held…"*

15. A new First Schedule was inserted into the 1972 Act by section 130 of the Finance Act 2010. The new First Schedule provided in paragraph 10 of Part 2 that exempted activities included:-

> *"(1) The acceptance of bets that are subject to excise duty imposed by section 67 of the Finance Act 2002 and bets that are exempted from excise duty by section 68 of that Act.*
>
> *(2) The issuing of tickets or coupons for the purpose of a lottery."*

16. The same wording was retained in the First Schedule to the Value Added Tax Consolidation Act 2010. The wording was amended further by section 60 of the

Finance Act 2011, but these changes had not come into force during the periods the subject matter of this appeal.

E. Evidence given on behalf of the Appellant

17. I heard evidence at the re-hearing of the appeal from Mr [redacted], the Managing Director of the Appellant. The witness testified that he was the Managing Director of the Appellant and had been a prime mover in its establishment. He further testified that he was responsible for keeping the books and records of the Appellant, and for making returns to the Respondent.

18. He gave evidence that the books and records of the Appellant had been kept by him to the best of his ability, and said that they had evolved over time as the Appellant's business had developed. He testified that the Respondent had made a number of recommendations in relation to the books and records following the audit of the Appellant, and that these recommendations had been implemented by the Appellant.

19. The witness testified that prior to the Appellant introducing a Merchant Terminal on the 30th of September 20[redacted], the Appellant was running what he described as a "*very small, simple operation.*" He said that the Appellant's bank account reflected this. The Appellant initially kept weekly records of the flow of monies in and monies out of the business but in or about 20[redacted] it began to maintain a daily cash sheet. The Appellant recorded the opening and closing flow of gaming chips and the opening and closing cash amounts. The records were initially kept on handwritten worksheets and from these data was inputted into the Appellant's Excel records. The Appellant did not retain the underlying worksheets. The Excel records included a daily log, a weekly

log and a quarterly log. The witness testified that the amount of detail recorded would have increased as time went on and, at the time of the hearing, the current system had been in place since approximately 20██.

20. The witness gave evidence that things changed significantly for the Appellant following the introduction of the merchant terminal in late 20██. He said that this had effectively created a circular flow of cash, and the Appellant had been required to withdraw significant sums of cash from its bank account to put back into the Cash Office for its members. He said it was similar to a petrol station providing an ATM for customers.

21. The witness testified that this resulted in significant cash leaving the Appellant's bank account. He said that he maintained a 'Safe Account', which recorded the money coming in from the bank and out to the Cash Office.

22. The witness further testified that he used a computer programme to calculate the wages payable by the Appellant. He further stated that all expenses and miscellaneous expenditure was paid either through the bank account or from cash. He testified that the Appellant's Excel records recorded all bank expenditure and cash expenditure, and he was satisfied that all cash expenditure was fully accounted for in the records.

23. The witness further gave evidence in relation to comparable gaming offerings available from bookmakers, and testified that they offered Fixed Odds Betting Terminals, betting on lotteries and roulette to their clients. I was furnished with copies of roulette betting slips from Boylesports and Paddy Power in support of his evidence.

24. In cross-examination, the witness accepted that the VAT estimates the subject of the appeal related to periods from 20██ to 20██ inclusive, and that daily records had only been introduced at some time during 20██. He accepted that the Appellant's records had evolved over time. He further accepted that only weekly summary sheets had been shown to the Respondent in the course of the audit. The witness accepted that the Appellant had failed to keep the written records underlying the data recorded in the Excel system, but he did not accept that the Excel records were merely a computer summary, or that the Excel records did not constitute proper books and records.

F. Submissions of the Appellant

25. The Appellant furnished written submissions on the 1st of November 2013. In relation to the first issue outlined in paragraph 6 *supra*, the Appellant referred me to Article 13.B(f) of the Sixth Directive and Article 135(1) of the 2006 VAT Directive, and pointed out that former provided that:-

> *"Without prejudice to other Community provisions, Member States* ***shall exempt*** *the following* ***under conditions which they shall lay down*** *for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:*
>
> *…*
>
> *(f) betting, lotteries and other forms of gambling,* ***subject to conditions and limitations laid down by each Member State****…"* [Appellant's emphasis]

26. The Appellant submitted that since Member States received an imperative to exempt betting from VAT under the terms of the Sixth Council Directive, the State did not have

the power to exclude "*betting*" from the list of exempted activities detailed in the First Schedule to the 1972 VAT Act by enacting section 82 of the Finance Act 1980.

27. The Appellant further submitted that the words "*under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse*" could not be construed in such a manner as to negate the VAT exemption for betting, lotteries and other forms of gambling, as this would be contrary to the imperative of the Directive.

28. The Appellant further submitted that those words imposed a condition precedent on the State to detail the conditions governing the correct and straightforward application of the exemptions and preventing any possible evasion, avoidance or abuse, and submitted that the State had failed to meet its obligations in this regard.

29. The Appellant further submitted that the words "*subject to conditions and limitations laid down by each Member State*" could not be construed in such a manner as to negate the VAT exemption for betting, lotteries and other forms of gambling prescribed by the Sixth Directive.

30. It further submitted that the words "*conditions and limitations*" were to be construed collectively rather than individually. It submitted that as the words were not defined in the Directive, they could only be construed as giving Member States the power to impose conditions and/or limitations on the extent of the VAT exemption available to registered traders. It submitted that "*conditions and limitations*" could not be construed as meaning "*exclusions*", nor could they amount to the cancellation of the VAT exemption, as doing so would be contrary to the imperative of the Directive.

31. The Appellant further submitted that in construing "*conditions and limitations*", I should have regard to the purpose of the Sixth Directive as recorded in the Preamble,

which included the recital that "*a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States*."

32. The Appellant further submitted that a determination that betting, lotteries and other forms of gambling were liable to VAT would offend against the principles of direct effect and fiscal neutrality.

33. In relation to the second issue identified by the Appellant, it submitted that the removal of the word "*betting*" from the list of VAT-exempt activities in the First Schedule to the 1972 VAT Act by the enactment of section 82 of the Finance Act 1980 was insufficient to bring the profits from betting within the charge to VAT.

34. The Appellant submitted that the removal of "*betting*" from the First Schedule by section 82 conflicted with the imperative of the Sixth Directive. It further submitted that even if the State did have the power to subject the profits from gambling to VAT by the enactment of section 82, then it had failed to comply with the further imperative in the Directive to lay down conditions for the purposes of ensuring the correct and straightforward application of the exemption and of preventing any possible evasion, avoidance or abuse, and/or conditions or limitations on the exemption from VAT of betting, lotteries and other forms of gambling.

35. The Appellant further submitted that the State did not enact the legislative provisions required by the Directive to ensure certainty in Irish VAT legislation, because it had not enacted legislation:-

- **(a)** which included betting in its definition of goods or services;
- **(b)** which specified what constituted "*taxable consideration*" in relation to betting;

(c) which deemed the provision of an opportunity to accept bets as the provision of a service;

(d) which deemed part or all of a wager to be consideration;

(e) which provided for the method of charging and collecting VAT on bets and wagers laid;

(f) which provided a method for identifying and determining deductible VAT on club members' winnings paid by the VAT-registered person;

(g) which ensured the correct application of the exemptions;

(h) which ensured the straightforward application of the exemptions;

(i) which prevented any possible evasion, avoidance or abuse; and,

(j) which set down the conditions and limitations applicable to betting, lotteries and other forms of gambling.

36. The Appellant reiterated that "*conditions and limitations*" were not defined in the Directive and submitted that applying a dictionary definition to those words meant that the Sixth Directive effectively provided that Member States would exempt from VAT betting, lotteries and other forms of gambling, *"subject to provisions on which an obligation depends and subject to confinements within bounds."* The Appellant submitted that "*to confine within bounds*" could not be construed as permitting the exclusion of betting, lotteries and other forms of gambling from the exemption granted by the Sixth Directive.

37. The Appellant further submitted that the exclusion of betting from the list of exempt activities in the First Schedule to the 1972 Act had resulted in there being an absence of certainty in the legislation as to the VAT liability of a casino on the "*consideration*" arising from betting, and no VAT liability could arise from the activity of betting in the absence of such certainty.

38. The Appellant further stated that it was relying on the principle of direct effect in this regard, as it believed that the State had not brought the income of casinos from betting within the charge to VAT. The Appellant referred me in this regard to the decision of the Court of Justice in the joined cases **C-453/02 *Finanzamt Gladbeck –v- Linneweber*** and **C-462/02 *Finanzamt Herne-West –v- Akritidis*** (hereinafter referred to as "***Linneweber***"), where the Court stated at paragraph 33 of its judgment that:-

> "[W]*herever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied upon against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State…"*

39. In relation to the third, fourth and fifth issues identified by the Appellant, the Appellant submitted that if I found that the changes brought about by the enactment of section 82 of the Finance Act 1980 were not incompatible with the provisions of the Sixth Directive, then it submitted that transactions supplied without consideration were not liable to VAT. It submitted that it was an essential requirement of the VAT legislation that goods and services be exchanged for consideration in order for the provision of those goods and services to come within the charge to VAT. The Appellant relied in support of this proposition on the decision in ***National Coal Board –v- Customs & Excise Commissioners*** **[1982] STC 863**.

40. The Appellant submitted that playing chips of fixed denominations were used in the Appellant's premises as an alternative to currency because they were a convenient method for the staff and club members to determine the value of a bet or wager and the value of a member's winnings. The exchange of cash for playing chips was based

on the understanding that cash would be returned to a member presenting the chips for encashment at the Appellant's Cash Office. The Appellant submitted that if cash was used by club members instead of playing chips when placing bets with the Appellant, there would be no question of goods being supplied for consideration by the Appellant. The Appellant submitted that the temporary exchange of playing chips for cash by the Appellant could not constitute the supply for consideration of goods by the Appellant within the meaning of section 2(1)(a) of the 1972 VAT Act.

41. The Appellant further referred me to section 10(1) of the 1972 Act, which provides that:-

> *"The amount on which tax is chargeable by virtue of section 2(1)(a) shall, subject to this section, be the total consideration which the person delivering goods or rendering services becomes entitled to receive in respect of or in relation to such delivery of goods or rendering of services, including all taxes, commissions, costs and charges whatsoever, but not including value-added tax chargeable in respect of the transaction."* [Appellant's emphasis]

42. The Appellant submitted that when a club member placed a bet with the Appellant, no portion of the bet was surrendered for the opportunity to place the bet. The bet was placed for one purpose only, namely to ensure that on the occurrence of a certain event which the member predicted or expected, the member would receive payment of an agreed sum of money related to the amount he had wagered. In the event that the certain event did not occur, the member forfeited the amount wagered.

43. The Appellant submitted that it did not impose a charge on the club member for the service or opportunity it provided to its members enabling them to place bets. It submitted that in considering whether or not some or all of the wager constituted

consideration, it was relevant to consider what consideration passed between the club and the member when a wager was won by the member.

44. The Appellant further submitted that no consideration passed to it from bets placed with it by its members. When a member lost a wager with the Appellant, the transfer of the amount wagered by the member was done in satisfaction of a debt owed to the Appellant, and not in consideration for any service provided by the Appellant.

45. The Appellant further submitted that the use of the phrase "*total consideration*" in section 10(1)(a) meant that the amount on which tax is chargeable is the aggregate of certain amounts which the person delivering goods of rendering services becomes entitled to receive in respect of or in relation to the delivery of individual goods or the rendering of individual services, rather than from the aggregate consideration from the total 'sales' in the VAT period.

46. The Appellant submitted that if the use of the word "*total*" in section 10(1)(a) required that the consideration from the delivery of all goods and services in the VAT period be calculated by aggregating the individual winnings in the period, the calculation of the total consideration would not include amounts won by club members during the VAT period, as these payments do not constitute consideration. The Appellant submitted that if it was liable to VAT on the consideration it received for the supply of goods or services, which it disputed, then the amount on which VAT was chargeable was the net amount after deducting from gross winnings the payments made to club members in respect of their winnings during the relevant VAT period.

47. The Appellant further submitted that if it was entitled to deduct pay-outs to club members in calculating the amount on which VAT was to be calculated, it followed that an income and expenditure account would have to be prepared to calculate the

net amount of its income from betting. The Appellant referred me to section 76A(1) of the Taxes Consolidation Act 1997 as amended, which provides that "*…the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains*", and to section 4 of that Act which defines profits as meaning "*income or chargeable gains*" for corporation tax purposes.

48. The Appellant submitted that VAT is a tax on consideration regardless of whether the consideration contains a profit or results in a loss. VAT is not a tax on the profit element of consideration; profit was instead liable to income or corporation tax. The Appellant submitted that because a bet wagered is profit when won, and not consideration for the supply of either a good or a service, such winnings are not liable to VAT.

49. Section 10(1)(a) further referred to the total consideration which the person delivering goods or rendering services "*becomes entitled to receive*". The Appellant submitted that this phrase had to mean the agreed monetary value of the goods or services rendered.

50. The Appellant further submitted in this regard that a bet is a conditional 'gentleman's' agreement between two persons that a specified outcome of two or more possible outcomes will occur. Betting agreements provide that if the specified outcome occurs, one person keeps the total amount wagered and the other person forfeits the amount wagered. The Appellant submitted that when it accepted a bet from a club member, it did not become entitled to receive all or any of the bet placed. The amount exchanged was not exchanged "*in respect of or in relation to the delivery of goods or the rendering of services*"; instead, it was an exchange on foot of the result of a specified chance event occurring and in satisfaction of the consequential debt. The Appellant submitted that it only became entitled to receive the bet placed if and when

a club member lost the bet. No goods or services passed to the club member when he forfeited the bet wagered, and it followed that what the Appellant received was winnings rather than consideration for a good or service.

51. In summary, the Appellant submitted that its winnings from bets were profit, and not consideration; that no part of a wager placed by a club member was consideration; and that the act of accepting a wager was not the provision of a service. The Appellant further submitted that it did not supply any goods or services to its members in exchange for the placing of wagers, nor did a club member receive any goods or services when he lost a bet.

52. The Appellant referred me to the decision in **C-215/94** ***Mohr –v- Finanzamt Bad Segeberg*** as authority for its contention that where a service is supplied without a direct link to payment and without any contractual obligations on a person to pay for the service, it cannot come within the scope of VAT.

53. In relation to the issue of the provision of services, the Appellant noted that section 5 of the 1972 Act defined the rendering of a service as "*the performance or omission of any act or the toleration of any situation*". The Appellant provided the setting and the facilities for club members to place bets with the Appellant and staff were available to operate the roulette table.

54. The Appellant submitted that the provision of the facility to place bets did not constitute the provision of services and that, even if it did, no consideration was paid by the club members for that facility. As the VAT legislation did not provide that all or part of a bet or wager is deemed to be consideration for VAT purposes, such betting activities could not come within the charging provisions of the VAT legislation.

55. In relation to the provision of the setting for its members, the Appellant submitted that the setting where a bet was placed did not alter the fact that the betting individual was being afforded the opportunity to make a bet rather than being provided with a good or service. Accordingly, the Appellant submitted that its provision of a setting for its members did not constitute provision of a service.

56. The Appellant further submitted that any liability to VAT had to be specifically provided for by the VAT legislation, and where the legislation was not clear and specific, or where ambiguities arose, it was a matter of law whether liabilities crystallised or not. The Appellant referred me to the decision in ***McGrath –v- McDermott*** **[1988] IR 258** in this regard.

57. Turning to the sixth issue, the Appellant submitted that if I was to find that it received consideration from club members from the bets they placed, it would be necessary to specify how the amount of consideration liable to VAT was to be determined. In particular, the Appellant submitted that it was necessary to decide whether the Appellant was liable on the total amount received from members in exchange for playing chips or, as the Appellant submitted, on the surplus or gross profit arising to the Appellant after the playing chips had been exchanged back for cash by the members.

58. The Appellant submitted that profit and consideration are not synonymous; profit might be an element included in consideration received but consideration did not necessarily include a profit element. The Appellant therefore reiterated that the surplus arising to the winner of a bet was not consideration in the hands of the winner but was instead a profit, which could only be liable to corporation or income tax, and not to VAT.

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59. Even if I was to find that the Appellant was in receipt of consideration for VAT purposes, it submitted that the amounts lodged to its bank account represented the gross proceeds which arose from the temporary exchange of playing chips for cash, and not the total consideration to which the Appellant became entitled in respect of or in relation to the provision of services. The Appellant submitted that it was only after the encashment of all playing chips by all club members that the gross profit from bets placed by club members with the Appellant could be ascertained.

60. The Appellant referred me in this regard to the decision of the Court of Justice in **C-38/93 *H.J. Glawe Spiel- und Unterhaltungsgeräte Aufstellungsgesellschaft mbH & Co. –v- Finanzamt Hamburg-Barmbek-Uhlenhorst*** where the Court held that in the case of gaming machines offering a chance of winning (slot machines) which, pursuant to mandatory statutory requirements, are set in such a way that they pay out as winnings a certain percentage of the stakes inserted, the consideration actually received by the operator in return for making the machines available consists only of the proportion of the stakes which he can actually take for himself.

61. In relation to issues seven and eight, the Appellant submitted that the principle of fiscal neutrality requires, *inter alia*, that comparable services (which are necessarily in competition with one another) must be treated equally for the purposes of VAT and must be subject to a uniform rate. It further pointed out that in joined cases **C-259/10** and **C-260/10 *HMRC –v- The Rank Group plc*** (hereinafter ***"Rank"***) the Court of Justice had held that:-

> *"The principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of value added tax of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement does not require in addition*

that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established."

62. The Appellant further submitted that it was well-established that VAT should not be a cost of the producer or distributor of goods or services – it should only be a cost to the consumer. The Appellant submitted that if I was to find that the surplus or gross profit arising from betting was liable to VAT, the effect would be to find that the liability for VAT fell on the Appellant as the provider of the services, and not on the consumers of those services.

63. The Appellant submitted that, because the VAT legislation does not prescribe a means for collecting VAT on bets placed in casinos, the assessment of VAT liabilities on casinos becomes a cost to the casino operators rather than to the members of those casinos. It further submitted that the assessment of VAT on casino operators constituted a breach of fiscal neutrality because bets placed with bookmakers are not liable to VAT. The Appellant further submitted that a determination that it was liable to VAT on its winnings from bets placed with it by club members would result in double taxation, because its profit would be subject to both VAT and Corporation Tax, contrary to the tenets of taxation.

64. The Appellant further submitted that bookmakers provided fixed odds betting facilities to members of the public similar to the facilities provided by the Appellant to its members, such as roulette. The Appellant submitted that it was in direct competition with bookmakers. Bookmakers had to pay a 2% excise levy on the value of bets they received, whereas the Appellant and other casinos were expected to pay VAT at the rate of 23%. The Appellant submitted that the difference in the taxation regimes applied to casinos and to bookmakers resulted in a distortion of competition between the two types of businesses, which was in breach of the doctrine of fiscal

neutrality. The Appellant referred me to ***Rank*** and **C-97/06 *Navicon SA –V- Administracion del Estado*** in support of this submission.

65. The Appellant summarised its arguments and submissions as follows:-

(a) The Value Added Tax Act 1972 exempted betting from VAT.

(b) On a strict interpretation of the wording of the Sixth Directive, the State did not have the power to nullify the Vat exemption afforded to betting by the Sixth Directive.

(c) The State failed to bring certainty into VAT legislation following the enactment of section 82 of the Finance Act 1980.

(d) The re-cast Sixth Directive of 2006 repeated the imperative "*Member States **shall exempt***" betting.

(e) There is no amount of consideration included in the amount of a bet wagered.

(f) Profits are liable to corporation tax, income tax or capital Gains tax, and not VAT.

(g) The application of VAT legislation to the income of casinos offends the principle of fiscal neutrality.

(h) The assessments are excessive.

G. <u>Submissions of the Respondent</u>

66. It was submitted on behalf of the Respondent that section 2 of the Gaming & Lotteries Act 1956 defined "*gaming*" as meaning "*playing a game (whether of skill or chance or partly of skill and partly of chance) for stakes hazarded by players.*" The section further defined "*stake*" as including "*any payment for the right to take part in a game and any other form of payment required to be made as a condition of taking part in the game*

but does not include a payment made solely for facilities provided for the playing of the game."

67. The Respondent submitted that it was clear from the definitions in the 1956 Act that in gaming, the individual participated in the event or process on which a stake was hazarded. In contrast, in betting, the individual placing the stake has no part or influence, directly or indirectly, on the outcome of the event or process being bet upon.

68. The Respondent submitted that the Appellant was not, and had not any time been, a bookmaker. It pointed out that it was not registered with the National Excise Licensing Office of the Respondent for the purpose of collecting excise (betting) duty, and section 2 of the Betting Act 1931 required all bookmakers to be so licensed.

69. The Respondent further submitted that the amount on which VAT is chargeable is the total consideration which the person supplying the goods or services becomes entitled to receive. In the case of a casino, VAT is chargeable on the profit element of the transaction as, on balance, this represents the best possible approach to identifying the appropriate amount on which VAT should be charged.

70. The Respondent submitted that in issuing the assessments under appeal, the Respondent had disallowed certain purchase credits claimed by the Appellant on the grounds that there had been no supply of the goods purchased for VAT purposes.

71. The Respondent further submitted that Article 135(1)(i) of Council Directive 2006/112/EU (formerly Article 13(B)(f) of the 6th Council Directive 77/388/EC) had been correctly implemented through paragraph 10 of Schedule 1 of the Value Added Tax Consolidation Act 2010, which paragraph specified the forms of gambling that are exempt in the State.

72. The Respondent referred me to **C-283/95 *Karlheinz Fischer –v- Finanzamt Donaueschingen***, which concerned the payment of VAT on unlawful and punishable games of chance when the corresponding activity carried on by a licensed public casino was exempt from VAT. The Court held that because unlawful transactions in the operation of a game of chance were in competition with lawful activities, the principle of fiscal neutrality precluded their being treated differently as regards VAT. The Court noted that it was clear from the wording of Article 13(B)(f) that gambling was in principle to be exempted from VAT, but Member States retained the power to lay down the conditions and limitations of that exemption. The Court noted that the Commission had maintained that Article 13(B)(f) did not involve an absolute prohibition on the taxation of games of chance.

73. The Respondent further referred me to ***Linneweber***, cited above, and noted that the Court had held in that case that Article 13(B)(f) precluded national legislation which provided that the operation of all games of chance and gaming machines was exempt where it was carried out in licensed public casinos, while the operation of the same activity by traders other than those running licensed casinos did not enjoy that exemption.

74. The Respondent next referred me to **C-58/09 *Leo-Libera GmbH –v- Finanzamt Buchholz in der Nordheide***. In that case, the taxpayer operated a gaming hall with gaming machines. It declared the operations in connection therewith in its VAT returns but claimed that its activities were exempt from VAT, arguing that in accordance with Article 135(1)(i), a Member State could not exempt from VAT only betting and lotteries but had to also exempt other forms of gambling.

75. The Court held that as far as gambling was concerned, Member States were not only free to lay down the conditions and limitations of the exemption provided for in

Article 135(1)(i) but also had a discretion which allowed them to prohibit activities of that kind, totally or partially, or to restrict them and to lay down more or less rigorous procedures for controlling them. It concluded that Article 135(1)(i) had to be interpreted as meaning that the exercise of the discretionary power of the Member States to fix conditions and limitations on the VAT exemption provided for by that provision allows those States to exempt from that tax only certain forms of gambling.

76. The Respondent further referred me to **C-259/10 and C-260/10 *Commissioners for Her Majesty's Revenue and Customs –v- The Rank Group plc***. The Court in those cases held *inter alia* that:-

> "[T]*he Upper Tribunal (Tax and Chancery Chamber) seeks to know, essentially, whether or not, in order to assess whether, in the light of the principle of fiscal neutrality, two types of slot machine are similar and require the same treatment for VAT purposes, account must be taken of permitted minimum and maximum stakes and prizes, the chances of winning, the available formats and the possibility of interaction between the player and the slot machine.*
>
> *It must first be observed that, if Article 13B(f) of the Sixth Directive and the discretion which that provision grants to the Member States, mentioned in paragraph 40 of this judgment, are not to be deprived of all useful effect, the principle of fiscal neutrality cannot be interpreted as meaning that betting, lotteries and other games of chance must all be considered to be similar services within the meaning of that principle. A Member State may thus limit the VAT exemption to certain forms of game of chance (see, to that effect, Leo-Libera, paragraph 35).*
>
> *It follows from that judgment that that principle is not breached where a Member State imposes VAT on services supplied by means of slot machines while*

exempting horse-race betting, fixed-odds bets, lotteries and draws from VAT (see, to that effect, Leo-Libera, paragraphs 9, 10 and 36).

However, in order not to deprive the principle of fiscal neutrality of meaning and so as not to distort the common system of VAT, a difference of treatment for VAT purposes cannot be based on differences in the details of the structure, the arrangements or the rules of the games concerned which all fall within a single category of game, such as slot machines.

It is apparent from paragraphs 43 and 44 of the present judgment that the determination whether games of chance which are taxed differently are similar, which it is for the national court to make in the light of the circumstances of the case (see, to that effect, Joined Cases C-443/04 and C-444/04 Solleveld and van den Hout-van Eijnsbergen [2006] ECR I-3617, paragraphs 42 and 45, and Marks & Spencer, paragraph 48), must be made from the point of view of the average consumer and take account of the relevant or significant evidence liable to have a considerable influence on his decision to play one game or the other.

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

77. The Respondent further referred me to the decision of the Court of Justice in **C-12/98 *Amengual Far***, which concerned the interpretation of Article 13B(b) of the Sixth Directive. Article 13B(b) provided that:-

"Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose for ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles…

Member States may apply further exclusions to the scope of this exemption."

78. The Court therein observed that under Article 189(3) of the EC Treaty (now Article 249(3) EC), a directive is binding as to the result to be achieved upon each Member State to which it is addressed but leaves to the national authorities the choice of form and methods. Furthermore, it was clear from the wording of Article 13B(b) that the Sixth Directive had left Member States a wide discretion as to whether the transactions concerned were to be exempt or taxed.

79. The Court therefore concluded that Article 13B(b) allowed Member States, by means of a general rule, to subject to VAT lettings of immovable property and, by way of exception, to exempt only lettings of immovable property to be used for dwelling purposes.

H. Analysis and Findings

80. While the ***Amengual Far*** decision was concerned with Article 13B(b) of the Sixth Directive, and not Article 13B(f), I believe that it does still establish as a general principle that Member States have a discretion pursuant to Article 189(3) of the EC Treaty as to how they transpose exemptions into national laws.

81. While the Appellant sought to rely on the wording of the preamble which applies to all of the exemptions in paragraphs (a) to (h) of Article 13B, I believe that the preamble does not operate to govern or restrict Article 13B(f), which specifically provides for conditions and limitations in its own right. I believe this interpretation is supported by the revised wording now contained in Article 135(1) of Directive 2006/112/EC, which did not contain a general preamble but retained the right of Member States to lay down conditions and limitations on the general exemption for betting, lotteries and other forms of gambling.

82. It seems to me to be clear from the wording of Article 13B(f) and Article 135(1) that they are concerned with a single genus or family of activity, namely gambling. The approach taken by the Irish State in enacting the relevant domestic legislation as amended at various stages has been to take the genus of gambling and exempt certain specified activities which fall within that genus.

83. It is also clear from the decision in ***Leo-Libera*** that the principle of fiscal neutrality cannot be interpreted as meaning that betting, lotteries and other games of chance must all be considered to be similar services within the meaning of that principle. Accordingly, Article 13B(f) and Article 135(1)(i) have to be interpreted as meaning that the exercise of the discretionary power of the Member States to fix conditions and limitations on the VAT exemption provided for by those provisions allows those States to exempt from that tax only certain forms of gambling.

84. This finding was reiterated in the ***Rank Group*** decision, where the Court held that it followed that the principle of fiscal neutrality is not breached where a Member State imposes VAT on services supplied by means of slot machines while exempting horse-race betting, fixed-odds bets, lotteries and draws from VAT.

85. Having regard to the foregoing, I find that the State has correctly transposed Article 13B(f) of the Sixth Directive, and now Article 135(1) of Directive 2006/112/EC, into national law. It was not necessary for the legislature to enact legislation which provided that all gambling was exempt, with the exception of certain named types of gambling.

86. I further find that the State was entitled to limit the scope of the exemption afforded to betting by the enactment of section 82 of the Finance Act 1920 and/or by the enactment of section 130 of the Finance Act 2010 and/or by the enactment of the Value Added Tax Consolidation Act 2010. I do not accept the Appellant's submissions that the enactment of section 82 was insufficient to bring the profits from betting within the charge to VAT or that it conflicted with the imperative of the Sixth Directive. I also reject the Appellant's argument that the provisions of section 82 and its legislative successors have failed to provide the requisite degree of certainty necessary for the lawful imposition of a charge to tax.

87. I believe that the Appellant is correct in its submission that transactions supplied without consideration are not liable to VAT, and that it is an essential requirement of both European and domestic VAT legislation that goods and services be exchanged for consideration in order for the provision of those goods and services to come within the charge to VAT.

88. Having carefully considered the evidence before me and the submissions of the parties, I am satisfied that the Appellant does provide services to its members, namely the provision of the setting and the facility to place bets and take part in blackjack, roulette, cash games and poker tournaments.

89. I am further satisfied that the Appellant does receive consideration from its members in return for it supplying and rendering those services. My finding in this regard is supported by the provisions of section 8(7) of the 1972 Act as amended, which provisions are repeated in section 18(2) of the Value Added Tax Consolidation Act 2010, and which provide:-

> *"Where any goods or services are provided by a club or other similar organisation in respect of a payment of money by any of its members, then, for the purposes of this Act, the provision of the goods or services shall be deemed to be a supply by the club or other organisation of the goods or services (as the case may be) in the course or furtherance of a business carried on by it and the money shall be deemed to be consideration for the supply."*

90. I agree with the Appellant's submission that it ought not to be liable to VAT on its gross takings; instead, the amount on which VAT is chargeable is the net amount after deducting from gross winnings the payments made to club members in respect of their winnings during the relevant VAT period. This is, in my view, consistent with the decision of the Court of Justice in ***H.J. Glawe Spiel*** and furthermore accords with the Respondent's submission that in the case of casinos, VAT is chargeable on the profit element of the transaction as, on balance, this represents the best possible approach to identifying the appropriate amount on which VAT should be charged.

91. I do not accept as correct the Appellant's arguments that this approach offends against the principle that VAT is a tax on consideration and not on profits; it is instead

a method of calculating the taxable consideration received as accurately and fairly as possible. I also believe that the Appellant is incorrect in its submission that this approach would result in it being liable to double taxation.

92. Finally, I fully accept the Appellant's submission that the charge to VAT on its activities must not offend against the principle of fiscal neutrality. The decisions in ***Rank*** and ***Navicon*** make it clear that comparable services must be treated equally for the purposes of VAT and must be subject to a uniform rate. The Court of Justice held in ***Rank*** that the principle of fiscal neutrality would be infringed if there existed a difference in treatment for the purposes of value added tax of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer, and that it was not necessary to establish actual competition or a distortion of competition.

93. I further accept the Appellant's submission that the decision in ***Linneweber*** establishes that the Appellant is entitled to invoke the principle of direct effect if I am satisfied that the principle of fiscal neutrality has been infringed by the domestic legislation.

94. However, having carefully considered all of the evidence and the submissions made, I am not satisfied on the balance of probabilities that the services provided by the Appellant to its members are identical, or similar from a consumer's point of view, to the services provided by a bookmaker to its customers. It is worth emphasising that the onus of proof is on the Appellant in this regard. While the Appellant did point to the roulette game offerings from Boylesports and Paddy Power, those games are not, in my view, identical or even similar from the point of view of the average consumer. In coming to this view, I have regard to the fact that the format of the game and the extent of the interaction available to the player are materially different, and these are

factors which I am entitled to take into account in accordance with the decision in ***Rank***.

95. I therefore find that the domestic legislation imposing a VAT liability on the Appellant does not infringe the principle of fiscal neutrality.

96. The foregoing findings deal with the primary questions of principle in issue in this appeal. There remains the issue of quantum, including the amounts on which the Appellant is to be assessed to VAT for the periods under appeal and the extent of the allowable purchase credits claimed by the Appellant.

97. I note from the correspondence exchanged between the parties subsequent to the hearing before me that some progress has been made towards agreeing the issue of quantum, subject to the determination of this appeal. I hope that the findings reached above will clarify the legal points in issue in this appeal sufficiently for the parties to reach agreement on the amount of VAT payable by the Appellant. In the event that such agreement cannot be reached, I will hold a further hearing solely in relation to the issue of quantum, and will thereafter issue a supplementary determination in relation to that net issue.

I. Conclusion

98. The foregoing findings can be summarised as follows:-

(a) The State has correctly transposed Article 13B(f) of the Sixth Directive, and now Article 135(1) of Directive 2006/112/EC, into national law;

(b) The State was entitled to limit the scope of the exemption afforded to betting by the enactment of section 82 of the Finance Act 1920 and/or by the enactment of

section 130 of the Finance Act 2010 and/or by the enactment of the Value Added Tax Consolidation Act 2010;

(c) The Appellant does provide services to its members, namely the provision of the setting and the facility to place bets and take part in blackjack, roulette, cash games and poker tournaments;

(d) The Appellant does receive consideration from its members in return for it supplying and rendering those services;

(e) The amount of consideration on which the Appellant is chargeable to VAT is the net amount after deducting from gross winnings the payments made to club members in respect of their winnings during the relevant VAT period;

(f) The domestic legislation imposing a VAT liability on the Appellant does not infringe the principle of fiscal neutrality;

(g) As the domestic legislation correctly transposes the EU legislation and does not infringe the principle of fiscal neutrality, the Appellant is not entitled to invoke the principle of direct effect.

99. Accordingly, subject to the right of the parties to request a further hearing and supplementary Determination in relation to the issue of the quantum of tax assessed for the periods under appeal, I determine this appeal in accordance with section 949AK(1)(c).

Dated the 21st of October 2022

MARK O'MAHONY
Appeal Commissioner

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.