Trinity Term
[2020] UKSC 28
On appeal from: [2018] CSIH 78

JUDGMENT

The Advocate General representing the Commissioners of Her Majesty's Revenue and Customs (Respondent) *v* K E Entertainments Ltd (Appellant) (Scotland)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Leggatt

JUDGMENT GIVEN ON

24 June 2020

Heard on 28 and 29 April 2020

Appellant
Roderick Cordara QC

(Instructed by Ernst & Young LLP (London))

Respondent
David Thomson QC
Elisabeth Roxburgh
(Instructed by Office of the Solicitor to the Advocate General for Scotland)

LORD LEGGATT: (with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones and Lord Sales agree)

1. The question on this appeal is whether a bingo promoter is entitled to a refund of Value Added Tax ("VAT") paid to the Commissioners of Her Majesty's Revenue and Customs ("HMRC") over many years on fees charged to customers for the right to play bingo. The question itself has only retrospective significance, as VAT on commercial bingo operations was replaced in 2003 by a separate bingo duty. But the appellant's case also raises some broader issues about the assessment of VAT.

The taxpayer's operations

2. The appellant company (which I shall refer to as "the taxpayer") operates bingo clubs in Scotland. A customer who wishes to play bingo at one of its clubs pays a fee which entitles the customer to take part in a number of games of bingo, forming a session. On payment of the fee, the customer receives a book of cards. Each card contains a grid of numbers for one of the games in the session. The customer does not need to participate in every game. Cash prizes are paid to those who participate in games of bingo and win.

3. As is well known, games of bingo are presided over by a caller who draws and announces random numbers. If the number called out is on a player's card, the player marks it off. The game continues until one of the players has marked off on their card all the numbers required to win and announces that fact.

4. The bingo club manager decides, after the sale of tickets for a particular session has concluded and immediately before the session begins, what the prize money for each game in the session will be - save that some games, typically the jackpot game in the session, are played for fixed prizes advertised in advance. Such prizes tend to be consistent for the same sessions from week to week.

VAT on bingo

5. VAT is a tax charged on the supply of goods or services. There is a common system of VAT for member states of the European Union established by Council Directive (EC) 2006/112 of 28 November 2006 ("the Principal VAT Directive"). This directive continues to have effect in the United Kingdom during the transition period following the UK's exit from the European Union. The Principal VAT

Directive replaced the Sixth Council Directive (Council Directive 77/388/EEC of 17 May 1977). It is sufficient to quote the relevant provisions of the Principal VAT Directive, as it made no changes from the Sixth Council Directive which matter for present purposes.

6. The main UK national legislation is the Value Added Tax Act 1994 ("the VAT Act") and the Value Added Tax Regulations 1995 (SI 1995/2518) made under that Act ("the 1995 Regulations"). The national legislation must be interpreted so far as possible in conformity with the underlying directive, which also creates rights that are directly enforceable by individuals against the state in so far as the national legislation has not implemented the directive or has not done so correctly: *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (Case C-152/84) [1986] QB 401, paras 46-47.

7. Article 73 of the Principal VAT Directive provides:

> "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 …"

Article 73 is implemented in the UK by section 19 of the VAT Act, which includes the following provisions:

> "(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."

8. VAT is a tax on turnover, not profit. Thus, in the normal case the tax is charged on the full amount which the customer agrees to pay to the trader without any deduction for costs incurred by the trader in making the supply (although VAT on inward supplies to the trader can be deducted as "input tax" from the trader's "output tax" in calculating the amount of tax payable to HMRC).

9. In the case of commercial gambling, however, it has been recognised that it would be wrong to regard all the money received from participants by the organiser as consideration for the supply of a service. As pointed out by Jacobs AG in *H J Glawe Spiel-und Unterhaltungsgerate Aufstellungsgesellschaft mbH & Co KG v Finanzamt Hamburg-Barmbeck-Uhlenhorst* (Case C-38/93) [1994] STC 543; [1994] ECR I-1679, paras 14-30, and *Fischer v Finanzamt Donaueschingen* (Case C-283/95) [1998] QB 833, paras 32-59, the basic activity of gambling involves money changing hands through placing bets and receiving winnings and does not involve the consumption or supply of any goods or service at all. What can be seen as a service is promoting and organising the activity and providing facilities for it. In so far as money received from customers by the promoter or organiser is paid out again to players as winnings, it cannot fairly be regarded as consideration for the supply of this service. It is therefore only the net sum retained by the promoter after deduction of winnings which may be included in the taxable amount for VAT purposes.

10. That approach was endorsed by the court now known as the Court of Justice of the European Union (the "CJEU") in the *Glawe Spiel* case, which concerned the application of the VAT regime to gaming machines. The machines contained two compartments. Coins inserted to play on the machine went into one compartment (the "reserve"), unless the reserve was full, in which case they went into the "cash box". Coins paid out as winnings all came from the reserve. Coins which entered the cash box were retained by the operator for its own benefit. The machines were set up so that on average they paid out as winnings a pre-determined proportion of the money inserted. The CJEU held that in these circumstances the taxable amount did not include the winnings paid out to players.

11. To apply this principle to bingo, it is common ground that it is necessary to divide the fees charged by the promoter to customers into two components. One component is referred to as the *stake*. This is the contribution which each customer is treated as making towards the cash prizes paid out to the winners of games of bingo. The stake is outside the scope of the VAT regime. The other component is the *participation fee*. This is calculated by deducting the stake from the total fee received and is treated as the consideration obtained by the promoter in return for the supply to the customer of the right to play bingo for cash prizes. At all material times, VAT was payable on this component.

The change in HMRC's guidance

12. The background to the present dispute is a change in the guidance given by HMRC about how the participation fees on which VAT was payable should be calculated. Until 2007, leaflets and notices published by HMRC stated that bingo promoters should calculate the participation fees separately for each game in a

session. This is referred to as the "game by game" basis of calculation. In 2007, the guidance changed. In February 2007, HMRC issued Business Brief 07/07 ("the business brief"), which stated that the participation fees treated as taxable turnover should instead be calculated on a "session by session" basis.

13. The difference of approach matters for this reason. As mentioned, some bingo games are played for fixed prizes advertised or guaranteed in advance. If too few customers pay to attend a session, the proportion of the fee paid by each customer which is attributed to such a game may not be enough to fund the guaranteed cash prize. In that event the promoter will have to top up the prize money for that game from other funds. If participation fees are calculated on a game by game basis, the funds used to top up the prize money for any game will not reduce the taxable turnover for the session. If, on the other hand, participation fees are calculated on a session by session basis, then amounts used to top up the prize money for any game will reduce the taxable turnover for the session (unless and to the extent that the total prize money paid out in the session exceeds the total fees received).

14. Accordingly, if the game by game basis of calculation is used, the taxable consideration will potentially be higher than where the session by session basis is used. This is because, on the game by game approach, part of the prize money given out (that part which, for any individual game, is funded by participation fees attributable to other games in the session) is subject to VAT, whereas on the session by session approach this part of the prize money is not subject to VAT.

The business brief

15. As mentioned, the change of approach by HMRC was announced in the business brief, published in 2007, which aimed to "clarify" HMRC's policy on how to calculate for VAT purposes participation fees paid by cash bingo players. The key parts of the business brief said this:

> "*Calculating the VAT due*
>
> When a player pays to participate in all or part of a bingo session, the supply made by the promoter is the right to participate in the number of games during that session for which they have received payment. As a player cannot participate in further sessions unless they make further payment, the supply to the player is completed when the session ends. In these circumstances the amount of VAT due on participation and session charges should properly be

calculated on a session-by-session basis by deducting the stake money arising in each individual session from the total amount (less any admission fees) paid by players to participate in that same session. Where money from other sources is added to the stake money received in the session in order to meet guaranteed prizes, that additional money cannot be used to reduce the value for VAT of the participation and session charges paid for taking part in that session.

…

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 a 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. In particular, businesses should note that:

- where the total of previous errors does not exceed £2,000 net tax, an adjustment may be made to your current VAT return; but

- where the total of previous errors exceeds £2,000 net tax a separate claim should be submitted to HMRC (in these cases the errors must not be corrected through your VAT returns).

HMRC may reject all or part of a claim if repayment would unjustly enrich the claimant. …"

16. Notice 700/45, to which cross-reference was made in the business brief, gives general guidance on how to correct errors and make other adjustments to VAT returns and how to claim refunds of any VAT paid that was not due. At the relevant time the notice stated that any such claim or adjustment was subject to a time limit of three years.

17. The legislative basis for the guidance in Notice 700/45 on claiming a refund of VAT paid that was not due was section 80 of the VAT Act. The version of section 80 in force at the relevant time (as amended by section 3 of the Finance (No 2) Act 1995) stated:

> "(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) made further provision for the crediting and repayment of amounts that were not due. Section 80 continued:

> "(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.
>
> …
>
> (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 three 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 …
>
> …
>
> (7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them."

The taxpayer's claims for repayment

18. Until 2007, the taxpayer accounted for VAT on its bingo operations on a game by game basis in accordance with HMRC's published guidance. After the business brief was issued, the taxpayer made a claim under section 80 of the VAT Act for repayment of tax that would not have been payable had it calculated its taxable turnover on a session by session basis rather than a game by game basis. Because of the time limit in section 80(4), this claim was limited to output tax paid in the previous three years. The taxpayer was repaid the amount of tax that was not due in those years applying the session by session basis.

19. In 2011 a First-tier Tribunal (Tax Chamber) heard an appeal by another bingo club operator which had made a claim to be repaid output tax going back to 1996. As with the taxpayer in this case, that operator had calculated its taxable turnover on a game by game basis until HMRC published the business brief. The argument advanced in support of its claim was afterwards adopted by the taxpayer in the present case and I will consider it in more detail soon. In short, it was said that the change to a session by session basis of calculation had brought about a decrease in the taxable consideration received by the operator during the relevant period and that the operator was entitled to make an adjustment to its VAT return to reflect this reduction which was not subject to any time limit. The First-tier Tribunal accepted this argument and allowed the appeal: see *Carlton Clubs plc v Revenue and Customs Comrs* [2011] UKFTT 542 (TC); [2011] SFTD 1209.

20. In the light of this decision, the taxpayer in the present case made an adjustment of output tax in its VAT return for the period ending December 2012 in a sum of £460,630.36 by way of a credit to offset output tax brought into account in the years 1996 to 2004. The credit represented the amount of output tax that would not have been brought into account in those years if the session by session basis rather than the game by game basis of calculation had been used. The taxpayer explained its reasons for making this adjustment in a letter to HMRC dated 29 January 2013.

21. On 21 March 2013 HMRC issued a decision declining to accept the adjustment and assessing the taxpayer for what it considered to be undeclared output tax in a corresponding amount.

The proceedings below

22. The taxpayer appealed against HMRC's decision and assessment to the First-tier Tribunal (Tax Chamber), which allowed the taxpayer's appeal, substantially adopting the reasoning of the tribunal in the *Carlton Clubs* case [2016] UKFTT 508 (TC). HMRC appealed to the Upper Tribunal (Tax and Chancery Chamber), which refused the appeal [2017] STC 1895; but its further appeal to the Inner House of the Court of Session was allowed by the First Division (Lord Carloway, Lord President, Lord Drummond Young and Lord Tyre) for reasons given in an opinion dated 13 December 2018: [2018] CSIH 78; [2019] STC 368. The Inner House accordingly reinstated HMRC's assessment of VAT. However, it granted the taxpayer permission to appeal to this court, noting that there are some 14 other cases pending which raise similar or related issues and are said to have a total value in the region of £30 to £40m.

The taxpayer's case

23. The taxpayer's case, presented with dexterity by Mr Roderick Cordara QC, has exhibited a somewhat protean quality but can, I think, be captured in the following contentions:

> i) The game by game and session by session methods were both lawful and correct methods of calculating output tax due on fees charged by the taxpayer for the right to play bingo for cash prizes and, as such, the taxpayer's claim is not a claim for repayment of tax paid that was not due (which would be time-barred under section 80 of the VAT Act).

ii) Instead, the taxpayer has made an adjustment to its VAT return (to which no time limit applies) to reflect a decrease in consideration for the relevant supplies of services which has resulted from the change in the method of calculation.

iii) The taxpayer is entitled to make such an adjustment as it was required or invited to do so by HMRC in the business brief.

The statutory time limit

24. The first and fundamental obstacle which the taxpayer's claim faces is the time limit imposed by section 80 of the VAT Act. It is not disputed that the UK is entitled to set a time limit for making any claim to be credited or repaid tax that has been overpaid and that the time limit imposed by section 80 is valid and effective for this purpose. Hence it is not in dispute that, if the taxpayer's claim for repayment of VAT accounted for between 1996 and 2004 falls within section 80, the claim is time-barred. The taxpayer is therefore in the position of having to show, in order to succeed, that the output tax for which it accounted to HMRC on a game by game basis in those years was indeed due to HMRC. That is because if the amount which the taxpayer is claiming "was not VAT due to [HMRC]", then pursuant to section 80(4) and (7), HMRC is not liable to credit or repay that amount.

25. This confronts the taxpayer with a dilemma. Clearly it does not wish to argue - and does not argue - that the approach set out by HMRC in the business brief was wrong and that the correct basis of calculation is the game by game basis and not the session by session basis. Such a contention, if correct, would defeat the taxpayer's claim for repayment as it would mean that, for the years covered by the claim, tax has been correctly accounted for on the game by game basis. Worse than that, it would also mean that, by using the session by session basis of calculation for periods after 2004, the taxpayer has underpaid VAT and therefore owes money to HMRC.

26. On the other hand, if the taxpayer accepts that, as stated in the business brief, VAT should properly be calculated on the session by session basis and not the game by game basis, then the taxpayer is in principle entitled to be repaid the amounts of output tax that were overdeclared in past years as a result of using the game by game method of calculation on the ground that such amounts were not due to HMRC. The taxpayer has indeed made a successful claim on this basis for the years 2005 to 2007. However, if this is the correct view, then the present claim relating to earlier years is time-barred.

27. The way in which the taxpayer seeks to escape this dilemma is by arguing that *both* methods of calculation are, in principle, correct and consistent with the applicable legislation. Accordingly, when the taxpayer was using the game by game method, it was paying output tax that was due; but it was also complying with the legislation and paying output tax that was due when it adopted the session by session method of calculation.

28. To develop this argument, Mr Cordara QC drew a contrast between the normal case in which ascertaining a trader's taxable turnover is a straightforward question of fact and a class of cases in which evaluative judgment is required. In the normal case the consideration obtained for a supply of goods or services is ascertained by identifying what, as a matter of fact, the customer agreed to pay for the supply. Sometimes, however, a single price is charged by a supplier which comprises a taxable element and a non-taxable element (or element subject to a different rate of tax). This might be, for example, because a single price covers the supply of a service which is subject to VAT and another service which is exempt. In such cases some method of apportionment is needed to determine what part of the price paid by the customer is attributable to each element. This is often not an exact process. There may be no single "right" method of apportionment but two or more methods each of which is reasonable and legitimate.

29. The present case falls into the category where the amount which the customer has agreed to pay needs to be split into two separate elements, one of which is taxable and the other not. The split is not one which has been agreed between the customer and the supplier. It requires an apportionment to be made based on an enquiry into the internal financial position of the supplier's business. Mr Cordara submitted that whether to take as the accounting unit for this purpose individual games of bingo, or bingo sessions, or all the games or sessions held in a week, or in a month, or in some other period, is a question to which there may be no one right answer. In relation to the taxpayer's business, he argued, both the game by game basis and the session by session basis were reasonable and valid methods to adopt. It therefore cannot be said that, by accounting for VAT using the game by game method in line with HMRC's guidance at the time, the taxpayer brought into account as output tax any amount that was not due and which it is now seeking to claim back.

30. In their written case counsel for HMRC did not appear to dispute that there was more than one lawful method of apportionment available to the taxpayer in this case. In oral argument Mr Thomson QC clarified HMRC's position as being that, while this may be so "in principle", it was not true on the agreed facts of this case. For my part I think it clear that there can be only one correct method of calculating the taxable element of fees charged to customers for playing cash bingo and that, on the facts of the present case, this was the session by session method and not the game by game method.

The correct method of calculation

31. Counsel for the taxpayer was concerned to emphasise that deciding how to apportion a unitary price charged by a supplier into two elements for the purpose of calculating VAT can involve an exercise of evaluative judgment, as to which differences of view can exist within a spectrum of what is reasonable. This is undoubtedly true. But it does not follow that there must be more than one method of apportionment which the supplier may lawfully use. Although that is a possible conclusion for a court or tribunal to reach, in most cases where such a question is raised the court or tribunal can be expected to exercise its own judgment as to which method should be used. There is good reason for this. In matters of taxation consistency of approach is of critical importance. If the same exercise of apportionment may lawfully be carried out in more than one way, the result is likely to be that different taxpayers whose situations are identical will lawfully pay different amounts of tax. That offends the principle of equal treatment. It is also capable of distorting competition between businesses.

32. In the case of a pan-European system of taxation such as VAT, there is an additional consideration that recognising more than one method of apportionment as lawful could result in inequality in competition between businesses situated in different member states. This was a matter emphasised by the CJEU in *MyTravel plc v Customs and Excise Comrs* (Case C-291/03) [2005] STC 1617. That case concerned the apportionment for VAT purposes of a single price charged by a tour operator to customers for a package holiday which comprised services bought in from third parties (for example, hotel owners) and services provided by the tour operator itself (for example, where it used its own airline). In an earlier decision, *Customs and Excise Comrs v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined Cases C-308/96 and C-94/97) [1998] STC 1189, the CJEU had considered two possible methods of making such an apportionment. One method treated the consideration attributable to each component as proportional to what it cost the operator to supply the service. The other method was based on the market value of each component, if sold separately. Both methods involved assumptions which were to some extent arbitrary. The court had ruled (at para 46 of the judgment) that:

> "a trader may not be required to calculate the part of the package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package."

33. This could be read as giving the trader, where the market value of the in-house services can be established, a choice of which method to use. In the *MyTravel*

case, however, the CJEU held that this is not the position. The court ruled that a trader may not use the market value method at its own discretion according to whether this produces a lower tax liability than would result from using the actual cost method. Rather, the trader must use the market value method whenever possible unless the trader proves that the criterion of actual costs "reflects the actual structure of the package" (para 35 of the judgment). The reasons given (at paras 32-33 of the judgment) for not according traders the right to choose which method to use bear quotation:

> "32 The grant to taxable persons of such a right could have the consequence of allowing them to increase artificially the taxable amount subject to the lowest rate and of thus creating an inequality in competition between businesses, in favour of those which have established their business or have a fixed establishment in a member state which taxes certain transactions at very low rates or even zero-rates them, as in the United Kingdom in relation to passenger transport. Such an interpretation could, therefore, run counter to the principle of neutrality of VAT.
>
> 33 As is apparent from the ninth recital in the preamble to the Sixth Directive, the Community legislature wished the taxable base to be harmonised 'so that the application of the Community rate to taxable transactions leads to comparable results in all the member states'. This harmonisation is thus intended to ensure that situations similar from an economic or commercial point of view are treated identically as regards application of the VAT system. The harmonisation thus helps to ensure the neutrality of that system."

34. The same aim of seeking to achieve harmonisation and a uniform basis of assessment such as will eliminate, as far as possible, factors which may distort competition is reflected in the fourth, seventh and eight recitals to the Principal VAT Directive.

35. The only case cited on this appeal which proceeded on the basis that a taxable person had a right to choose between different lawful methods of apportionment is *Victoria & Albert Museum Trustees v Customs and Excise Comrs* [1996] STC 1016. In that case the trustees of a museum needed to apportion input tax on goods and services purchased for use in both their business and non-business activities. Guidance published by HMRC stated that for this purpose "there is no special method of apportionment" and that any method could be used, provided that it produced a fair result and was used with the prior agreement of the local VAT office.

Having used one method of apportionment for several years, the trustees obtained the agreement of their local VAT office to use a different method which was more advantageous to them. They then claimed a refund of the tax that would have been saved if the more favourable method had been used in earlier years, relying on a regulation which allowed "an error in accounting for tax or in any return" to be corrected. Turner J affirmed the finding of a tribunal that the trustees had not made an "error" when all that had happened was that they had chosen a method of assessment which did not provide the most favourable outcome.

36. Whether or in what circumstances it is compatible with EU law to allow taxpayers a choice between methods of apportionment when calculating VAT was not a question considered in the *Victoria & Albert Museum* case, nor is it necessary to explore that question further here. The argument in the *Victoria & Albert Museum* case proceeded on the assumption that there was more than one lawful method of apportionment in accordance with the HMRC guidance applicable in that case. What the decision shows is that, if that is the position, it does not lead to the conclusion desired by the taxpayer. Where a lawful method has been adopted, the fact that another method could lawfully have been used does not in itself provide any basis for subsequently claiming a refund of tax that would have been saved if the alternative method had been used instead.

37. In any event the facts of this case bear no relevant similarity to those of the *Victoria & Albert Museum* case. It has never been suggested in guidance issued by HMRC that bingo promoters had a discretion to choose between different methods of apportionment. Furthermore, contrary to what has been urged on the taxpayer's behalf, the apportionment between taxable and non-taxable elements of fees charged by bingo promoters to customers does not require an evaluative judgment. It is simply a matter of arithmetic and involves no exercise of judgment at all.

38. Before a composite or package price is apportioned between taxable and non-taxable elements, it is first necessary to identify the service or services in return for which the price is being charged. On the agreed facts of the present case, there can be no doubt about this. It is an agreed fact that what a customer who wishes to play bingo at one of the taxpayer's clubs receives in return for payment of the fee charged is the right to participate in a session of bingo. That is reflected in the book of cards supplied to the customer at the time of payment. Whether customers choose to use all the cards they receive and play each game included in the session is up to them: there is no suggestion that any refund is available if a customer does not take part in a game; nor are cards sold separately for the individual games in a session.

39. I recognise that the fact that a single composite price is charged is not decisive and there may be cases in which it better reflects commercial reality to regard customers who pay a single price as intending to purchase two or more distinct

services: see *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] 2 AC 601, paras 29-31. However, in the present case I can see no reason - and none has been advanced - for going behind the pricing policy adopted by the taxpayer and treating the fee charged to participate in a session of bingo as if it were a bundle of separate fees charged for the rights to play separate games. On the contrary, such a division would fail to reflect the commercial reality that what a customer purchases and intends to purchase is the right to play all or any of the games which make up the session as he or she chooses.

40. Once the relevant supply has been identified as the right to participate in a session, the apportionment of the fee charged to the customer into the separate components referred to as the stake and the participation fee does not involve any exercise of judgment. It is a simple arithmetical calculation. All that is required is to add up the total fees received for each session and deduct the total cash value of the prizes paid out in that session to arrive at the taxable consideration. That is an exercise which can yield only one correct answer.

41. I therefore think it clear that on the agreed facts of this case the session by session basis was the only correct method of calculating taxable turnover. The game by game basis was an incorrect method to use because it wrongly treated customers as if they were paying separate fees to participate in individual games when in fact they were not. It follows that, in so far as the taxpayer accounted for more output tax and paid more VAT between 1996 and 2007 as a result of using the game by game basis of calculation than it would have done if the session by session basis had been used, the taxpayer accounted for and paid to HMRC tax that was not due. This should be a satisfactory conclusion for the taxpayer, as it means that the taxpayer was entitled under section 80 of the VAT Act to the refund of VAT for periods after September 2004 which it claimed. But the conclusion is not as munificent as the taxpayer would like, as it also means - because of the time limit in section 80(4) - that the taxpayer is not entitled to any refund of tax accounted for or paid to HMRC in any earlier period.

42. That is a complete answer to taxpayer's claim in these proceedings, but I will also address the further steps in the taxpayer's argument.

Alleged decrease in consideration

43. The legislative provision on which the taxpayer has sought to found a claim for repayment of VAT without falling within section 80 of the VAT Act is article 90 of the Principal VAT Directive. This states:

> "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."

44. Although a contrary opinion was expressed by Lord Drummond Young in the Inner House, it is common ground on this appeal that there is no difference in meaning between the term "price" in article 90 and the term "consideration" used in article 73: see eg *Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co KG* (Case C-462/16) EU:C:2017:1006, para 45.

45. The mechanism in UK national law for claiming repayment of VAT in cases covered by article 90 is contained in regulation 38 of the 1995 Regulations. Regulation 38 applies where there is an increase or "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. In such circumstances the taxable person is required to "adjust his VAT account" in accordance with the regulation. Unlike where a claim for repayment of tax is made under section 80, there is no time limit for making an adjustment under regulation 38.

46. The taxpayer argues that, where there has been a change from one method of calculating its tax liability (the game by game basis) to another method (the session by session basis) which produces a lower taxable amount, the adoption of the new method - at any rate where it takes place in response to a relevant communication from HMRC - involves a "decrease in consideration" (or reduction in the price) occurring after the accounting period in which the original supply took place. This accordingly requires an adjustment to be made under article 90 of the Principal VAT Directive and regulation 38 of the 1995 Regulations to reduce the amount of tax payable.

47. I do not consider this a tenable interpretation of the legislation, essentially for reasons given by the Inner House. As the CJEU has observed on several occasions, the provision which is now article 90 of the Principal VAT Directive embodies one of the fundamental principles of the directive, according to which the basis of assessment is the consideration actually received by the taxable person. In accordance with that principle, the provision:

> "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."

See *Goldsmiths (Jewellers) Ltd v Customs and Excise Comrs* (Case C-330/95) [1997] ECR 1-3801; [1997] STC 1073, paras 15-16; *Freemans plc v Customs and Excise Comrs* (Case C-86/99) [2001] 1 WLR 1713, para 33; *Grattan plc v Revenue and Customs Comrs* (Case C-310/11) [2013] STC 502, para 35. This may occur because part or all of the price is not in the event paid or because some form of rebate or refund is made by the supplier which reduces the consideration received after the supply has taken place.

48. What is required, however, is a change in the consideration actually received by the supplier. No case has been cited in which it has been held that a change in the method used to calculate the taxable proportion of the consideration received falls within the scope of article 90. It is plain, in my view, that it does not. In such a case nothing has happened since the time of the supply to reduce the consideration actually received at that time. All that has happened is that the taxpayer has had second thoughts about how the consideration received at the time of the supply should be analysed for tax purposes.

49. The position was well summarised by Lord Drummond Young in the Inner House, when he said (at para 61 of the judgment) that what is involved when a retrospective shift is made by a bingo promoter from a game by game to a session by session basis of calculation "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 agree.

50. A case heavily relied on by the taxpayer is *Elida Gibbs Ltd v Customs and Excise Comrs* (Case C-317/94) [1997] QB 499. This concerned coupon schemes operated by a manufacturer of toiletries under which consumers who presented a coupon (either cut out from a newspaper or magazine or distributed by the retailer) when buying a product in a shop received a discount off the purchase price. The prices charged by the manufacturer to wholesalers, and by wholesalers to retailers, were not affected by the coupon schemes. But retailers who accepted coupons from consumers could get the value of the coupons refunded to them directly by the manufacturer. The CJEU held that in calculating its taxable turnover the manufacturer could deduct the sums which it refunded, even though there was no direct contractual relationship between the manufacturer and the retailers to whom the sums were paid.

51. The taxpayer emphasised that the CJEU in its judgment treated the predecessor provisions to articles 73 and 90 as expressions of the same underlying principle (of neutrality) and did not make it clear, or apparently think it necessary to specify, under which of those provisions the taxable amount was to be reduced. The taxpayer further emphasised that the reduction in the taxable amount recognised in the *Elida Gibbs* case did not involve any amendment of the contract or refund of

money between the manufacturer and its customer (the wholesaler). This was said to show that in the present case there could likewise be a reduction in the taxable amount, and hence in the amount of VAT payable by the taxpayer, without any contractual amendment or refund of money to its customers.

52. In my opinion, the decision in the *Elida Gibbs* case provides no assistance to the taxpayer. Although the CJEU was not asked to and did not decide in that case whether (the predecessor to) article 73 or article 90 was the applicable provision, it is clear from later decisions that it was the latter provision which applied and that the correct analysis is that the original taxable amount (ascertained when the goods were supplied by the manufacturer to its wholesaler customer) was subsequently reduced when coupons were accepted and refunds claimed and paid: see *Freemans plc v Customs and Excise Comrs* (Case C-86/99) [2001] 1 WLR 1713, paras 31-33 and 36; *Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co KG* (Case C-462/16) EU:C:2017:1006, paras 37-42. The fact that the refunds were paid, not to the manufacturer's own customer but to a party further down the supply chain, was held not to matter. But it was fundamental to the court's reasoning in the *Elida Gibbs* case that the original taxable amount was not actually received by the manufacturer because part of that amount was subsequently repaid - albeit directly to retailers rather than to its own customer. In the present case the supply chain does not extend beyond the taxpayer's bingo-playing customers and so the possibility of refunding part of the price to someone further down the supply chain does not arise. That feature of the *Elida Gibbs* case is therefore of no relevance. The essential point is that, unlike in the *Elida Gibbs* case, there has been no refund made to anyone by the taxpayer and accordingly article 90 is not engaged.

53. It is worth noting in this context the reason why there is no time limit for making an adjustment under regulation 38 and the fact that this reason does not justify exempting from any time limit a claim of the present kind.

54. Until it was revoked in 2009, regulation 38 used to contain a provision which said that it did not apply to "any increase or decrease in consideration which occurs more than three years after the end of the prescribed accounting period in which the original supply took place". In *General Motors Acceptance Corpn (UK) plc v Revenue and Customs Comrs* (2003) VAT decision 17990 a tribunal held that this provision was ineffective because it was incompatible with the predecessor to article 90 of the Principal VAT Directive - the reason being that imposing a limitation period "has the effect of ousting the taxable person's basic right to be taxed on the consideration received by him and no more" (see para 65). This is clearly right. It is right because no adjustment can be made under regulation 38 unless and until an event occurs, however long after the original supply was made, which reduces the consideration actually received by the taxable person. It would be contrary to principle if the taxable person was barred from making the necessary adjustment to

its tax liability to take account of such an event by a time limit which had expired before the event occurred and the adjustment was capable of being made.

55. That rationale, however, has no application in a case of the present kind where what is said to constitute a "decrease in consideration" does not depend on any event which has occurred since the supply of services was made. All that has happened is that the taxpayer has subsequently altered the way in which it has calculated its VAT liability. All the matters, however, on which the calculation of its liability is based (the amount of fees received from customers and the amount of the prize money paid out) were established when the original supply was made - indeed even before each bingo session began. Nothing has happened since then which needs to be brought into account and which the taxpayer might have been prevented from bringing into account if there were a time limit. This is consistent with the fact that regulation 38 and article 90 are concerned with actual payments or changes in the liability to make payments which occur after a supply of goods or services has taken place and not with a mere subsequent change of accounting method.

The effect of the business brief

56. It would undermine the orderly management of the tax system and subvert the policy embodied in section 80 of the VAT Act if a taxable person could insist on adjusting its tax liability for all past years, without any limit in time, simply by deciding to adopt a different method of calculating the taxable element of the price charged to its customers. I noted earlier that, even if it had been true that the game by game method and the session by session method of calculating taxable turnover were both valid and lawful methods, the fact that the taxpayer switched after 2007 from one lawful method to another would not of itself give the taxpayer any right to recover the tax that it would have saved if it had previously used the session by session method. The basis on which the taxpayer has sought to found such a right is the publication by HMRC of the business brief. That document is said to have "required or invited" bingo promoters in the position of the taxpayer to make a retrospective adjustment to their VAT account by re-calculating their output tax for all past years (without limit in time) using the session by session basis instead of the game by game basis of calculation.

57. The way in which the taxpayer's case was put before the tribunals and the Inner House was to argue that, although both methods of calculation were consistent with the applicable legislation, the taxpayer was required to use the method set out in the guidance published by HMRC at any given time. This guidance was said to contain "directions" as to the method of calculation to be used. Thus, it was said that initially directions given by HMRC required the taxpayer to calculate its taxable turnover on a game by game basis. But then, when the guidance changed, the

taxpayer was required to calculate its taxable turnover using the session by session basis of calculation - not only going forward but also retrospectively for all past periods.

58. It is, however, a misconception to characterise guidance of the kind issued by HMRC in this case as capable of giving "directions" with which taxpayers are obliged to comply. As Lewison LJ explained in *Leeds City Council v Revenue and Customs Comrs* [2015] EWCA Civ 1293; [2016] STC 2256, para 4:

> "The administration and collection of VAT in this country is under the management of HMRC (formerly the Commissioners for Customs and Excise). There are many problems of interpretation arising out of the VAT code and HMRC provide the public with their own interpretation of points of difficulty; and information about the practice they adopt in various areas. These are variously contained in notices, business briefs and the VAT manual. They are not law: they are no more than HMRC's interpretation of the law. HMRC are not of course infallible, and so Parliament has legislated for a system of tribunals to decide contested points. As and when cases are decided against HMRC they will often revise their opinion and inform the public accordingly. Sometimes, of course, HMRC disagree with a tribunal decision, in which event they may choose to appeal."

59. The fundamental point that an administrative agency, such as HMRC, has no power (in the absence of specific statutory authority) to issue guidance which has legally binding force is qualified by the doctrine which protects legitimate expectations created by such a public body. There is no doubt that guidance formally published by HMRC is capable in some circumstances of generating an expectation on the part of a taxpayer that a particular policy or practice or course of action will be followed which the law will protect by preventing HMRC from acting in a way which will frustrate that expectation: see eg *R (Davies) v Revenue and Customs Comrs* [2011] UKSC 47; [2011] 1 WLR 2625, paras 25-29. It is not necessary on this appeal, however, to examine the precise contours of this doctrine, as it is clear that it has no relevance to the facts of this case. The taxpayer is not seeking to prevent HMRC from frustrating an expectation said to have been created by guidance published before 2007 that the game by game method could properly be used to calculate the amount of VAT payable. Such an argument might have been advanced if the game by game method had been more favourable to the taxpayer than another method which HMRC was now contending ought to be used. But the factual situation in this case is the direct opposite of that. The taxpayer is seeking to argue that the game by game method should <u>not</u> be used to calculate the tax that was

payable in periods before 2007. Any legitimate expectation that the taxpayer is entitled to rely on the accuracy of pre-2007 guidance does not assist that argument.

60. Accordingly, to suggest that the business brief "required" bingo promoters to use the session by session basis of calculation ascribes to guidance published by HMRC a status which it does not have. Such guidance is not capable of imposing on taxpayers an obligation to calculate tax in a particular way. It represents only HMRC's view or interpretation of the law and, if a taxpayer disagrees with HMRC's view, it can appeal from a decision or assessment based on that view to a tribunal whose function it is to give authoritative interpretations of the law (subject to any further appeal).

61. In any case it is quite impossible to read the language of the business brief as instructing bingo promoters to make retrospective adjustments to their VAT returns. The section of the business brief (quoted at para 15 above) headed "Making claims or adjustments" says that bingo promoters who fall into the category described "may" make a claim for a repayment, not that they "must" to do so.

62. In oral argument on this appeal Mr Cordara for the taxpayer accepted that the business brief merely invited and did not require bingo promoters who had in past periods calculated VAT on a game by game basis to seek a repayment. His submission was that this could be done - as the heading of the relevant section of the business brief indicated - in either of two ways: by making a claim or by making an adjustment. If a bingo promoter made a claim for repayment on the basis that it had paid tax which was not due, this would be governed by section 80 of the VAT Act, with its time limit on recovery. If on the other hand the promoter elected to make an adjustment under regulation 38 on the basis that there had been a decrease in consideration for the supply, then (as already mentioned) such an adjustment is not subject to any time limit. Having originally availed itself only of the first option, it is the latter invitation which the taxpayer has now chosen to accept.

63. I have explained why, as a matter of law, the only basis on which a repayment of tax could properly be claimed or made in the circumstances of the present case is that the tax was not due because it was calculated on a game by game basis when it should have been calculated on a session by session basis, and that there is no legal basis on which an adjustment under regulation 38 could properly be made. Had HMRC invited bingo promoters to make such adjustments and offered to repay tax which it was not liable to repay, it seems to me that it would have been acting outside its powers. But, in any case, the business brief cannot reasonably be read as making such an invitation or offer.

64. The only invitation made in the business brief was to bingo promoters who have calculated VAT on a game by game basis, and "who now find that they have done so incorrectly", to "make a claim to HMRC for a repayment of any resulting overdeclaration". Such a claim can only reasonably be understood as a claim under section 80 the VAT Act, made on the footing that the promoter had overpaid tax because it had used the game by game method of calculation when, as advised in the business brief, the amount of VAT due "should properly be calculated on a session-by-session basis".

65. The sole peg on which the taxpayer seeks to hang its contention that adjustments under regulation 38 were invited is the reference to "adjustments" in the section heading and in the cross-reference to Notice 700/45. It is true that the subject matter of Notice 700/45 included adjustments under regulation 38 (although, unhelpfully for the taxpayer's case, such adjustments were said in the notice to be subject to a time limit of three years). However, the notice provided entirely general guidance about how to correct VAT errors and make adjustments or claims and was not specifically concerned with bingo. The fact that it included an explanation of how to make an adjustment under regulation 38 therefore does not mean that HMRC in the business brief were inviting bingo promoters who had previously used a game by game basis of calculation to make an adjustment under regulation 38. There was no suggestion that everything covered by the notice was relevant to the claims for repayment which bingo promoters were invited to make. Nor does the fact that the heading refers to making claims "or adjustments" support such an inference. The reference to adjustments in the body of the section, to which this must relate, is in the first bullet point, which states that "where the total of previous errors does not exceed £2,000 net tax, an adjustment may be made to your current VAT return". This kind of adjustment to correct small errors was provided for in regulation 34 of the 1995 Regulations (and was also explained in Notice 700/45). It was quite different from the kind of adjustment to reflect a decrease in consideration provided for in regulation 38.

66. Moreover, as the second bullet point explained, "where the total of previous errors exceeds £2,000 net tax a separate claim should be submitted to HMRC". This could only be a claim under section 80 of the VAT Act for repayment of tax paid in error when it was not due. That was yet further confirmed by the statement that "HMRC may reject all or part of a claim if repayment would unjustly enrich the claimant". A defence of unjust enrichment is provided by section 80(3) in relation to claims under section 80 of the VAT Act.

67. I therefore consider that the language of the business brief is entirely inconsistent with the taxpayer's case and can only reasonably be read in the way that it was originally read by the taxpayer, as inviting (only) claims from bingo promoters for repayment of VAT which had been calculated incorrectly by using

the game by game basis of calculation when the session by session basis ought to have been used, subject to the statutory time limit for such claims of three years.

Conclusion

68. For these reasons I can find no merit in the taxpayer's arguments and would dismiss the appeal.