



**Michaelmas Term
[2020] UKSC 49**

On appeal from: [2018] EWCA Civ 2210

JUDGMENT

Commissioners for Her Majesty's Revenue and Customs (Appellant) v London Clubs Management Ltd (Respondent)

before

**Lord Carnwath
Lady Black
Lady Arden
Lord Kitchin
Lord Sales**

JUDGMENT GIVEN ON

27 November 2020

Heard on 25 February 2020

Appellant
George Peretz QC
Elizabeth Wilson
(Instructed by HMRC
Solicitor's Office (Bush
House))

Respondent
Andrew Hitchmough QC
Barbara Belgrano
(Instructed by Ashurst
LLP (London))

LORD KITCHIN: (with whom Lord Carnwath and Lady Black agree)

1. London Clubs Management Ltd (“LCM”) operates casinos where games such as blackjack, punto banco and American roulette are played. The questions to which this appeal gives rise concern the correct treatment for gaming duty purposes of non-negotiable gaming chips and free bet vouchers which are provided free of charge by LCM and some other casino operators to selected gamblers to encourage them to gamble in their casinos.

2. Gaming duty is an excise duty which was introduced by the Finance Act 1997 (the “FA 1997”). Section 10(1) provides that the duty is charged in accordance with section 11 on any premises where dutiable gaming takes place. It is accepted that the gaming at issue in this appeal is dutiable gaming for which LCM, as the provider of the casino premises where it takes place, is liable.

3. The amount of gaming duty payable is calculated by applying the relevant rate of gaming duty to the “gross gaming yield” from the casino premises during a specified accounting period. Section 11(8) provides that the gross gaming yield consists of the aggregate of “gaming receipts” and “banker’s profits” for that period:

“(a) the gaming receipts for that period from those premises;
and

(b) where a provider of the premises (or a person acting on his behalf) is banker in relation to any dutiable gaming taking place on those premises in that period, the banker’s profits for that period from that gaming.”

4. “Gaming receipts” are defined by section 11(9), which reads, so far as relevant:

“For the purposes of subsection (8) above the gaming receipts for an accounting period from any premises are the receipts in that period from charges made in connection with any dutiable gaming which has taken place on the premises other than -

...

(b) any charge the payment of which confers no more than an entitlement to admission to the premises.”

5. “Banker’s profits” were, at the relevant time, 1 October 2008 to 30 September 2012, defined by section 11(10) as the amount by which the value in money or money’s worth of the stakes staked exceeded the value of the prizes provided by the banker:

“In subsection (8) above the reference to the banker’s profits from any gaming is a reference to the amount (if any) by which the value specified in paragraph (a) below exceeds the value specified in paragraph (b) below, that is to say -

(a) the value, in money or money’s worth, of the stakes staked with the banker in any such gaming; and

(b) the value of the prizes provided by the banker to those taking part in such gaming otherwise than on behalf of a provider of the premises.”

6. Section 11(10A), which has had effect since 1 September 2007, addresses the valuation of prizes:

“Subsections (2) to (6)(a) of section 20 of the Betting and Gaming Duties Act 1981 (expenditure on bingo winnings: valuation of prizes) apply, with any necessary modifications, for the purposes of gaming duty as they apply for the purposes of bingo duty.”

7. Section 20 of the Betting and Gaming Duties Act 1981 (the “BGDA”) says, so far as relevant:

“(2) Where a prize is obtained by the promoter from a person not connected with him, the cost to the promoter shall be treated as the value of the prize for the purpose of subsection (1).

(3) Where a prize is a voucher which -

(a) may be used in place of money as whole or partial payment for benefits of a specified kind obtained from a specified person,

(b) specifies an amount as the sum or maximum sum in place of which the voucher may be used, and

(c) does not fall within subsection (2),

the specified amount is the value of the voucher for the purpose of subsection (1).

(4) Where a prize is a voucher (whether or not it falls within subsection (2)) it shall be treated as having no value for the purpose of subsection (1) if -

(a) it does not satisfy subsection (3)(a) and (b), or

(b) its use as described in subsection (3)(a) is subject to a specified restriction, condition or limitation which may make the value of the voucher to the recipient significantly less than the amount mentioned in subsection (3)(b).”

The facts

8. The relevant facts are not in dispute and are very straightforward. Normal cash chips are either purchased by gamblers for cash or won on a winning bet. They are replayable at the gaming tables until they are lost, or they may be used to buy goods or services, or they may be encashed.

9. Non-negotiable chips are provided to selected gamblers as a promotional tool. They have some of the characteristics of normal cash chips. In particular, they may be used to place bets at the gaming tables and they are replayable until they are lost. If the gambler wins, the banker pays out the winnings in cash chips and the gambler retains the non-negotiable chips and may use them to place further bets.

10. There are important differences between non-negotiable chips and cash chips, however. First and as I have mentioned, they are not purchased for cash but are provided free of charge. Secondly, they cannot be used to buy goods or services, nor can they be encashed. They can be used to place bets and that is all. Thirdly, when a gambler loses a bet placed with non-negotiable chips, the banker places them in the table's "drop box" which is a secure box under the gaming table. In contrast (with the exception of tips), cash chips are not placed in the drop box. Rather, when a gambler loses a bet placed with cash chips, the chips are placed in the chip float, a tray which rests in front of the banker and contains the casino's chips. Fourthly, non-negotiable chips are physically distinguishable from cash chips. The face of each non-negotiable chip is clearly marked "non-negotiable".

11. Free bet vouchers are printed paper vouchers which are also provided to selected gamblers as a promotional tool. There are several different types. "Free play vouchers" or "replayable vouchers" can be used in just the same way as non-negotiable chips. If the gambler loses the bet, they are placed in the drop box. If the gambler wins the bet, the winnings are paid to him in cash chips and the voucher is returned to him and may be used to place further bets. "One-hit vouchers" can only be used to place a single bet, regardless of whether the gambler wins or loses. Once the voucher has been played, the dealer puts it in the drop box. If the gambler has won the bet, his winnings are paid in the form of cash chips. If he loses the bet, he receives nothing. "Cash match" vouchers operate in a similar way to one-hit vouchers, except that a gambler must first place a bet with cash chips in order to use a cash match voucher of the same value. Finally, there are "free gaming chips vouchers". They may be exchanged for non-negotiable chips at the casino's cash desk without charge. These non-negotiable chips can then be used in just the same way as other non-negotiable chips.

12. Non-negotiable chips have no printed terms and conditions. Free bet vouchers, on the other hand, are subject to terms and conditions which may limit the games in which they may be played (for example, blackjack or punto banco), the bets for which they may be placed (for example, even money bets) or the time at which they may be used (for example, between particular dates). In these proceedings non-negotiable chips and all free bet vouchers have been referred to collectively as "Non-Negs" and I too will use that terminology. No one has suggested that, for tax purposes, the various kinds of Non-Negs should be treated differently from one another. But I should observe that the Upper Tribunal pointed out, entirely correctly in my view, that free gaming chips vouchers should not have been included in the same category as other Non-Negs because they are not used in the game itself, nor do they end up in the drop box; it is only the Non-Negs into which they may be exchanged which are placed as bets. Clearly this can have no effect on the outcome of this appeal, however.

13. LCM introduced Non-Negs in 2008 and from that time it included the face value of all the Non-Negs played by gamblers and retained by its casinos in their drop boxes in the calculation of its banker's profits. However, following a review of that approach, it considered that it had made an error in so doing and that, in consequence, it had over-declared its payable gaming duty. In October 2012 LCM therefore wrote to the Commissioners for Her Majesty's Revenue and Customs ("HMRC") and requested repayment of £1,973,376.97 of gaming duty which it said had been overpaid in the period from 1 October 2008 to 30 September 2012. The request was made under section 137A of the Customs and Excise Management Act 1979. On 13 March 2013, HMRC rejected that claim. LCM appealed against that decision.

The proceedings

14. The First-tier Tribunal ("FTT") (Judge Sinfield) [2014] UKFTT 1060 (TC) dismissed LCM's appeal. The FTT rejected LCM's argument that Non-Negs did not have any value in money or money's worth within the meaning of section 11(10)(a) of the FA 1997 because they were provided to the gambler free of charge and so the gambler did not risk anything of value when he placed them as a bet. It accepted instead the argument advanced on behalf of HMRC that the value in money or money's worth of the Non-Negs was their monetary face value on the basis that the face value would be used to calculate the winnings in cash chips and on a losing bet the gambler would no longer have the right to bet the monetary value of the Non-Negs for free.

15. On appeal by LCM, the Upper Tribunal (Tax and Chancery Chamber) ("UT") (Henderson J and Judge Roger Berner), [2016] UKUT 0259 (TCC) allowed the appeal. It held that the FTT failed to have proper regard to the requirement that the value of the stakes staked in section 11(10)(a) of the FA 1997 must be the value of those stakes in money or money's worth. However, Non-Negs did not represent any money paid or deposited with LCM, nor did they have any value in money's worth by reason of being redeemable for cash or for goods or services. Further, there was no evidence and there were no findings of fact either that Non-Negs were transferable or, if they were, as to the monetary value that they might realise upon any transfer.

16. The UT also addressed the position of Non-Negs as prizes under section 11(10)(b) of the FA 1997. It considered that this was not an issue which needed to be resolved to dispose of the appeal but it was desirable that it should express a view upon it because the system of valuation for gaming duty purposes of chips and vouchers for free bets should be regarded as a whole, taking into account the positive and negative elements of the calculation of the banker's profits.

17. On this issue, the parties took the position that Non-Negs should be treated in the same way for the purposes of section 11(10)(a) and (b). Hence LCM's case was that Non-Negs were to be treated as having no value for the purposes of section 11(10)(a) and (b). HMRC, on the other hand, argued that Non-Negs were to be treated as having their face value for the purposes of section 11(10)(a) and (b), with the result that only when a Non-Neg was not returned to or retained by the gambler would its value contribute to banker's profits.

18. The UT observed that it was not part of LCM's claim or its case on appeal that if Non-Negs had no value for the purposes of section 11(10)(a) they could nevertheless have a value for the purposes of section 11(10)(b). Correspondingly but not surprisingly, LCM did not dispute HMRC's analysis of the position as to the value of Non-Negs as prizes were HMRC's argument as to the value of Non-Negs for the purposes of section 11(10)(a) to have prevailed.

19. The UT accepted LCM's contentions on this issue. It held that Non-Negs which were returned to or retained by the gambler fell within section 20(4)(a) and (b) of the BGDA and therefore must be regarded as having no value. They fell within section 20(4)(a) because they failed to satisfy section 20(3)(a) and (b). They could be used to play a game but that did not mean they were used "in place of money as ... payment for benefits". They fell within section 20(4)(b) because their use was restricted to the same use as any other Non-Neg and therefore could not have any different value in money or in money's worth.

20. The Court of Appeal (Flaux, Leggatt LJJ, Dame Elizabeth Gloster) [2018] EWCA Civ 2210; [2019] 1 WLR 1 dismissed HMRC's further appeal. It held that a Non-Neg was not a "stake staked" for the purposes of section 11(10)(a) of the FA 1997; and, if a Non-Neg was a stake staked, that stake had no value in "money or money's worth". Dame Elizabeth Gloster, with whom Leggatt and Flaux LJJ agreed, reasoned that the assessment of stakes staked under section 11(10), in context, involved a conventional arithmetical calculation of real-world stakes received from players which, if necessary, could feature as revenue figures in a set of accounts and contribute to the casino's gross profits. It did not include artificial or notional values placed on tokens given to the gambler by the casino as a promotional exercise which intrinsically had no value and were non-negotiable, or at best had an economic value to the player equivalent to their face value multiplied by the chance of winning. In no sense could the face value of a Non-Neg, or even the value calculated by reference to the chance of winning, feature as a receipt in a casino's accounts or be said to contribute to its gross profits. Further, when a gambler used a Non-Neg, he was not using his own money or putting his own money at risk. When a gambler lost a Non-Neg and it was placed in the casino's drop-box, he was not losing cash but the right to use that Non-Neg to place a bet. On an objective assessment of value, a Non-Neg had no value in money or money's worth for the purposes of section 11(10)(a).

21. HMRC also asked the Court of Appeal to consider the value of Non-Negs as “prizes provided” on the basis that, although a finding on this issue was not necessary to dispose of the appeal, there should, so far as possible, be consistency between the value of Non-Negs as “stakes staked” and as “prizes provided”.

22. The Court of Appeal duly did so and, once again, agreed with the reasoning of the UT. The benefit which a retained Non-Neg provided was no different from that referable to the original Non-Neg. As no payment was required for the original Non-Neg, there was no payment in money which the Non-Neg could replace. Nor did staking a Non-Neg in a casino game entail “payment” in return for a “benefit”. Moreover, the use of a Non-Neg was restricted, since it could only be used as a stake, and its use as such had no value. The UT was therefore right to conclude that the effect of either section 20(4)(a) or (b) of the BGDA was that a Non-Neg retained as a prize had no value for the purposes of section 11(10)(b) of the FA 1997.

This appeal

23. Upon this further appeal, HMRC contend that the Court of Appeal fell into error on each of the issues it decided. It is therefore necessary to consider:

- i) whether, in calculating banker’s profits, Non-Negs are “stakes” for the purposes of section 11(10)(a) of the FA 1997;
- ii) what “value, in money or money’s worth” (if any) Non-Negs have for the purposes of section 11(10)(a); and
- iii) what “value” (if any) should be given to Non-Negs for the purposes of section 11(10)(b).

Issues (i) and (ii) - Non-Negs as stakes staked

24. It is convenient to address these issues together, for they are closely related. HMRC’s case is clear and straightforward. They contend that for the purposes of section 11(10)(a) Non-Negs are “stakes staked” when they are played in a game and that their value “in money or money’s worth” is their face value because that is the value which is attached to them in the game. Non-Negs are to be treated as a “stake” for the purposes of section 11(10)(a) because they are treated as a stake under the rules of the game in which they are played, and are to be valued by reference to their value in money as a stake under those rules. This approach is, they say, focused on the treatment of the Non-Negs in the game but also reflects the commercial reality

that it is only because they can be staked at their face value and confer an entitlement to cash winnings if the play is successful that they act, as intended, as incentives or rewards.

25. HMRC recognise that one of two other approaches might be adopted. The first is that section 11(10)(a) is concerned with stakes which consist of cash or which can be encashed or converted to cash, in which case Non-Negs, which cannot be encashed, have a zero value or are not stakes at all. The second is that this provision is concerned with stakes which have a real-world value to the gambler, and that this is their value under the provision. HMRC continue that this value will generally not be zero because a gambler can, by using cautious strategies, convert a Non-Neg into cash chips. Further, if the Non-Neg is assignable, it will have a value in an arm's length transaction between its holder and another gambler. HMRC accept that it is not open to them on this appeal to argue that, on this approach, the market value of the Non-Negs in issue was not zero but say that, were this court to find this is the correct approach, it would be open to them to do so in other cases, and to argue that the market value is substantial.

26. It is contended by HMRC that their preferred approach is the correct one. Section 11(10)(a) is concerned with the existence and value of the stake being placed as a stake in the casino game, and not its value in any other context, such as its value when encashed or when sold or assigned to another gambler. They continue that this is why, when ordinary cash chips are given by casinos to favoured gamblers and are used to place bets in a game, these chips count as stakes staked in the game for duty purposes. It is also why a cash incentive given to a gambler, such as a promise of a £50 "cash back" if £1,000 worth of ordinary cash chips are bought and staked, has no effect on the value of those cash chips as stakes staked in the calculation required by section 11(10). The promise does not affect the treatment or value of the stakes staked in the game under the rules of the game.

27. LCM contends that HMRC's approach accords with neither the wording of the legislation nor the judicial guidance in this area. Playing a casino game with a Non-Neg does not involve staking a stake with the banker. Further, if and in so far as playing with a Non-Neg does involve staking a stake, the value of the stake in money or money's worth is nil.

28. The case advanced by LCM therefore has two elements. In support of the first, namely that a Non-Neg is not a stake staked within the meaning of section 11(10)(a), it argues that it is inherent in the concept of staking a stake that a gambler is putting something of value at risk. However, a Non-Neg has no value and it represents nothing of value. A gambler risks nothing when he plays a game with a Non-Neg and the banker gains nothing if the player loses his bet.

29. Much the same reasoning underpins the second limb of LCM's case. It argues that if a Non-Neg is a stake then it has no value in money or money's worth. Assessment of whether a Non-Neg has a value in money or money's worth requires a consideration of the economic substance which underpins its use as a stake in a game. As a matter of substance, the gambler is not placing anything of value at risk. The Non-Neg is a token which allows him to play the game for free.

30. I should add one further point at this stage. The parties remain in agreement that there should, so far as possible, be consistency in approach between the value of Non-Negs as stakes staked under section 11(10)(a) and as prizes provided under section 11(10)(b). This is a matter to which I must return in considering issue (iii).

Discussion

31. Before addressing these rival arguments and the proper interpretation of the legislation, I must say a little about the nature of a cash chip and what it represents. This was explored by the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. The case concerned the misappropriation by a solicitor of money from his firm's client account. The solicitor exchanged that money for cash chips which he gambled away at the respondents' club. In these proceedings the firm sought to recover from the respondents the money lost by the solicitor as money had and received. One of the issues which arose was whether the respondents had given, in good faith, good consideration for the money. At that time gaming contracts were void under section 18 of the Gaming Act 1845 ("the 1845 Act") but the respondents nevertheless claimed they had given good consideration for two reasons: first, each time the solicitor placed a bet at the club, he obtained in exchange the chance of winning and thus of being paid; and secondly, the chips were supplied to the solicitor in exchange for money, and this constituted a separate contract, independent of the contracts under which bets were placed at the club and it was not void under the 1845 Act.

32. The House of Lords had no difficulty rejecting the first of these arguments. Each time the solicitor placed a bet he received nothing in return which constituted valuable consideration. The gaming contract was void and, if the solicitor won his bet, he had no right to any winnings, though he might have had a confident expectation that the club would pay. Were it otherwise, the club would soon have gone out of business.

33. The second argument ultimately fared no better. In the course of his reasoning, Lord Goff of Chieveley said this at p 575F-H:

“In common sense terms, those who gambled at the club were not gambling for chips: they were gambling for money. As Davies LJ said in *CHT Ltd v Ward* [1965] 2 QB 63, 79:

‘People do not game in order to win chips; they game in order to win money. The chips are not money or money’s worth; they are mere counters or symbols used for the convenience of all concerned in the gaming.’

The convenience is manifest, especially from the point of view of the club. The club has the gambler’s money up front, and large sums of cash are not floating around at the gaming tables. The chips are simply a convenient mechanism for facilitating gambling with money. The property in the chips as such remains in the club, so that there is no question of a gambler buying the chips from the club when he obtains them for cash.”

34. Lord Goff went on to explain that if gaming contracts were not void under English law there would be a contract in respect of the chips under which the club would accept the deposit of money by the gambler and provide him with chips which he could use to place bets or redeem; and separate contracts would be made when each bet was placed, at which point in time part or all of the money so deposited would be appropriated to the bet. As it was, however, each time the gambler placed a bet, the agreement between the gambler and the club was an agreement by way of gaming and so was null and void. The club, by accepting the bets, had not given valuable consideration for the money wagered by the gambler because the club was under no legal obligation to honour those bets.

35. It follows that when a gambler plays with cash chips in a casino, he is not staking the chips but the money those cash chips represent which he has deposited with the casino. When the gambler uses the chips to make a bet in a game, the money those chips represent is appropriated to the bet the gambler is making. If the gambler loses the bet, the right to the money those chips represent passes to the casino. If, on the other hand, the gambler wins the bet, then, depending on the rules of the game, the gambler will be entitled to a prize comprising the money he has bet and a further monetary prize, the size of which will usually be related to the size of the bet the gambler has made and the odds of him winning. The gambler will be given cash chips which represent the money he has won and he can use those chips and the money they represent to place further bets or he may encash the chips.

36. I can now turn to the legislation and would make three points at the outset. First, the assessment of the gross gaming yield from any premises requires a focus upon the activity of gaming and not the provision of other goods or services on the premises. As I have explained, section 11(8) of the FA 1997 provides that the gross gaming yield consists of the aggregate of the gaming receipts from the premises and, where the provider of the premises (or a person acting on his behalf) is banker in relation to dutiable gaming taking place on the premises, the banker's profits. Gaming receipts, as defined in section 11(9), comprise, subject to section 11(9)(b), receipts from charges made in relation to dutiable gaming such as fees to participate in a particular dutiable game. Similarly, banker's profits are those profits derived from the activity of gaming and not any wider activities or services provided at the premises at which the gaming takes place.

37. The second point concerns the nature of banker's profits and the perspective from which they must be considered. As defined in section 11(10), banker's profits from gaming are the value in money or money's worth of the stakes staked with the banker in any such gaming, less the value of the prizes provided by the banker to the gamblers taking part in the gaming (excluding anyone who takes part on behalf of a provider of the premises). This assessment must, so it seems to me, be carried out from the perspective of the banker for it is the banker's profits which must be brought into account in calculating the gross gaming yield from the premises.

38. The third point concerns the nature of the valuation that must be conducted. In my view, the expression "money or money's worth" in section 11(10)(a) emphasises that in determining the value of the stakes staked it is the actual and real world value of the stakes in the hands of the banker which matters. Section 11(10)(a) is concerned with stakes which are or represent money (as cash chips do) or which can be converted into money. Similarly, in working out the value of the prizes provided by the banker, it is the actual or real world cost to the banker of providing the prizes that must be brought into account, subject to the operation of section 20 of the BGDA. I would reject the submission made by HMRC that section 11(10)(a) is concerned with the role the stake plays in the game and the value it carries for that purpose. In my view, the UT was right to say that this goes too far and attaches insufficient weight to the expression "money or money's worth" and the context, which requires a focus on the economic substance of the stake and the real financial contribution that stake makes to the banker's profits from gaming and in turn to the gross gaming yield from the premises. So too, the Court of Appeal was correct to say that the calculation of stakes staked involves a conventional accounting of the real world value of the stakes which have been staked in any given accounting period.

39. Aspects of this approach to the legislation are reflected in the decision of the Court of Appeal in *Aspinalls Club Ltd v Revenue and Customs Comrs* [2013] EWCA Civ 1464; [2015] Ch 79. There *Aspinalls Club Ltd*, the operator of a well-known

gaming casino, offered various incentive schemes to wealthy gamblers whom it wished to encourage. These took the form of commissions or rebates provided to the gambler based on the amount of chips played or losses incurred by him over the term of the agreement. Under one of these schemes, the “cash chip agreement”, Aspinalls agreed to pay to the gambler a commission based on the total amount of cash chips staked during the course of the agreement providing the gambler had staked enough to meet a turnover requirement. One issue to which the appeal gave rise was whether, as Aspinalls argued, the value of the stake staked had to be determined by reference to the agreement between Aspinalls and the gambler under the cash chip agreement. Hence, Aspinalls argued, the value of the stake staked was the value of the stake less any commission due under the agreement.

40. The Court of Appeal rejected that argument for reasons given by Moses LJ, with whom Black and Gloster LJ agreed, at para 8:

“... Section 11(10)(a) of the 1997 Act is clear. The value in money or money’s worth of the stakes staked is the face value of the chip. Staking a chip is the same as staking money and the value in money of the chip is its face value: see Davis LJ in *CHT Ltd v Ward* [1965] 2 QB 63, 79 and Lord Goff of Chieveley in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 575, cited [2011] UKFTT 325 (TC) at para 30; [2012] STC 2124, para 35. The stake is the amount risked in connection with the game; it is the value of that stake which is put at risk in the game. The value put at risk in the game is not altered by reference to any commission the player receives under the cash chip agreement.”

41. The Court of Appeal was right to reach this conclusion. Section 11(10)(a) is concerned with the value of the stakes staked in the game, not any wider consideration such as the payment of commissions. The value of the stakes staked by a high value gambler with the benefit of the cash chip agreement was the face value of the chips used by that gambler to place the bet. That was the amount of money the gambler put at risk. The Court of Appeal went on to find, again rightly in my view, that the commissions were not prizes either. Section 11(10)(b) is concerned with the prizes provided by the banker in the game in the event the gambler wins the bet. The focus throughout is on the game itself, not the wider activities of the casino or the expenses it has incurred or its overall profitability.

42. That brings me to Non-Negs and how they are to be treated under this statutory scheme. I would acknowledge at the outset that Non-Negs do have a real world value to the gambler. They confer on the gambler a right to make a bet in a game without placing any of his own money at risk, and with the bet comes the

opportunity of winning. To this extent, therefore, I agree with HMRC's submissions. Non-Negs operate as incentives or rewards because they have a real world value to the gamblers to whom they are provided and by whom they may be used to place bets in a game. So too I would reject LCM's submission that a gambler risks nothing when he uses a Non-Neg to make a bet. He risks losing the Non-Neg and with it the opportunity to win a prize by using it to make a bet.

43. Nevertheless, Non-Negs are very different from cash chips which represent money deposited by the gambler, or money which he has won or been given to encourage him to bet. Non-Negs do not represent money to which the gambler is entitled and, unlike cash chips, they cannot be encashed or exchanged for goods or services.

44. Further, when a gambler places a bet using a Non-Neg, no money is appropriated to the bet. If the gambler loses, the Non-Neg is placed in the drop box but no right to money passes to the casino. When the casino allows a gambler to bet with a Non-Neg, it is, in a sense, allowing the gambler to bet with the casino's own money. Put another way, from the point of view of the casino, a Non-Neg amounts to a free bet. As such, a Non-Neg has no real world value to the casino when the gambler loses it in a bet save in so far as it may be said that a contingent liability of the casino to pay out according to the rules of the game in which it is played is eliminated. But in my view, this does not instil in the Non-Neg a "value, in money or money's worth" within the meaning of section 11(10)(a). Nor does it render it a "stake staked" within the meaning of that provision. Furthermore, a Non-Neg does not make a contribution to "the banker's profits" within the meaning of section 11(10) or to the banker's "gross gaming yield" within the meaning of section 11(8). This is so whether the Non-Neg is assignable or not. The assignability of the Non-Neg cannot and does not affect its value to the casino.

The diamond necklace

45. This approach also yields the answer to a question which animated submissions at the hearing of this appeal. It arises from an illustration used by HMRC. Suppose, say HMRC, a gambler stakes a diamond necklace with an uncertain market value lying somewhere in the range of £15,000 to £35,000. HMRC submit that section 11(10) of the FA 1997 deals with this uncertainty by treating the value of the necklace (and so the stake) as the value that it is given in the game. So, if the casino and the gambler agree that the value of the necklace is to be treated for the purposes of the game as £10,000 then that is its value for the purposes of section 11(10) when it is placed as a stake. The casino cannot argue later that the true value of the necklace is less than £10,000, nor can HMRC argue that the true value is more than £10,000. This, HMRC continue, is the position in relation to Non-Negs too. The casino and the gambler have agreed that Non-Negs shall be treated as having

their face value for the purposes of the game, and that is the value they must have when placed as a stake under section 11(10). This approach produces certainty.

46. LCM agrees that, in this example, the necklace is to be treated as having a value of £10,000 for the purposes of calculating the banker's profits but says that this is consistent with its case rather than that of HMRC. Its case, it continues, focuses on the contract between the parties in order to determine whether there is a stake and, if there is a stake, what its value is. Non-Negs allow a gambler to play for free. He places nothing at risk. So, a Non-Neg has no value and is not a stake.

47. I would not accept the arguments of either party in relation to this example for they both seem to me to ignore the need to assess the value in money or money's worth of the stakes staked in calculating the banker's profits from gaming under section 11(10). The need to assess the value in money or money's worth emphasises the need to ascertain the real objective value, that is to say, the real world value of a stake staked. If the casino and the gambler have agreed a value of £10,000 for a necklace which is staked in a game but the casino later finds that the necklace is made of paste and worthless, then it will contribute nothing to the banker's profits. Conversely, if the casino discovers that it has made a good bargain and that the necklace is worth more than £10,000, then that is the contribution it will make to the banker's profits. Of course the fact that the casino and the gambler have agreed a value of £10,000 for the necklace may be powerful evidence of its true value but it may not be determinative, and where it is not I can see no reason why HMRC, which are not party to the agreement between the casino and the gambler, should be bound by its terms.

48. For all of these reasons, I would conclude that Non-Negs are not stakes staked within the meaning of section 11(10)(a) of the FA 1997, nor do they have any value in money or money's worth within the meaning of that provision.

Issue (iii) - Non-Negs as prizes

49. I agree with the UT and the Court of Appeal that any discussion of how Non-Negs are to be valued in a game ought also to consider their value when returned by the casino to the gambler who has won his bet. As I have said, HMRC and LCM agree that Non-Negs which are returned to the gambler in that way are prizes within the meaning of section 11(10)(b) of the FA 1997. They also agree that, so far as possible, there should be a consistency in approach as to the value of Non-Negs as stakes staked under section 11(10)(a) and as prizes provided under section 11(10)(b). Hence HMRC say that they should be treated as having their face value for the purposes of section 11(10)(a) and (b) whereas LCM argues, and the UT and the Court of Appeal agreed, that they have no value. So too it formed no part of the

submissions of either party that Non-Negs should be treated differently for the purposes of section 11(10)(a) and (b).

50. I would emphasise, therefore, that HMRC do not contend that, were this court to hold that Non-Negs are not “stakes staked” or that they do not have a “value, in money or money’s worth” equal to their nominal face value when assessing the value of the stakes staked in a given accounting period, they nonetheless have their face value when returned to gamblers as prizes by application of section 20 BGDA. Nor, I would add, did LCM make such a submission. Nevertheless, it seems to me to be desirable that I should address, on their merits, HMRC’s arguments concerning the value of Non-Negs as prizes, albeit that these arguments have only been advanced as the counterpart of their case that Non-Negs have their face value as stakes staked.

51. HMRC have developed their case on this aspect of the appeal in the following way. They say that, as a matter of ordinary language, a Non-Neg may be used in place of money as payment for benefits of a specified kind, namely the benefit in the course of a game of cash equivalent to the face value of the Non-Neg. In the game, the Non-Neg is as good as cash, and a gambler who uses the Non-Neg is in the same position as a gambler who uses cash. Accordingly, section 20(3)(a) and (b) of the BGDA are satisfied and in so far as the UT and the Court of Appeal found to the contrary, they fell into error and misunderstood the statutory language and the underlying economic reality. They also say that section 20(3)(c) is satisfied, about which there has been no dispute.

52. Turning now to paragraph (b) of section 20(4) of the BGDA, HMRC say this must be read with section 20(3)(a) and (b) and that, in referring to a “specified restriction, condition or limitation which may make the value of the voucher to the recipient significantly less than the amount specified in subsection (3)(b)”, the paragraph must be referring to a restriction, condition or limitation on the use of the voucher beyond the fact that it can only be used as payment for benefits of a specified kind obtained from a specified person. Were it otherwise, any voucher which satisfied the requirements of section 20(3)(a) would also fall within section 20(4)(b) and that cannot have been the intention of the legislature. As for Non-Negs, HMRC say that there is no restriction on their use beyond the limitation that they can be used for the purpose of playing particular games in LCM’s casino.

53. In summary, HMRC continue, Non-Negs are vouchers which satisfy section 20(3)(a), (b) and (c) of the BGDA. Further, Non-Negs do not satisfy section 20(4)(b). It follows that Non-Negs are to be treated as having their face value as prizes for the purposes of section 11(10)(b) of the FA 1997.

54. In my judgment Non-Negs do not satisfy section 20(3)(a) of the BGDA. As I have explained, gamblers gamble with money. When a casino issues cash chips, the property in those chips remains the property of the casino. The cash chips are simply a convenient way of facilitating gambling with money. A gambler who places a bet using cash chips is not purchasing goods or services or any other benefits with the chips or with the money those chips represent. He is placing his money at risk under the terms of an agreement he makes with the casino to play a game of chance. Similarly, when a gambler uses a Non-Neg to place a bet he is playing a game of chance in which the casino treats him as having put money to the value of the Non-Neg at risk. If the gambler loses, the casino retains the Non-Neg. If the gambler wins, the Non-Neg is returned to him together with any other prize he has won. But in neither case has the gambler used the Non-Neg in place of money as whole or partial payment for benefits of a specified kind obtained from the casino or banker.

55. In these circumstances it is not necessary to express a final view on the proper interpretation and application of section 20(4)(b). Nevertheless, I would be minded to reject one aspect of the submissions of HMRC here too. In particular I would not accept that section 20(4)(b) must be referring to restrictions, conditions or limitations on the use of the vouchers concerning matters other than the kinds of benefits for which they can be used as payment or the persons from whom those benefits can be obtained. To my mind a critical feature of section 20(4)(b) is the requirement for its application that the restriction, condition or limitation may make the value of the voucher to the recipient *significantly less than its face value*. Some vouchers will satisfy this condition and others will not. Whether a Non-Neg does so or not will depend upon the restrictions, conditions or limitations imposed by the casino on its use and the impact those restrictions, conditions or limitations have upon the value of the Non-Neg to the gambler.

56. I am confirmed in these views because, on the interpretation of section 20(3) of the BGDA which I would hold to be correct, the outcome is a coherent scheme for the treatment of Non-Negs whether used by gamblers to place bets or when returned to gamblers as prizes. Were it otherwise, the legislation would have the consequence that Non-Negs would not contribute to banker's profits when gamblers lost their bets but would reduce those profits when gamblers won and had their Non-Negs returned to them as prizes. It would mean that if, for example, a gambler, who places as a bet a Non-Neg with a face value of £100, wins three times in a row before losing, and each time he wins has his Non-Neg returned to him together with any other prize, the casino can say that, simply by returning the Non-Neg, it has incurred a cost of £300 in prizes and reduce its profits accordingly. That would produce an incoherent scheme which would be unduly favourable to casinos and in my view that cannot have been Parliament's intention.

Conclusion

57. For all of these reasons, I would dismiss this appeal.

LADY ARDEN:

Banker's profits for gaming duty purposes

58. This appeal concerns gaming duty, which is chargeable on premises such as casinos in the United Kingdom where dutiable gaming, including casino games, takes place. The respondent at its casinos provides to selected customers “Non-Negs”, that is, non-negotiable vouchers for gaming conferring the right to place free bets in order to induce those customers to visit its casinos and engage in gaming. The vouchers can only be used for that purpose and they are non-negotiable in that they cannot be exchanged for cash or used to pay for goods or services such as food and drink, but, if the customer using Non-Negs wins, he receives redeemable cash chips and is given back his Non-Negs. Non-Negs are not subject to any restriction on transfer. They bear a face value amount which is the amount for which they can be wagered.

59. The key question at the heart of this appeal is whether the Non-Negs should be taken into account as part of “the banker’s profits” for the purposes of section 11(8)(b) read with section 11(10) of the Finance Act 1997 (“the FA 1997”), which are set out in paras 3 and 5 above.

60. Gaming duty in this case is charged on gross gaming yield from the relevant premises (section 11(8) of the FA 1997, para 3 above). Where there is a banker for gaming purposes, the gross gaming yield means both the gaming receipts and “the banker’s profits”. These are defined in section 11(10) as follows:

“In subsection (8) above the reference to the banker’s profits from any gaming is a reference to the amount (if any) by which the value specified in paragraph (a) below exceeds the value specified in paragraph (b) below, that is to say -

- (a) the value, in money or money’s worth, of the stakes staked with the banker in any such gaming; and

(b) the value of the prizes provided by the banker to those taking part in such gaming otherwise than on behalf of a provider of the premises.”

Value of stakes is value at large

61. It is clear that Parliament in enacting this provision is requiring there to be brought into account for the purposes of gaming duty not the receipts of gaming (which are covered by section 11(8)(a)) but the *value* of “stakes staked” less the value of prizes paid. It is, therefore, not determinative that the stake might have been issued as a free bet by the casino, or that the receipt was less than its perceived value as where the customer puts down a stake in the form of an IOU but then fails to pay. The key is the value of whatever has generated the gaming activity.

Value is not restricted to the amount for which the stake is bet

62. In my judgment, the term “value” in section 11(10)(a) is value at large in that it is determined by open market valuation, that is what a person would pay for it in the open market, and that person could include the casino. In its primary case HMRC adopt a “game-based” approach to valuation and submits that “the value ... of the stakes staked” is the value which the stake is given for the purposes of the relevant gaming, as opposed its value to any particular person or in the market. HMRC point out that the term “banker” is used in this subsection in its gaming connotation. The term “value ... of the stakes staked” is not, however defined and it seems to me that that it must bear its ordinary meaning. The expression “stake staked” are an unusual collocation of words, and it has not been suggested that the combined phrase is a term of art. The word “staked” seems to mean “which has been staked”, meaning actual staking and constituting a form of condition subsequent to the identification of a stake. I do not think it can be read as “in the amount that it has been staked”. Even if it did, it could be liable to circumvention where stakes were accepted, for instance, in ounces of silver. I therefore join with the majority in rejecting HMRC’s primary case.

63. Of course, it is consistent with HMRC’s case that, as the majority hold and I agree, the diamond necklace of uncertain value is to be taken to have a value equal to the amount for which the casino allows it to be staked, no more and no less. This is also consistent with my approach. As I see it, that limitation is achieved by the word “staked”. The only value which is relevant is that which has been wagered or “staked”, and the rest falls outside gaming duty.

64. I can see that it would be easier to administer the duty (which is self-assessed in the first place) if the person liable to gaming duty had to take only the face value of the voucher, but we have to interpret the words that Parliament has used. This to me is more important than the fact that the object of section 11(10) is to ascertain the banker's profits because section 11(10) does not have as its purpose the presentation of a true and fair view of a banker's profits, as would the statutory accounts of a registered company. Section 11(10) is an artificial sectoral formula which has left matters of deduction out of account and which can equally bring matters into account even if they would not fall to be included under conventional accounting principles (cf para 38, last sentence of Lord Kitchin's judgment). *Aspinalls* (paras 39 to 41 above) shows that the formula is not based on conventional accounting principles of admitting the deduction of all costs incurred in making a particular profit.

Market value is in issue on this appeal

65. An alternative case put by HMRC is market valuation. This does not arise on the facts in this case as found by the tribunals. It arises only because the majority has adopted the approach to value of valuation from the perspective of the banker alone. This excludes market valuation. Therefore it seems to me incumbent to deal with the issue of market valuation on this appeal. If market value is the "value" of the stake, and a stake has a market value, that stake would, to the extent of that value, form part of the banker's profits once the stake had been staked.

Contrary to the majority's conclusion, value of a stake is not restricted to the perspective of the banker

66. In my judgment, the majority make a critical error in interpreting "value" as the value from the perspective of the banker without any legislative direction to that effect (see para 37 above). This appears, in the opinion of the majority, to make irrelevant any market value: see para 44 above ("*The assignability of a Non-Neg cannot and does not affect its value to the casino*"). That means that, if the banker issues a free bet and can then say, when the free bet is staked, that there is no contribution to its tangible assets, the free bet is outside the scope of gaming duty. In my judgment this is contrary to the statutory direction in section 11(10) to ascertain the "value" of the stakes staked because value is, as explained above, unqualified. The "banker's perspective" approach fails to take account of the fact that the free bet is staked and leads to gaming activity at the premises which are subject to gaming duty. A nil value is still a value. An objective value is a real world value. Profits can be banker's profits without the elements used to calculate those profits having to be valued from the perspective of the banker. Moreover, if Lord Sales is right in his interpretation of section 20 of the BGDA (dealing with the valuation of prizes), the further asymmetric and anomalous result is reached under

section 11(10A) that the casino can not only exclude the free bets from banker's profits but also deduct the amount of prizes in the form of free bets from other stakes and reduce its other banker's profits accordingly.

67. In any event, if there is a market value, it is as open to the banker as anyone else to make an offer to acquire the Non-Neg. It is wrong to conclude that market value is not available to the casino. The casino could offer to acquire the Non-Neg when the holder arrives at the casino, perhaps by offering him a free drink in exchange or a cash chip of a reduced amount. If the banker modelled the risk of a holder of a Non-Neg winning, it would no doubt be in its interests to make such an offer at the appropriate amount to avoid a loss. When the player loses his bet, the right to stake the Non-Neg is lost and the paper voucher is taken out of play. So, in my respectful judgment it is not open to the casino to say that nothing passes to it: it has extinguished the liability on the Non-Neg. There cannot be read into the statute a requirement that this benefit is acquired by way of assignment or transfer.

HMRC's failure to lead evidence of market value

68. HMRC made an error of law at the start of this case which was corrected by the Tribunals. HMRC contended that the "value" of a Non-Neg was its face value. The First-tier Tribunal (Judge Greg Sinfield) rejected that method of valuation and found that the value was the chance of winning. The Upper Tribunal ("UT") (Henderson J and Judge Roger Berner) corrected that by pointing out that the value had to be value "in money or money's worth", and there was no evidence to support any valuation. Therefore, HMRC failed on the facts, but *non constat* that it could not be shown on other evidence that objectively speaking the Non-Neg had value. The UT explained the position as follows:

"33. We do not regard as anything to the point that the Non-Neg might provide the player with a right to play a game, or a right to have the chance to win, or a promise from the club in those respects, which Ms Wilson argued was a valuable right. The mere fact that such a right might subjectively be regarded by the holder of the Non-Neg as a valuable right, in the sense that it would enable that holder to play a game without putting money at risk, is not material to an objective valuation, in money or money's worth, of the stake staked.

34. On the other hand, the objective valuation of a stake would, in our view, have to have regard to the monetary value, if any, that could be obtained on an arm's length assignment to a third party of the right to place that stake, in the same way

that it would if the Non-Neg was redeemable for cash or for goods and services. That would be money's worth for the purpose of section 11(10)(a). It was not, however, HMRC's case that the stakes of the Non-Negs should have any value other than the face value of the Non-Negs, and there were no findings of fact either that the Non-Negs were transferable or, if they were, what value might be realisable on a transfer. Furthermore as section 11(10)(a) requires the individual stake to be valued, there would have to be evidence of a value generally obtainable in a market in Non-Negs or evidence that a particular Non-Neg could have been, at the time it was staked, assigned for money or money's worth. In the absence of such evidence, it is not possible to ascribe any money's worth to the stake by reference to any assignable right.

35. It follows, in our judgment, that the FTT erred in law when it concluded, at para 27, that the value, in money or money's worth, of a Non-Neg was its monetary face value, on the basis that the face value would be used to calculate winnings in cash chips and on a losing bet the player would no longer have the right to bet that monetary value for free. In our view, the FTT failed to have proper regard to the requirement that the value in section 11(10)(a) must be a value in money or money's worth ...”

69. The Court of Appeal (as referred at [2019] 1 WLR 1) agreed with this passage from the judgment of the UT (paras 36, 51 and 52).

Mechanics of objective valuation

70. Objective valuation permits the possibility that the parties will adduce evidence as to whether another person in the open market would buy the voucher and if so at what price. In the hands of an experienced player, it might be that the Non-Negs could be turned into winnings, paid in cash chips, which the player could then encash. In those circumstances the Non-Neg may have some value in the open market, even if small. The objective valuation of the stake permits the stake to be taken into account at an appropriate value as directed by Parliament if it has generated gaming activity, which is the trigger for the charge to gaming duty.

71. The voucher serves the function of a gaming chip. In the normal way the customer obtains a gaming chip by placing a deposit of cash with the banker. Lord Kitchin refers to the speech of Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991]

2 AC 548 in which this point is made. But with free bets there is no deposit of cash: although there are different types of voucher in this case as Lord Kitchin explains, this feature is a constant. In short, the Non-Negs are all free bets issued by the casino itself “as a promotional tool”. The fact that they are not issued for cash does not in my judgment prevent it from being a stake or having an objective value for the purposes of section 11(10).

72. Furthermore, the majority accept that the Non-Neg has a real world value to the gambler and thus, I assume, a value might be realisable on the open market: see para 42 of the judgment of Lord Kitchin.

73. Subjective ideas of value play no part in the process of valuing a stake. I therefore agree with Lord Kitchin in rejecting the argument to that effect that a diamond necklace of uncertain value offered and accepted as a stake for a specified amount is to be valued by reference to what the parties or at least the banker thought was its value. It is irrelevant if the banker or the player wrongly thought that the necklace was paste and therefore much less than it turned out to be. As I have said, it is inherently unlikely, given that Parliament would be concerned with the fair and equal allocation of tax burdens, that it was intended that the value of a stake should depend on anything other than its objective market valuation.

74. That leaves the question of exactly what must be valued. As I have explained, one function of the word “staked” in the expression of “the value ... of the stakes staked” is to limit the stake to that part of, or that part of the value of whatever is staked, or what is used in the game.

Why a Non-Neg is a “stake” for the purposes of section 11(10)(a) of the FA 1997

75. In my judgment, a Non-Neg is a stake and the Court of Appeal fell into error in holding otherwise. Dame Elizabeth Gloster, with whom Leggatt and Flaux LJJ agreed, reasoned on this issue as follows:

“29. ... The calculation of *stakes staked* under section 11(10)(b), to my mind, in context, involves a conventional arithmetical calculation of real-world stakes received from players, which, if necessary, could feature as actual receipt or revenue figures in a set of accounts; it does not - on any natural reading - include artificial or notional values placed on tokens *given to the player* by the casino, as part of a promotional or marketing exercise, which intrinsically have no value and are

non-negotiable, or at best have an economic value to the player equivalent to their face-value multiplied by the chances of winning. In real terms, when the casino gives out Non-Negs to favoured players, it is allowing the player to bet with its (the casino's) own money. There is no receipt by the casino contributing to its gross profits; on the contrary, in permitting the player to gamble with a Non-Neg, what the casino is actually doing is incurring a contingent (non-enforceable) liability to pay out, according to the relevant odds of the game, in respect of the face-value of the Non-Neg in the event that the chip is placed as a winning bet. It is, in my judgment, counter-intuitive in such circumstances to characterise what is essentially an item of the casino's own expenditure as part of the *banker's profits* or as a *stake* having a value in money or money's worth. In no sense could the face value of a Non-Neg, or even the value to the player calculated by reference to the chances of winning, feature as a receipt in a casino's accounts or be said to contribute to its gross profits.

30. For that reason taken on its own, I would not regard a Non-Neg as being a stake which was required to be taken into account in the calculation of *gross gaming yield* as defined under section 11(8) or of *banker's profits* as referred to or defined under section 11(8)(b) or section 11(10). In particular, I do not consider that the amplified definition of *banker's profits* in section 11(10) requires one artificially to include the Non-Negs (which are clearly not items of receipt directly contributing to profit, but rather items of expenditure) in the statutory profit calculation. In other words, in construing the relevant provisions one has to have regard to the relevant context. Although the phrase in section 11(10)(a) *the stakes staked with the banker* could arguably be said, linguistically, to be broad enough to include a Non-Neg (simply because a Non-Neg chip is placed on the gaming table by a favoured recipient as a stake), in my judgment, the phrase, construed in its actual context - ie the ascertainment of *gross gaming yield and banker's profits* - does not permit the artificial inclusion, as an item of stake under section 11(10)(a), of an amount of the casino's promotional marketing *expenditure* given to the player by the casino. Only in the most general and indirect sense could such a 'stake' be said to be contributing to profit; and it could not be said in any real sense to constitute part of the *gross gaming yield* of the casino."

76. I do not agree with this analysis. This reasoning with respect confuses the stake staked with its value. A “stake” is an ordinary English word meaning:

“That which is placed at hazard; esp a sum of money or other valuable commodity deposited or guaranteed, to be taken by the winner of a game, race, contest, etc.” (Oxford English Dictionary, 2nd ed (1989))

77. The word “staked” enables stakes which are not used in gaming to be left out of account and so Non-Negs which are issued but never used may be excluded from the calculation of banker’s profits. But a stake can on an assessment of its market value be worthless, as in the case of forged cheques (see *Lydiashourne Ltd v Revenue and Customs Comrs (Decision E00092)*, 13 August 1998 explained by the UT at para 42). This is an important point in the statutory scheme.

78. Stakes and prizes are not, moreover, the same as assets and liabilities in accounting generally. Parliament has required a specific account to be taken of stakes staked and prizes paid, and the fact that a stake might in some circumstances for accounting purposes be treated as a conditional liability or expenditure of the casino rather than as a receipt is not relevant. As stated above, a nil value is still a value. A stake does not cease to be a stake because it is of nil value.

Does statute require the method of valuing Non-Negs as stakes and Non-Negs as prizes to be consistent?

79. The valuation of Non-Negs as prizes which can be deducted from “the value ... of stakes staked” is governed by section 11(10A) (para 6 above) which incorporates by reference subsections (2) to (6)(a) of section 20 of the BGDA (as amended by the Finance Act 2003) (the relevant parts of section 20 are set out in para 7 above). Section 11(10A) is not as such a “deeming” provision, but one which requires modifications to be made to the incorporated provisions.

80. Where, as here, such a provision does not spell out the modifications which can be made, it may give rise to some exacting interpretation issues, and there should in my view be no expectation or anticipation that such a provision when carefully analysed should have “rough edges” - or worse. It is, in my judgment, more important to approach those provisions in their application to gaming duty on the basis of the principle of statutory construction that it should be presumed that Parliament intended the statutes *in pari materia* (as here) to constitute a harmonious whole. On that basis, if I am right that the value of the Non-Neg falls into the definition of “the banker’s profits” I would as a matter of first impression expect the

basic rules of debit and credit to apply and therefore, that if the value of stakes is credited on one basis, that, when Non-Negs form part of a prize, they will be debited on the basis of a similar valuation method. On that last point, the views of the majority and my own coincide. On the other hand it is noticeable that subsections (3) and (4) of section 20 BGDA are expressly drafted so as to achieve HMRC's primary case on section 11(10) of the FA 1997 that the relevant value (in that case, a Non-Neg) is the face value amount of the voucher, an argument which all members of the Court have rejected, and so some differences may in fact be unavoidable.

81. HMRC's arguments of the parties are set out in paras 51 to 53 above. I approach the submissions on the hypothesis that it has been shown that the Non-Negs have a market value as a stake.

82. As to section 20(3)(a) I agree with Lord Sales. The majority do not explain what is meant by "in place of money" and in my judgment it must include "instead of money". On that basis the prize of a Non-Neg plainly satisfies section 20(3)(a). (No issue arises on section 20(3)(b) or (c)).

83. As to section 20(4)(b), the UT held that the prize was not to be treated as valueless because of its restrictions under section 20(4) but in this the Upper Tribunal failed to give weight to the direction to find the value *to the recipient*. The recipient was a player, and the value of a free bet to someone who wants to gamble is not obviously significantly less than the face value of the voucher (and the majority accept the real world value of a free bet to the player: para 42 above).

84. The question whether section 20(4)(b) is satisfied will depend on a consideration of the restriction in question. It is capable of being satisfied as where, for instance, the voucher contains some unreasonable condition as to the time of use of the voucher. I agree with Lord Sales that it must be a restriction on the use not of the prize but of the voucher in place of money as described in section 20(3)(a).

85. The point is that, if the condition in section 20(4)(b) is met, it would be unreasonable to afford the casino the deduction of the face value of the prize to which it would otherwise be entitled to under section 20(3). This is consistent with the fact that, if section 20(4)(b) is met, it would be unlikely that the Non-Neg would have any market value as a stake.

86. If it is not met in any case, the banker would, on the face of it, be entitled to a deduction for the amount specified in the voucher. I do not propose to express a final view on this because the Court has heard no argument on whether, as authorised in principle by the terms of section 11(10A), in these circumstances section 20(3)

must necessarily be modified to achieve parity between the credit to profits and the deduction of prizes where Non-Negs are involved. That question must remain open.

Conclusion

87. On the facts of this case, but for reasons materially differing from the majority and the Court of Appeal, I would dismiss this appeal.

LORD SALES:

88. I agree with Lord Kitchin’s judgment in respect issues (i) and (ii), regarding the proper interpretation of section 11(10)(a) of the Finance Act 1997 (as amended). That is all that is necessary to dispose of the appeal. However, the UT and the Court of Appeal also expressed views in respect of issue (iii), regarding the proper interpretation of section 20 of the BGDA, as it applies by virtue of section 11(10A) of the FA 1997 in relation to the valuation of prizes for the purposes of section 11(10)(b), and we were invited to do the same. On that issue, I have come to a different conclusion from Lord Kitchin.

89. As regards section 11(10)(a), I agree with Lord Kitchin that the subparagraph is concerned with the value to the banker of the stake staked. Although section 11(10) is focused just on the game (rather than the banker’s income or profits in the wider sense), it imposes a tax on the banker. Accordingly, it is appropriate to construe it as applying in relation to real economic gains which the banker receives in the context of the game. This is borne out by the fact that what is taxed under section 11 is the “gross gaming yield” (section 11(2)(a)), which is calculated, according to section 11(8), by adding together “gaming receipts” and the “banker’s profits” from the gaming. This language strongly suggests that what is in contemplation is receipts in the sense of real sums received by the banker (and section 11(9), which explains how they are to be calculated, reinforces this point) and profits in the sense of real profits realised by the banker from the gaming. In my view, this context informs the construction to be given to section 11(10), which explains how “banker’s profits” are to be calculated. Further, as the UT emphasised (para 27), the reference in section 11(10)(a) to “money or money’s worth” indicates that the calculation is concerned with real world value. I would add that the context shows that it is real world value available to the banker which is significant.

90. As Lord Kitchin points out, from the point of view of the gambler a Non-Neg does have a real economic value (para 42); but from the point of view of the banker, as a contribution to its receipts and profits, it has none - it simply represents a free bet (para 44). I agree with him that in the context of section 11(10)(a), the relevant

concept of real economic worth is that given from the banker's perspective, not from that of the gambler. This view is supported by the points made in para 89 above.

91. Therefore HMRC's submissions regarding the interpretation of section 11(10)(a), to say that under that provision either a Non-Neg should be given its face value or should be given the notional market value it might have if it is assignable by the gambler, must be rejected. "Money's worth" in section 11(10)(a) refers to real economic value to which the banker has access and which therefore can add to his profits. It does not include value to which only the gambler has access. Hence, it does not include the putative exchange value for the gambler of selling a Non-Neg to a third party who wants to gamble. Even if the Non-Neg is assignable, this is not value to which the banker has access in any real sense. If the banker wants to sell chips to another gambler, he will sell him regular chips. The application of section 11(10)(a) does not depend on the happenstance whether a Non-Neg is assignable or not. Parliament intended that the application of the tax should be uniform as between different bankers and that it should not depend upon such matters, which are of no economic consequence from the banker's point of view.

92. It should be emphasised that this is to give section 11(10)(a) a different construction from that arrived at by the UT, as endorsed by the Court of Appeal. Although the UT dismissed HMRC's contention that a Non-Neg should be given a value under section 11(10)(a) equal to its face value, the UT considered (para 34) that this provision required a notional objective value to be given to a Non-Neg in the gambler's hands, and it was only because HMRC had not introduced any evidence as to what that value might be that in this case the Non-Negs should be treated as having nil value for the purposes of section 11(10)(a). By contrast, on Lord Kitchin's interpretation of section 11(10)(a), with which I agree, the focus is firmly on the value of a stake for the banker in the context of the game. This means that issues which would affect the value of a Non-Neg from the point of view of the gambler, but not the banker, such as whether it is assignable or not, are irrelevant.

93. In my view, this approach to the proper interpretation of section 11(10), rooted in economic reality so far as concerns the banker's position and the calculation of his profits from the game, also means that the premise for the submissions made both by HMRC and LCM - namely that Non-Negs must be given the same value in subsection 11(10)(a) (the plus side of the calculation of the banker's profits) and in subsection 11(10)(b) (the minus side of that calculation, based on the prizes given in the game) - breaks down. It is agreed that when a gambler plays a game with a Non-Neg and wins, so that the Non-Neg is returned to him with his winnings, the Non-Neg so returned constitutes part of the prize given in the game. (Of course, one might have Non-Negs the terms of which only allowed them to be played once and excluded them from being returned if the gambler wins a game using them, but that is not true of the Non-Negs in issue on this appeal.) There is a real cost to the banker in providing a Non-Neg as a prize, equal to the

percentage chance the gambler has of winning real money from the banker when using the Non-Neg to bet in the next game. Accordingly, the value of a Non-Neg is different in the two elements of the calculation. The value of a Non-Neg is nil from the point of view of the banker as regards section 11(10)(a), but when awarded as a prize it represents a real cost to the banker which ought in principle to be brought into account under section 11(10)(b), since section 11(10) is concerned with economic reality in relation to the banker's position. It is unfortunate that the submissions of the parties on issue (iii) were not entirely helpful or well-directed, because they proceeded on the false premise that the approach to valuing a Non-Neg should be the same for both sides of the equation.

94. Before the amendment of section 11 of the FA 1997 by the addition of subsection (10A) in 2007, in calculating his profits from the gaming under section 11(10) the banker was entitled to bring the real cost of providing a Non-Neg as a prize into account under subparagraph (b). Section 20 of the BGDA, to which section 11(10A) of the FA 1997 refers, deals with the valuation of non-cash prizes in bingo gaming (see subsection (1): "A person's expenditure on bingo winnings for an accounting period is the aggregate of the values of prizes provided by him in that period by way of winnings at bingo promoted by him"). I do not consider that the amendment of the FA 1997 in 2007 to cross-refer to section 20(2)-(6)(a) of the BGDA to govern the calculation of the value of prizes given by the banker was intended to change the fundamental scheme of section 11(10) so as to disable the banker from bringing into account the value of Non-Negs as prizes, even though they represent a real economic cost in the game for the banker. Yet this is the consequence which Lord Kitchin's interpretation of section 20 produces. Rather, in my opinion, the cross-reference to section 20 was intended to simplify and make uniform across the gambling industry and across different games of chance the calculation of the value of the cost to the banker or game organiser of vouchers (including Non-Negs) given as prizes, for the purposes of calculating their income or profits from the game.

95. In my view, on a straightforward reading of section 20(3) and (4) of the BGDA (set out at para 7 above), a Non-Neg given as a prize satisfies the conditions in subsection (3) and does not fall within subsection (4), with the result that the Non-Neg is treated for the purpose of section 11(10)(b) of the FA 1997 as having its face value. This is somewhat generous to the banker, as the true economic cost of the Non-Neg will be less than this. But it only applies in relation to those Non-Negs which are played and then returned to the gambler when he wins, which will be a very small subset of Non-Negs. In relation to Non-Negs which are played and lost, the banker cannot bring their cost to him into account at all.

96. I consider that the interpretation of section 20 which I prefer respects the basic structure of section 11(10), in that it does give a value to what is a real cost to the banker in providing Non-Negs as prizes. The application of deeming provisions

in tax legislation, like section 20 of the BGDA, inevitably involves some rough edges, which may somewhat benefit the taxpayer or HMRC depending on the particular context. Such rough edges are the price paid for securing simplicity, uniformity and equality of treatment across a range of situations. In any event, it seems to me that the application of section 20(3) and (4), respectively, is clear in the present context. I do not think it is possible to depart from the clear wording of the provision as legislated by Parliament in order to address the sort of situation identified by Lord Kitchin at para 56 above.

97. It is common ground that a Non-Neg qualifies as a “voucher” for the purposes of section 20(3). Section 20 involves a degree of departure from the focus in section 11(10) of the FA 1997 on the economic position of the banker, in that section 20 focuses on the economic benefit of the voucher to the gambler: see section 20(3)(a), which focuses on how the gambler is able to make use of the voucher, and section 20(4)(b), which also focuses on the value of the voucher to the recipient. Therefore, in my opinion, one cannot say that just because a Non-Neg does not qualify as a stake under section 11(10)(a) because it has no economic value for the banker, the same conclusion must follow when applying section 20.

98. For present purposes, the starting point in applying section 20 is subsection (3). That provides that where the prize is a voucher which satisfies the conditions in subparagraphs (a) to (c), “the specified amount is the value of the voucher” for the purpose of the calculation of the cost to the banker of the provision of the voucher as a prize. In the present case, it is agreed that the condition in subparagraph (c) is satisfied. The application of section 20(3) therefore turns on subparagraphs (a) and (b).

99. In my view, in respectful disagreement with Lord Kitchin, as regards subparagraph (a), a Non-Neg given as a prize “may be used in place of money as whole or partial payment for benefits of a specified kind obtained from a specified person”. The gambler is entitled to use a Non-Neg in place of an ordinary chip, representing money, as payment for a benefit of a specified kind, namely participation in a game of chance, obtained from a specified person, namely the banker. It seems to me that the condition in subparagraph (a) clearly is satisfied in relation to a Non-Neg. I do not understand it to be in dispute that the condition in subparagraph (b) is satisfied: a Non-Neg clearly specifies the amount of money which it represents in the game.

100. Therefore, according to section 20(3) and subject to section 20(4), the relevant amount to be brought into account as the cost of the prize in section 11(10)(b) of the FA 1997, as amended, is the value which the Non-Neg is specified to have. A Non-Neg with a face value of, say, £5 for use in a game will have that value for the purposes of section 11(10)(b).

101. I turn then to section 20(4), to see whether it has the effect that the Non-Neg given as a prize should be treated as having no value for the purposes of section 11(10)(b) of the FA 1997. In my view, the precondition for the operation of section 20(4) set out in subparagraph (a) is not satisfied. For the reasons given above, a Non-Neg given as a prize satisfies section 20(3)(a) and (b).

102. That leaves the alternative precondition for the operation of section 20(4) set out in subparagraph (b). In my view, normally this precondition is not satisfied either.

103. A paradigm case for application of section 20(4)(b) would be a prize in a bingo game or other game of chance in the form of a voucher redeemable for a week's holiday worth a specified amount at a specified resort, but where the fine print stated that it could only be used in one specified and unattractive week of the year. In such a case, the value of the voucher to the recipient, who in practice might not be able or might not wish to use the voucher, might well be significantly less than its apparent face value. What is significant about such a case is that the use of the voucher "as described in subsection (3)(a)" (ie to obtain the benefits of a specified kind from the holiday resort) is subject to a relevant restriction, condition or limitation in relation to using it to obtain that benefit.

104. However, assuming that one is concerned with a Non-Neg in simple form, that is not the position in the present case. (I leave aside cases which might arise in theory, in which a Non-Neg is subject to conditions which mean that the gambler cannot simply use it at will in a game, but, say, could only so use it at particular times of day which were inconvenient: such conditions would give rise to a potential issue regarding the application of section 20(4)(b) similar to that referred to in para 103 above). The use of a simple form Non-Neg as described in subsection (3)(a) (ie to stand in place of money in payment for participation of a game of chance with the banker) is not limited in any way. When used for that purpose, the Non-Neg is used in place of money at the full face value of the Non-Neg. It is irrelevant that it cannot be used in place of money for any other purpose.

105. For the reasons I have given, under issue (iii) I consider that section 20 of the BGDA as applied to section 11(10)(b) of the FA 1997, as amended, has the effect that a Non-Neg given as a prize should be brought into account at the full face value of the Non-Neg.