



**TC06608**

**Appeal number: MAN/2009/0296  
MAN/2009/0388  
TC/2009/10723  
TC/2013/01023  
TC/2013/01024  
TC/2015/00397**

*VAT – exemption - betting and gaming – whether exclusion from exemption of supplies of gambling made through fixed odds betting terminals contrary to EU principle of fiscal neutrality - whether games played on FOBTs were similar to comparator games - appeals allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BETWEEN**

**DONE BROTHERS (CASH BETTING) LIMITED  
TOTE (SUCCESSOR) COMPANY LIMITED  
TOTE BOOKMAKERS LIMITED**

**Appellants**

**- and -**

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

**Respondents**

**Tribunal: Judge Greg Sinfield  
Mr Ian Abrams**

**Sitting in public at Taylor House, 80 Rosebery Avenue, London on 14, 15, 16, 20  
and 21 November 2017**

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

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

## DECISION

### Introduction

1. The Appellants appeal against decisions of the Respondents ('HMRC') rejecting the Appellants' claims, under section 80 of the Value Added Tax Act 1994 ('VATA94'), for the repayment of VAT accounted for on supplies of gambling by means of fixed odds betting terminals ('FOBTs') between 6 December 2005 and 31 January 2013 (the 'Claim Period').

2. During the Claim Period, the provision of facilities for placing bets or playing games of chance was an exempt supply under item 1 of Group 4 of Schedule 9 to VATA94. In the same period, supplies made through FOBTs were subject to VAT at the standard rate because FOBTs were 'gaming machines' as defined by section 23 VATA94 and, as such, excluded from the exemption by Note (1)(d) to Group 4 of Schedule 9 to VATA94. Throughout the Claim Period, casino roulette, electronic roulette, online gaming, and over the counter bets on virtual games ('the comparator games') were exempt from VAT. The Appellants accept that the United Kingdom could lawfully limit the scope of the exemption of betting, lotteries and other forms of gambling but contend that was subject to the EU law principle of fiscal neutrality. The Appellants considered that the games supplied through FOBTs, which were taxable, were similar to the comparator games played in casinos and online which were exempt and that the different treatment of the supplies for VAT purposes breached the principle of fiscal neutrality. Based on their view, the Appellants made their claims for repayments of overpaid VAT. HMRC rejected the claims on the ground that the supplies were not sufficiently similar to engage the principle of fiscal neutrality. The Appellants appealed.

3. The quantum of the claims is not agreed and the parties have not asked us to determine it at this stage. Accordingly, the only issue for determination in this decision is whether the Appellants' supplies of the FOBT games during the Claim Period were similar to one or more of the comparator games for the purposes of the principle of fiscal neutrality so that the different VAT treatment of those supplies breached that principle.

4. In addition to the Appellants' claims in relation to overpayment of VAT on supplies made through FOBTs, the Appellants made claims for VAT overpaid on supplies of gambling from other gaming machines, known as section 34/category C machines. These represent less than 1% of the total claims by value. During the hearing it was agreed, for reasons that need not be set out here, that we did not need to consider the grounds of appeal in relation to the section 34 and category C machines in this decision but that the parties will decide whether and, if so, how to take any appeal in relation to those machines forward and communicate that to the Tribunal within a period of three months following the release of this decision. Accordingly, we do not consider those supplies further in this decision.

### Legislative framework

5. The interpretation and effect of the relevant provisions of Directive 77/388 ('Sixth VAT Directive') and Council Directive 2006/112/EC ('Principal VAT Directive') and the UK legislation that implemented them in the Claim Period can be summarised as follows:

- (1) Throughout the Claim Period, Member States were required, first by Article 13B(f) of the Sixth VAT Directive and then by Article 135(1)(i) of the Principal

VAT Directive, to exempt from VAT “betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State”.

(2) Before 6 December 2005, supplies of the provision of gambling by means of FOBTs were exempt from VAT under item 1 of Group 4 of Schedule 9 to VATA94. The supply of a game of roulette, for example, was exempt whether played in a casino at a table or on an electronic roulette machine or FOBT, whether located in a casino or elsewhere, or online.

(3) With effect from 6 December 2005, the UK VAT legislation was amended and supplies of gambling by means of FOBTs were excluded from the exemption and made subject to VAT at the standard rate. The supply of a game of roulette played in a casino at a table or on an electronic roulette machine or online continued to be exempt.

(4) With effect from 1 February 2013, the UK VAT legislation was amended and supplies of gambling by means of FOBTs were once more exempt from VAT but became subject to Machine Games Duty.

6. In summary, the UK VAT legislation provided that gambling by means of a FOBT was exempt before 6 December 2005 and after January 2013 while supplies of the comparator games were exempt throughout.

### **Factual background**

7. The parties produced a statement of agreed facts and issues. The background, in so far as it is relevant to the issues, can be stated quite shortly.

8. The Appellants are all currently members of the same corporate group which is ultimately owned by Betfred Group Limited. During the Claim Period, Done Brothers (Cash Betting) Limited and the Horserace Totalisator Board provided gambling services via FOBTs located in licensed betting offices (‘LBOs’). The FOBTs offered the following games:

- (1) roulette;
- (2) slots games, such as “Rainbow Riches”;
- (3) virtual racing (typically, a virtual horse race or dog race);
- (4) virtual card games, such as blackjack;
- (5) bingo games;
- (6) miscellaneous other games, such as “Spoof”.

9. Under the UK VAT legislation that applied at the time, Done Brothers (Cash Betting) Limited and the Horserace Totalisator Board accounted for VAT on their supplies of gambling games via the FOBTs.

10. During the Claim Period, takings from supplies of the following comparator games were not subject to VAT when supplied in the UK:

- (1) roulette played at a live table in a casino;
- (2) roulette played via a machine in a casino where the outcome was determined by a real ball going around a real wheel, either on a live table or automated wheel;
- (3) roulette played online;

(4) slots, bingo, cards, virtual horse or dog racing and other gambling games that were available to play online;

(5) virtual racing where the bets were placed over the counter at a LBO.

11. In *Oasis Technologies v HMRC* [2010] UKFTT 292 (TC), the First-tier Tribunal decided that takings from supplies of slots games played on B3A lottery machines were not subject to VAT during the Claim Period. HMRC did not appeal that decision but they do not accept that supplies by means of B3A machines were exempt during the Claim Period. HMRC's position is that if we were to hold (contrary to HMRC's principal case) that treating category B3A machines as exempt from VAT, while treating FOBTs as subject to VAT, would infringe the principle of fiscal neutrality, then the issue of whether such machines are exempt should be stayed for determination at a future date.

12. In 2016, Tote (Successor Company) Limited and Tote Bookmakers Limited were substituted for the Horserace Totalisator Board.

### **Issue**

13. The principle of fiscal neutrality precludes treating similar goods and supplies of services differently for VAT purposes. A Member State cannot rely on conditions or limitations imposed by that Member State to make games of chance or gambling that are exempt under the Sixth VAT Directive or Principal VAT Directive subject to VAT if those conditions or limitations are contrary to the principle of fiscal neutrality (see Joined Cases C-259/10 and C-260/10 *HMRC v The Rank Group plc* [2012] STC 420 ('*Rank*'), at paragraph 68). It was common ground that, during the Claim Period, there was a difference in tax treatment between roulette and other games on FOBTs, which were subject to VAT, and table roulette and electronic roulette in casinos, online roulette and over the counter bets. The parties agreed that UK legislation that made games played on a FOBT subject to VAT during the Claim Period while exempting supplies of the comparator games would be contrary to the principle of fiscal neutrality if the FOBT games and the comparator games were similar. The only issue in this appeal is whether the games played on FOBTs were similar to one or more of the comparator games for the purposes of the principle of fiscal neutrality. If so then the Appellants' supplies of gambling by means of FOBTs during the Claim Period should have been treated as exempt from VAT.

### **Principle of fiscal neutrality**

14. Before considering the evidence and determining the issue of similarity, it is necessary to refer to the case law to determine what is meant by 'similarity' and how to assess it for the purposes of the principle of fiscal neutrality.

15. The CJEU has considered the application of the principle of fiscal neutrality in the field of gambling in a number of cases. Some of those cases concern betting, lotteries and other forms of gambling and they are, obviously, of particular relevance to this appeal.

16. In Case C-283/95 *Fischer v Finanzamt Donaueschingen* [1998] STC 708, the CJEU considered whether a Member State was required to exempt unlawful supplies of roulette games when the provision of roulette by licensed public casinos in that Member State was exempt from VAT. Under German law at the time, the game of roulette could only be provided commercially by licensed public casinos. Mr Fischer was not licensed to run a casino and therefore to operate games of roulette but had a permit to operate a game of skill using a machine called a 'Roulette Opta II'. However, he departed from the terms

of the permit in such a way that the game amounted to a game of roulette. The game was described as follows by Advocate General Jacobs in paragraph 8 of his Opinion:

“The equipment used by Mr Fischer consisted of a wheel bearing the numbers 1 to 24 and also the ‘numbers’ O and X. Numbers 1 to 12 were black and numbers 13 to 24 red. The object of the game was to predict, by placing chips on the appropriate squares of the gaming table, where the ball thrown by a croupier would come to rest. The players purchased the chips for DM 5 each. In each game they could place one or more chips on the squares for one of the numbers 1 to 24, O and X (en plein), on the line between the two numbers (à cheval) and/or on the red and/or black numbers square. A player received 24 times the value of his stake where he placed his stake on the square for the number on which the ball came to rest, 12 times his stake where the ball came to rest on one of the two numbers between whose squares he had placed his stake and 2 times his stake where he correctly predicted that the ball would come to rest on red or black.”

17. Mr Peacock QC, who appeared with Ms Sloane for the Appellants, submitted that, in *Fischer*, the roulette operated by Mr Fischer had compartments for numbers 1-24, rather than for numbers 1-36 as in the classic version but that difference (which would give rise to different odds) did not prevent the two games from being “substantially identical” for the purposes of the principle of fiscal neutrality.

18. It is correct that Advocate General Jacobs noted (see paragraph 25 of the Opinion) that it appeared from the order for reference that the game was substantially identical to roulette but the similarity does not seem to have been at issue in the proceedings. The only issue considered by the Advocate General and the CJEU was whether taxing unlawful roulette games provided by Mr Fischer while exempting roulette provided lawfully by licensed casinos breached the principle of fiscal neutrality. The similarity of the two games was a term of the reference and the Advocate General and CJEU clearly dealt with the case on that basis. Accordingly, *Fischer* does not establish, although it may suggest, that classic roulette in a casino and games based on roulette offered on machines were similar for the purposes of the principle of fiscal neutrality.

19. The CJEU in *Fischer* held (see paragraph 31) that the principle of fiscal neutrality precluded the taxation of unlawful roulette when the corresponding activity carried on by a licensed public casino was exempted. It is therefore quite clear that whether a game is lawful or unlawful is not a relevant factor in determining whether the two games are similar for the purposes of the principle of fiscal neutrality.

20. The CJEU considered the application of the principle of fiscal neutrality to supplies of gambling again in Joined Cases C-453/02 and C-462/02 *Finanzamt Gladbeck v Linneweber and Finanzamt Herne-West v Akritidis* [2008] STC 1069 (*‘Linneweber’*). Mrs Linneweber operated gaming machines in restaurants and amusement arcades. German law at the time provided that supplies through gaming machines in licensed public casinos were exempt from VAT while supplies through such machines in other places were taxable. Mrs Linneweber contended that the exemption should apply generally to supplies made through all gaming machines and not just those located in licensed public casinos. The tax authority argued that the principle of fiscal neutrality did not require gaming machines situated in casinos and those not in casinos to be taxed in the same way because the stakes and winnings in the case of gaming machines installed in casinos were significantly higher than those in other establishments so that there was no competition between the two types of machine. Mr Akritidis ran a casino in which he

organised card games which did not comply with the rules laid down by the authorities who assessed him to VAT on the income from the card games. Mr Akritidis appealed on the ground that income from organising lawful card games was exempt and distinguishing between lawful and unlawful card games was contrary to the principle of fiscal neutrality.

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

“26 As the Advocate General pointed out in points 37 and 38 of her Opinion, in order to determine whether the activities at issue in the case leading to the judgment in *Fischer* were comparable, the Court only examined the comparability of the activities at issue and took no account of the argument that the games of chance differed for the purposes of the principle of fiscal neutrality, for the simple reason that they are organised by or in public casinos”.

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

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

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

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

24. Mr Peacock submitted that, in paragraph 26, the CJEU approved the comments of the Advocate General in paragraph 38 of her Opinion that, in assessing whether roulette in a casino and the version of the game offered by Mr Fischer were similar, the CJEU’s ruling in *Fischer* showed that differences between public casinos and other locations in terms of “accessibility, the gambling environment, the ‘gambling culture’ or the different circle of user” were not relevant. We do not accept that the CJEU’s endorsement, in paragraph 26, of the Advocate General’s comments goes that far. In paragraph 26 and the following paragraphs in *Linneweber*, the CJEU is focussing on whether exempting the operation of games of chance and gaming machines in licensed public casinos while taxing the same operation carried on in other establishments breaches the principle of

fiscal equality. We do not read what the CJEU said in paragraph 26 of *Linneweber* as specifically endorsing the Advocate General's view on the CJEU's reasons for its ruling in *Fischer*, especially as the CJEU did not give those reasons in that case. However, we find the view of the Advocate General to be persuasive. What we must consider is whether the activities at issue, ie the FOBT games and the comparator games, are comparable. It is clear from *Fischer* that, in assessing the similarities between the games, we must disregard whether a game takes place in a licensed casino or elsewhere. That, it seems to us, is because the focus is on the nature or character of the game itself and not the environment in which it takes place. Accordingly, we disregard factors such as accessibility, the gambling environment, the gambling culture and the different circle of user unless they affect the nature or character of the game itself.

25. The leading CJEU authority on the application of the principle of fiscal neutrality in the context of gambling is now *Rank* which was released in 2011. In that case, the CJEU considered questions referred by the Court of Appeal and the Upper Tribunal in two separate sets of proceedings relating to mechanised cash bingo and slot machines. At the time, mechanised cash bingo was exempt if the stake was 50 pence or less and the prize was no more than £25 but if one of the conditions was not met then the game was subject to VAT. As the amount of the prize in mechanised cash bingo depended on the number of players in a particular game, it could change during a game or block of games and was not necessarily known by the players when they placed their stakes. The slot machines in the case were gaming machines under Part III of the Gaming Act 1968 which were subject to VAT whereas FOBTs, which the CJEU regarded as a type of slot machine and were comparator machines for the purposes of the appeal, were exempt from VAT.

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

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

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

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

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

44. Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the

differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other ...”

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

- (1) the lawful or unlawful nature of the operation of a game of chance (paragraph 45);
- (2) the identity of the operators of the games and the legal form by means of which they exercise their activities (paragraph 45);
- (3) differences in the setting in which games of chance are made available and, in particular, accessibility in terms of location and opening times and atmosphere (paragraph 47);
- (4) differences in the application of other taxes (paragraph 48);
- (5) the legal regimes relating to control and regulation of the games (paragraph 49); and
- (6) differences in the details of the structure, the arrangements or the rules of games which fall within a single category of game, such as slot machines (paragraph 55).

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

32. We have already noted that, in paragraph 55, the CJEU made the point that differences in the details of the structure, the arrangements or the rules of the games which fall within a single category of game, such as slot machines, should not be taken into account. The CJEU said that such differences cannot justify treating supplies in the same category of game differently for VAT purposes as that would deprive the principle of fiscal neutrality of meaning and allow distortions in the VAT system. We note that this was in the context of different games played on different machines that all fell into the same category, namely slot machines, because the CJEU regarded FOBTs as a type of slot machine, as can be seen from paragraphs 20 and 22.

33. We consider that two important points emerge from paragraph 55 of *Rank*. First, it is clear that two or more games may fall within a single category even where they differ in the details of their structure, their arrangements and their rules. That shows that a category is broader than a specific type of game. How broad a category might be can be seen from the fact that the CJEU classified slot machines as a single category even though the machines under consideration in *Rank* were used to play different games. The reference from the Court of Appeal concerned gaming machines, called Cadillac Jack, covered by section 21 of the Gaming Act 1968. The reference by the Upper Tribunal in *Rank Group plc v HMRC* [2012] UKUT 347 (TCC) (“*Rank UT*”) concerned two types of gaming machines: the first, known as Jackpots, within section 31 of the Gaming Act 1968 and the second, known generically as Amusements with Prizes covered by section 34 of that Act. And, of course, the machines against which they were compared were FOBTs which are not normally thought of as slot machines. There is also the fact that *Fischer*

concerned a 24-slot roulette type game played on a machine and even though we do not consider that the CJEU made any positive ruling that Mr Fischer's game was similar to standard roulette because it was a finding of the referring court (see our comments at [18] above), it seems to us that the Advocate General and the CJEU must have been content to proceed on the basis that the two games were in the same category.

34. At the hearing of this appeal, there was some discussion about whether a virtual card game, such as blackjack, fell into the same category as a virtual game of poker even when played on the same machine or system. Fortunately, that is not something that we need to decide as the Appellants only ask us to consider, for example, blackjack played on a FOBT in relation to blackjack played online. The issue of categorisation was also made easier for us by the fact that, in the course of the hearing, HMRC accepted that certain of the FOBT games and comparator games fell within the same category (but not that they were similar) as we set out below.

35. The second point that we consider worth noting is that, in paragraph 55, the CJEU did not rule out treating games that fell into the same category differently for VAT purposes where the games were distinguished by differences other than details of the structure, the arrangements or the rules of the games concerned. That was not the view taken by Mr Peacock. He submitted that if two games fell within a single category then that meant that the two games were similar and it was not necessary to consider whether they met the same needs from the point of view of the typical consumer. In effect, paragraph 55 was an overarching qualifying test that, if passed, meant that we did not need to go further. HMRC's position was diametrically opposed to that of the Appellants. Mr Peretz QC, who appeared with Mr Metcalfe for HMRC, contended that if we conclude that two games are not in the same category, there is no need to go further because games that are not in the same category cannot be similar for the purposes of the principle of fiscal neutrality. Only if the games are in the same category, are we required to consider whether they are similar in the sense that both games meet the same needs of the typical consumer. We prefer HMRC's submissions on this point. We regard it as strange that, if it had intended the fact that two games fell within a single category to be determinative, the CJEU did not say so in *Rank* but went on to list the relevant and irrelevant considerations for determining similarity.

36. As we have already stated, the CJEU left open the possibility that games in the same category might be treated differently for VAT purposes without offending the principle of fiscal neutrality where they differ other than by their structure, arrangements or rules or any of the irrelevant factors in paragraphs 45 – 49 of *Rank*. We consider that paragraph 55 contains a gateway test which must be passed before two games can be considered to be similar but does not establish similarity. Once it has been found that two games are in the same category then it is necessary to go further and consider whether they meet the same needs from the point of view of a typical consumer. Only if the two games are both in the same category and meet the same needs can they be described as similar for the purpose of the principle of fiscal neutrality. That two-stage process is exactly what the CJEU did in *Rank*.

37. In paragraphs 56 and 57 of *Rank*, the CJEU described the factors that should be taken into account when assessing whether two games of chance are similar for the purpose of the principle of fiscal neutrality. Mr Justice Norris in *Rank UT* pointed out that the French, Spanish and German texts showed that the word "evidence" in paragraph 56 of the English language version of the CJEU's judgment in *Rank CJEU* must mean "elements" or "circumstances". Also, it is clear from paragraph 22 of the judgment that,

when it used the word “formats”, the CJEU meant an event or a virtual game on the machines. Accordingly, the CJEU’s guidance in paragraphs 56 and 57 should be read as follows:

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

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

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

39. After the CJEU gave its decision, the appeals returned to the United Kingdom. HMRC conceded the appeal in relation to mechanised cash bingo but the two appeals in relation to the slot machines continued. The first, which had been referred by the Court of Appeal, ultimately went to the Supreme Court which decided the appeal by reference to the statutory definition of gaming machine (*HMRC v The Rank Group Plc* [2015] UKSC 48). The second slot machines appeal, which had been referred by the Upper Tribunal, was considered by Norris J who remitted the case to the First-tier Tribunal for rehearing in the light of the CJEU’s ruling. This Tribunal heard that appeal in May 2018 and we deferred releasing our decision in this case until we had done so.

### **Our approach to the principle of fiscal neutrality in this appeal**

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

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

42. We must then consider whether the separate games in each category met the same needs from the point of view of the typical consumer. In the absence of any direct evidence as to the needs of the average consumer and whether those needs were met, we approach the question of whether any particular element had a significant influence on the decision of the average customer to use one machine rather than another as a question of fact. Our evaluation is based on the evidence that was available to us which we discuss below. We must determine whether the differences between the FOBT games and the comparator games were liable to have a significant influence on the decision of the average consumer to play one or the other. We must take account of the relevant or significant elements or circumstances that are liable to have a considerable influence on the consumer's choice to play a game and not make distinctions based on insignificant differences. The elements or circumstances that are likely to have a considerable influence on which game of chance a consumer chooses to play include those set out by the CJEU in paragraph 57 of *Rank*.

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

44. HMRC submit that the evidence, which we discuss below, showed that the average player of FOBT games was considerably influenced in their choice of whether to play a game on a FOBT or some other form of the game by the following differences between them:

- (1) stakes and prizes;
  - (2) speed of play;
  - (3) return ratios (total prizes awarded as a percentage of total stakes);
  - (4) accessibility;
  - (5) the choice of events or games available; and
  - (6) the ability of the player to influence the outcome of the game by their play;
- and

(7) the underlying nature of the game in question.

45. The CJEU in paragraph 56 of *Rank*, indicated that the elements that are liable to have a considerable influence on the decision of the average consumer in that case are:

- (1) minimum and maximum stakes;
- (2) minimum and maximum prizes;
- (3) chances of winning;
- (4) events or games available; and
- (5) the possibility of interaction between the player and the machine/game.

46. Although *Rank* was concerned with mechanised bingo and slot machines, it seems to us that those elements apply equally to the games under consideration in this appeal. We consider that items (1), (3), (5), and (6) in HMRC's list of differences are consistent with the CJEU's guidance in *Rank* and we apply those in our analysis of whether the FOBT games are similar to the online, machine or live versions of the games. Item (7) in HMRC's list appears to us to be more relevant to deciding whether a particular game falls in the same category as another game which we have already discussed.

47. In relation to item (2) in HMRC's list, the Appellants submit that speed of play is ruled out as a factor by *Rank* because the CJEU in that case provides an exhaustive list of what factors are and are not relevant. HMRC submit that the list of factors in *Rank* is not exhaustive, it is an inclusive list, and the reason why speed of play is not mentioned in *Rank* is that it was simply not an issue in that case. Our view is that the list of relevant or significant elements or circumstances in *Rank* is not exhaustive and speed of play was not ruled out by CJEU in *Rank* as it ruled out certain other factors in paragraphs 45 – 49 and 55. We consider that speed of play is a factor that is capable of influencing a typical consumer's decision to play one game rather than another. Whether speed of play is liable to have a considerable or significant influence on the typical consumer's choice in relation to particular games within a single category is a question of fact.

48. Item (4) in HMRC's list is accessibility. We had great difficulty in understanding what HMRC meant by that term or how it could be relevant, given that the CJEU said, in paragraph 47 of *Rank*, that differences in the setting in which games of chance are made available and, in particular, accessibility in terms of location and opening times and atmosphere, are not relevant. Mr Peretz submitted on the last day that, when it talked about accessibility in terms of location and opening times, the CJEU was talking about various factors that serve as a proxy for the identity of the supplier. We did not find that took matters any further as the CJEU had also stated in paragraph 45 of *Rank* that the identity of the operators of the games and the legal form by means of which they exercise their activities should not be taken into account. We concluded that we should not have any regard to matters of accessibility as described by Mr Peretz.

49. Accordingly, in determining whether games in the same category met the same needs from the point of view of the typical consumer, we will take account of the following elements and consider whether any of them were liable to have a considerable or significant influence on the typical consumer's decision to play one game rather than another.

- (1) minimum and maximum stakes;
- (2) minimum and maximum prizes;

- (3) chances of winning;
- (4) return ratios (total prizes awarded as a percentage of total stakes);
- (5) speed of play;
- (6) the events or games available; and
- (7) possibility of interaction between the player and the machine/game, including the ability of the player to influence the outcome of the game by their play.

We consider that, in relation to the games considered in this case, items (1) and (2) are so closely linked that they should be considered together. In our view, it also makes sense to consider items (6) and (7) together as games available and player involvement have much in common.

## **Evidence**

50. We received evidence from six witnesses for the Appellants:

(1) Mr Mark Stebbings, Managing Director of Done Brothers (Cash Betting) Limited and Tote Pool Retail, provided a witness statement dated 22 June 2017 with attached exhibits. He gave evidence about the history of the gaming industry and its regulation during the Claim Period as well as the development of FOBTs.

(2) Mr Nick Martin, Head of Machines at Ladbrokes Coral Group plc, provided a witness statement dated 23 June 2017. He had been employed by Done Brothers (Cash Betting) Limited between 2004 and 2016. He gave evidence about the different types of machines provided by Done Brothers (Cash Betting) Limited in its Licensed Betting Offices ('LBOs') and the games they offered. He also gave evidence about whether, in his opinion, differences between the games supplied by Done Brothers (Cash Betting) Limited and certain comparator games relied on by HMRC were liable to have an influence on the average consumer's decision as to which game to play.

(3) Mr Russell Young, Commercial Director of Petfre (Gibraltar) Limited, provided a witness statement dated 23 June 2017. He described Done Brothers (Cash Betting) Limited's website and the games that it and other providers offered online in the Claim Period. He also gave his views on the similarities and differences between games offered on FOBTs and online.

(4) Mr Lee Gregory, Director of Inspired Gaming Group, which supplied electronic roulette machines to casinos and FOBTs and FOBT content to LBOs, provided two witness statements, namely a witness statement dated 22 June 2017 and a second witness statement, dated 17 October 2017, in response to a request by HMRC for further information. Mr Gregory described the electronic roulette terminals supplied to casinos and the nature of the roulette games and slots games offered on FOBTs.

(5) Mr Rick Mountney, Director of Content Development at SG Gaming, which designs and develops slot games and casino games (i.e. roulette, poker and blackjack) for the UK retail and online markets, provided a witness statement dated 23 June 2017. He described the roulette games played on FOBTs and online as well as the different types of slots games available on FOBTs and online.

(6) Mr Dave Hammond, a Director at Paddy Power Betfair, provided a witness statement dated 23 June 2017 and a supplementary witness statement dated 5 January 2018. He described the different types of game that were available online

during the Claim Period and his own experience of playing roulette in casinos, both on a table and at an electronic roulette terminal, on a FOBT and online. He also described the nature of slots games on FOBTs and online as well as his own preferences when playing such games.

51. HMRC did not produce any witness evidence but they submitted some documents on which they relied. All the witnesses for the Appellants were cross-examined by Mr Peretz. We found all the witnesses to be credible and fully accept their evidence. There were bundles of contractual and related documents which were produced by the witnesses and are discussed below. We also viewed videos and representative versions of the games. On the basis of the witness and other evidence, we find the facts to be as set out below in our discussion of the individual games.

52. In the absence of any evidence from HMRC to show that the FOBT games were not regarded by the typical or average consumer as similar to the comparator games, Mr Peretz relied on his cross-examination of the witnesses and forensic criticism of the physical evidence to submit that the Appellants had failed to discharge the burden of proof. He contended that the Appellants had not established that it was more likely than not that supplies of FOBT games and the comparator games met the same needs of and were viewed as similar by the average consumer during the Claim Period.

### **FOBT games and comparator games**

53. We now turn to consider the different games. Adopting the approach that we have described above, we identify the characteristics of the different games, consider whether they can be grouped into categories, insofar as that is not conceded, and determine whether FOBT games and comparator games in the same category met the same needs from the point of view of the typical or average consumer.

54. The Appellants contended that the following FOBT games and other games are comparable and similar for the purposes of the principle of fiscal neutrality:

- (1) FOBT roulette and roulette played online, in a casino live at the table or electronically by reference to a live table or an automated table.
- (2) FOBT slots (category B3) games and slots played online and on a B3A machine.
- (3) FOBT virtual racing and virtual racing played over the counter in a LBO or online.
- (4) FOBT virtual card games, such as blackjack, and versions of the same card games played online.
- (5) FOBT bingo and bingo played online and on a B3A machine.
- (6) FOBT other games, such as Spoof, and versions of the same games played online and on a B3A machine

55. In the sections that follow, we consider the FOBT games in relation to the comparator games identified by the Appellants.

#### *FOBT roulette and comparator games of roulette*

56. The core features or characteristics of European roulette (which is the only version we are concerned with in this appeal) are as follows. Roulette is played on a wheel with 37 numbered slots (36 numbers and one zero) divided into 'red' and 'black'. The wheel

spins and a ball is dropped into the wheel. Players bet on which number slot the ball will land on by placing chips on representations of the numbers or combinations of them or 'red' or 'black'. The outcome of the game is randomly determined by where the ball comes to rest.

57. During the Claim Period, roulette was available in LBOs, online, and in casinos, where roulette could be played both on a live table and on electronic roulette terminals (either linked to a live game taking place on a table with a croupier in that casino or elsewhere or on a fully automated wheel). In a casino, it was possible for a customer to play roulette at a live table, on an electronic roulette machine linked to a live wheel (either in that casino or in another one), on a fully automated electronic roulette machine, on a FOBT or online using their mobile.

58. At the hearing, HMRC confirmed that they accepted that FOBT roulette and the comparator games of roulette played online and electronically, whether by reference to a live table or an automated table, fell into the same category. HMRC did not accept that roulette played in a casino live at the table fell into the same category of game as FOBT roulette. Further, as discussed below, HMRC did not agree that FOBT roulette was similar to any of the comparator games of roulette. Strictly, we do not need to determine whether FOBT roulette and roulette played in a casino live at the table can be grouped into a single category because the principle of fiscal neutrality is engaged if FOBT roulette is similar to any of the comparator roulette games. It is sufficient for the Appellants' purposes that FOBT roulette and roulette played online and electronically fall into the same category of game provided that the different games are also similar; that is to say that they meet the same needs of the typical consumer. In case it becomes important, however, we state that we consider that FOBT roulette and roulette played in a casino live at the table fall into the same category. In brief, we take this view because the core features or characteristics of roulette are the same whether played on a FOBT or in a casino at a table and paragraph 47 of *Rank* makes clear that differences in the setting in which games of chance are made available and, in particular, accessibility in terms of location and opening times and atmosphere, are not relevant.

59. As we have discussed at [35] above, the fact that two or more games are in the same category does not mean that they are similar for the purposes of the principle of fiscal neutrality. We now consider the elements or circumstances that are liable to have a significant influence on the decision of the average consumer to play roulette either using a FOBT, online, or in a casino electronically by reference to a live table or an automated table.

60. There was no dispute that roulette played on FOBTs was subject to a maximum stake of £100 and a maximum prize of £500. The maximum prize limit meant that the amount that could be staked on a single number, in practice, was £13.88 (ie 500 divided by 36). The Appellants accepted that there were no legal limits on the maximum amount which could be staked or won on roulette played online or in casinos during the Claim Period. The Appellants submitted that we should ignore the limits on stakes and prizes and look at what amounts were actually bet by punters. The Appellants contended that the evidence showed that the different stake and prize limits did not affect the typical or average customer's decision to play roulette on a FOBT or online or in the casino.

61. The Appellants' evidence was that operators imposed their own limits on stakes and prizes. For example, Mr Young's evidence was that Petfre imposed a maximum stake of £200 and a maximum prize of £400 for particular bets on 3D roulette online. Mr

Gregory's evidence was that casinos would impose prize and stake limits that varied from table to table and from machine to machine. He also said that separate tables and machines used different chips with different values. Even where the maximum stake was higher than £100, his evidence, and also that of Mr Young, was that only a very small proportion of bets staked online or on electronic roulette terminals were £100 or more. Mr Gregory said, in relation to electronic roulette terminals, that the vast majority of bets placed were under £100. He further said that, for roulette played on FOBTs, electronic roulette terminals and online, the data showed that the majority of all stakes placed were £12.50 or less. Mr Young gave evidence to similar effect. He said that the average stake on roulette played online during the Claim Period ranged from £14.80 to £22.51. Mr Gregory also stated in cross-examination that if a person (a 'high roller') wished to make higher value bets on electronic roulette then the casino would configure the terminal so that the player could take advantage of higher chip values. That, however, was an exception. The evidence of Mr Martin was that his own experience and knowledge of how regular players played on FOBTs was that only a small proportion had ever staked £50 or more. This was supported by data (called the bin distribution table) showing that levels of stake were similar across the different channels.

62. HMRC submitted that differences between the stakes and prizes available on FOBT roulette and those available for online roulette had a significant influence on the choice of the average customer whether to play one or the other. The evidence showing that only a small proportion of customers playing online roulette staked more than £100 did not show that the bet could have been made on a FOBT (e.g. a bet on a single number was effectively capped at £13.88). Much of HMRC's cross-examination focused on representations made by the gambling industry in relation to a government proposal to reduce the maximum stake on FOBTs to £50 or even £2. The general thrust of responses was that such a reduction would have a significant impact on the revenues of operators, including the Appellants. In cross-examination and submissions, Mr Peretz also explored the issue of the "nudge regulations", introduced in 2015, under which customers who wished to bet in excess of a certain amount on a FOBT were required to have an account with the operator.

63. We did not find the points made in relation to the proposal to reduce the maximum stakes on FOBTs and the nudge regulations of any assistance in relation to the matter which we must decide. We accept the Appellants' submission that we should have regard to what customers actually did during the Claim Period. In our view, what the position might have been if the maximum stake had been reduced or what the impact was in 2015 when the nudge regulations were introduced are not relevant to the issue of whether the average consumer was influenced by available maximum stakes or prizes during the Claim Period. In our view, the best evidence of whether different stakes and prizes motivated such a person to play roulette on a FOBT or online via an electronic terminal is the average amounts actually staked on the different channels. It seems to us that, during the Claim Period, the average amounts staked by consumers playing roulette on FOBTs, online or electronically were broadly the same. The evidence clearly showed that the average stakes in online and electronic roulette were substantially below the £100 stake limit for FOBT roulette and only a small minority of bets were above £100. Accordingly, we find that the fact that FOBT roulette was subject to a maximum stake of £100 and a maximum prize of £500 did not have a significant influence on the typical consumer's decision whether to play FOBT roulette or roulette played online and electronically. We do not need to reach a decision on whether the availability of much larger stake and prize limits for roulette played in a casino would have influenced the decision of the average consumer.

64. We can deal with the issue of chances of winning and return ratios quite briefly. The chance of winning at roulette is determined by the number of slots on the wheel and so for European roulette, it is 36:1. The average return to players is 97.3%. The same bets could be placed in the same way in each game of roulette no matter whether played on a FOBT, online, electronically or at a table in a casino and the chances of winning and average return to players were the same. Accordingly, we find that these elements had no influence on the decision of the typical or average consumer to play roulette using one channel rather than another.

65. In relation to speed of play, HMRC acknowledged that the FOBT roulette games were in the middle in terms of speed between the online roulette games which were faster and casino electronic roulette games which were slower. Mr Peretz said that this did not matter as all HMRC have to do is to identify that speed was a factor that mattered to consumers and affected significantly the choice of game. We agree with that proposition but not with his further submission that, once speed has been identified as a relevant factor then it does not matter whether, as in this case, there were both much faster roulette games and slower roulette games that were exempt for VAT purposes while FOBT roulette was taxable. The evidence on this point showed that the difference between FOBT roulette and the other two channels used as comparators was not that great. The minimum speed between each spin of the wheel for FOBT roulette is 20 seconds but data showed that the average playing speed was between 35 and 36 seconds and 71.8% of all plays took 20 to 39.99 seconds. There were (and are) no restrictions on speed of play for online roulette which varied as different games had different features but it was generally faster. The average speed of play of one variant, Tyson Roulette, was 19.6 seconds and 82.4% of plays of that version took between 15 and 19.99 seconds. However, data produced by Petfre showed that other versions of online roulette took on average 27 to 37 seconds between spins. The evidence showed that electronic roulette was slower than roulette played on FOBTs and online. The electronic roulette is based on an actual roulette table operated automatically and the number of spins was limited to 50 per hour so that the time between spins was 72 seconds. One version of electronic roulette (Multi-win Roulette) offered four wheels spinning at different intervals so that bets could be placed more frequently than every 72 seconds. Roulette played electronically with a table operated by a live croupier and in a casino at the table had no speed restrictions but could be even slower. Mr Hammond explained that in a casino it was possible (and quite frequent) for people to play two adjacent tables at the same time to speed up play.

66. The issue, however, is not whether the games of roulette played using different channels could be played at different speeds but rather whether the difference in speed of play influenced the typical or average consumer to choose one game rather than the other. Mr Hammond said that features, such as Turbo Spin, had been developed to allow customers to play online roulette faster because of player preference but he also said that some customers like to play faster and some like to play more slowly both on FOBTs, online and at the table in a casino. What the evidence appears to show is that different customers liked to play at different speeds. That was true even within the same game. In a casino, some players would use two tables simultaneously to speed up play while others played on a single table at a time. Some players of online roulette chose to use the turbo feature to speed up play while others chose not to do so. Even players of FOBT roulette have some control over the speed of play as the game is on demand and so can be played at a pace dictated by the customer even though it could not be played as fast as some versions of online roulette. On the basis of that evidence, it seems to us that although some customers liked to play at different speeds and would therefore be influenced by the

ability to do so that did not mean that speed was liable to have a considerable influence on the typical or average customer's decision to play a game.

67. In terms of the method of play and possibility of interaction between the player and the game, including the ability of the player to influence the outcome of the game by their play, the game of roulette was identical whether it was played on a FOBT, electronically, online or at the table in a casino and there was no difference between them which could influence a customer to choose one rather than another.

68. We have concluded that none of the factors identified by the CJEU as relevant considerations in *Rank* exerted a significant influence on the average consumer's decision to play roulette on a FOBT rather than online or electronically by reference to a live table in a casino or an automated table. While there are differences in stakes and prizes as well as speed of play which might influence customer choice at the extremes, we consider that the evidence of actual customer behaviour shows that the typical or average consumer viewed roulette games on the different platforms as similar and interchangeable. Accordingly, we consider that the roulette games all met the same need from the point of view of the customer which was to play a roulette game rather than to play it at a particular level of stake or speed. Accordingly, treating roulette played on FOBTs and roulette played online, in a casino live at the table or electronically by reference to a live table or an automated table differently for VAT purposes during the Claim Period breached the principle of fiscal neutrality.

*FOBT slots (category B3 and section 34/category C) and comparator slots games*

69. The core features of the slots games are that they have a number of reels containing various characters (numbers, symbols etc) which the customer causes to spin by pressing a button to start the game. When the reels stop spinning they display a line or lines of characters. The arrangement of the characters on the win lines would determine whether the player had won a cash prize, gained access to a feature or lost their stake. Although the term 'slots' is used (because historically coins were put into a slot to play the game), a better term might be 'reels-based games'. Many of the games, eg 'Rainbow Riches', 'Luck O The Irish' and 'Reel King', were available on FOBTs, online and on a B3A machine.

70. The comparator slots games are those played online and on a B3A machine. During the hearing, HMRC confirmed that they accepted that B3 slots games on FOBTs fell into the same category of games as online slots games. HMRC did not agree, however, that those versions of slots games were "similar". Further, HMRC did not agree that B3 slots games on FOBTs fell into the same category of games as slots games on B3A machines because HMRC considered that there was insufficient evidence about the nature of slots games played on a B3A machine to draw such a conclusion (and HMRC did not agree that slots games on B3A machines were "similar").

71. In our view, it is clear from paragraph 55 of *Rank* that the CJEU regarded FOBTs and other machines used to play slots games as a single category of game. We consider that shows that what matters, when determining whether two games fall into the same category, is the nature of the game itself and not the means by which it is played. All the slots games, whether played on FOBTs, online or on a B3A machine had the same core features and we consider that they all fall within the same category. As slots games played on a FOBT fall into the same category as slots games played online and on B3A machines, different treatment for VAT purposes cannot be based on differences in the details of the structure, the arrangements or the rules of the games.

72. We now consider whether there are any elements or circumstances of a type identified by the CJEU in *Rank* that were liable to have a significant influence on the decision of the average consumer to play slots games on one platform rather than another. We focus on the comparison between FOBT slots games and online slots games as we heard more evidence about the latter than about B3A machine slots games. If we conclude that FOBT slots games and online slots games meet the same needs of the typical or average consumer then it is not necessary to consider whether B3A machine slots games are similar to FOBT slots games.

73. Mr Hammond confirmed that the same or similar slots games were available on FOBTs and online during the Claim Period and he was not aware of any significant differences between the different versions other than the fact that, in some cases, the maximum stakes and prizes for online versions were in excess of the limits that applied to FOBTs.

74. For FOBT slots games, the maximum stake was £1 until July 2011 when it was raised to £2 with a maximum prize of £500. For B3A machine slots games, the maximum stake was £1 throughout the Claim Period with a maximum prize of £500. There was no regulatory maximum stake or prize for online slots games.

75. The Appellants contended that there was no evidence that any difference in maximum stakes and prizes had an influence on the average consumer, let alone a significant influence. On the contrary, the evidence of Mr Martin and Mr Young was that the average stake on FOBT slots was only marginally lower than the average stake on online slots and, on average, only 5 or 6% of plays on online slots games had a stake exceeding £2.

76. HMRC submitted that it was clear that the absence of stake and prize limits in online slots across the Claim Period would have been perceived by the typical consumer as a significant difference between that game and B3 slots played on FOBTs.

77. The Appellants submitted that the slots games tended to be based on a small number of common, popular themes, such as Irish, Amazonian or Egyptian, with the same game having the same “maths profile” or “volatility” irrespective of the channel and with the same wide range of volatility (across different games) irrespective of the channel, to meet consumer preferences. Maths profile and volatility each refer to the frequency and extent of a winning bet – low volatility games have frequent small wins while high volatility games have less frequent but larger wins.

78. The evidence was that there was a variety of FOBT slots games with different volatilities, to cater for customers’ preferences and that there was the same range of volatility available on FOBTs and online. For example, the volatility/maths profile of Rainbow Riches was the same for the FOBT version and the online version.

79. The evidence of Mr Hammond was that the volatility of the game was far more noticeable to the player than the return because the return to player was generally always around 90-95% and differences could only really be perceived by playing the game many thousands (if not millions) of times. Mr Mountney said that, in his experience, the most important factor about a slots game was its maths profile. He confirmed that a game designed by SG Gaming would have had the same volatility/maths profile on FOBTs and online. His evidence was that different games had different volatilities/maths profiles but

they were the same for that game whether it was online or on a FOBT. Mr Martin gave similar evidence in relation to slots games offered by Coral on FOBTs and online.

80. The evidence, in particular of Mr Hammond and Mr Mountney was that the difference in the rates of return to player between the slots games on FOBTs and online was less than 5%. The Appellants submitted that there was no evidence that the small differences in the return to player percentages would have been noticeable to players but, on the contrary, Mr Martin's evidence was that a customer would not notice whether the return to player of a slots game was 90% or 95%.

81. HMRC did not contest that the volatility/maths profile of slots games on FOBTs and online was the same and the differences in the rates of return to player between the two platforms were small.

82. There was also no evidence that there was much difference in the speed of play of slots games on FOBTs, B3A machines and online. For FOBT slots and B3A machines, there was single play once every 2.5 seconds. There was no restriction on the speed of play for online slots but it seemed to us to be unlikely to be significantly faster (and certainly no slower) than the speed of play on FOBTs. In our view, speed of play was not a factor that would have influenced the choice of the typical or average consumer to play a slots game on one platform rather than another.

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

84. We have found that, in many cases, the elements or circumstances identified by the CJEU in *Rank* as likely to exert a significant influence on the average consumer's decision to play were identical in the versions of the same games whether played on FOBTs, online or on a B3A machine. There were differences in the maximum stakes and prizes available for slots games on FOBTs and online but we consider that the fact that the stake exceeded £2 (which was the limit on FOBTs) in only 5% or 6% of plays on online slots games showed that the ability to place a stake in excess of £2 was not a significant influence on customer choice. In conclusion, we consider that slots games on a FOBT were similar to the same games played online. We also consider that, although there was less evidence,

it is also likely to be true of slots games played on a B3A machine. Accordingly, our view is that the slots games all met the same need from the point of view of the customer and treating slots games played on FOBTs and slots games played online or on B3A machines differently for VAT purposes during the Claim Period breached the principle of fiscal neutrality.

*FOBT virtual racing and comparator virtual racing games*

85. The core features of the virtual racing games are that they show a virtual horse race or dog race ie one where the animals and the course are computer generated graphics. Before the start of the race, the customer places a bet on a virtual horse or greyhound. The virtual race is shown and has a similar appearance to a real horse race or dog race. The customer wins or loses according to the outcome of the race which is determined by a random number generator

86. During the Claim Period, virtual racing games were available on FOBTs, online and over the counter in LBOs. The graphics of the game were very similar in each case. The virtual races over the counter in LBOs were scheduled to take place at particular times, usually when there was no live racing or other events on which to bet. Virtual racing games on FOBTs and online were available on demand.

87. During the hearing, HMRC confirmed that they accepted that virtual racing on FOBTs and online fell into the same category of game. HMRC did not agree, however, that those versions of virtual racing were “similar”. HMRC did not accept that virtual racing over the counter in LBOs fell into the same category of game as virtual racing on FOBTs (and, further, did not agree that virtual racing over the counter and virtual racing on FOBTs were “similar”).

88. HMRC submitted that virtual racing over the counter in LBOs should not be regarded as in the same category as virtual racing on FOBTs (or sufficiently similar to it) because the games were scheduled, in the manner of a live horse race, whereas virtual racing on FOBTs was on demand. HMRC also relied on the fact that virtual racing over the counter did not involve the use of a machine. The evidence of Mr Gregory was that the fact that the race was scheduled was not significant:

“It is a scheduled event, so players get in the venue, it’s advertised when the race will come on, and yes, if you play virtual sports on a terminal it is on demand. You place your bets. But other than that, the interface, the results, the way results are generated and the presentation layer are all identical”

89. It seems to us that HMRC sought to rely on differences of timing (scheduled versus on demand races) and operation (employee operated in LBOs versus player operated on FOBTs). Our view is that those elements are not core features of virtual racing and do not justify viewing them as falling in different categories. Both on FOBTs and in over the counter racing, the key elements are the placing of bets on the outcome of a virtual event shown on a screen. When and how the virtual race is started are irrelevant considerations. We consider that virtual racing on FOBTs, online and over the counter should be seen as a single category of game. The appropriate categorisation is ‘virtual racing’ and the core features of the game, as we have described them above, are the same for all forms of virtual racing.

90. We now consider the elements or circumstances that are liable to have a significant influence on the decision of the average consumer to play virtual racing games either on a FOBT or online or over the counter in LBOs. In relation to virtual racing on FOBTs and online, HMRC relied on differences in terms of accessibility, speed of play and stakes and prizes.

91. The maximum stake on FOBTs during the Claim Period was £100 and the maximum prize was £500 whereas there were no limits for online virtual racing. However, the average stake in virtual racing on FOBTs for each year in the period from 2005-2013 ranged between £3.77 and £5.40. For online virtual racing, the average stake for a particular year was between £2.25 and £4.86 during the same period. We did not have any evidence about the average value of stakes during the same period for virtual racing over the counter in LBOs but between 2009 and 2013 the average stake was between £6.30 and £7.13. The variations in average stake values are not very large (from £3.77 to £7.13 at most). In any event, the issue is whether the ability to stake higher amounts and/or win higher prizes was something that had a significant influence on the average consumer's decision to play virtual racing on a FOBT or online or over the counter in LBOs. As the average value of stakes actually placed was much lower than the maximum permitted on a FOBT even when higher amounts could be staked, eg online, it appears to us that the maximum (or minimum) stakes and prizes were not factors that were likely to have had a significant influence on the choice of the typical consumer to play on a FOBT or online or over the counter in LBOs.

92. The evidence showed that the average return to player (total prizes awarded as a percentage of total stakes) for virtual racing on FOBTs during the period from 2005 to 2013 ranged between 86.88% and 89.06%. For online virtual racing, the average return to player varied between 83.35% and 96.02%. We did not have any evidence about the return to player percentages for over the counter virtual racing. The percentages overlapped and the rate of return for FOBT virtual racing fell in the middle of the range for online virtual racing. We consider that shows that the average return to player could not have been something that would have influenced the typical consumer to play virtual racing on a FOBT rather than online because online virtual racing offered both better and worse returns to players. Also, as in the case of slots games, a player would have to play different virtual racing games hundreds, perhaps thousands, of times before any difference in the return to player would be noticeable so it is unlikely to have influenced the choice of the typical customer.

93. We can deal with the other factors such as speed of play, format of virtual racing games available and possibility of interaction between the player and the machine/game, including the ability of the player to influence the outcome of the game by their play, quite quickly. The evidence showed and we find that virtual racing on FOBTs and online were materially identical in relation to these elements and we consider that they would not have influenced the choice of the average customer to play one rather than the other. In the case of virtual racing over the counter in LBOs, there was no possibility of interaction between the player and the machine/game because it was operated by an employee in the LBO but we do not consider that was a relevant difference because such personal interaction was not a core feature of the game.

94. In conclusion, we consider that virtual racing games on FOBTs, online and over the counter in LBOs were similar to each other and met the same need from the point of view of the average customer. Accordingly, our view is that treating virtual racing games on FOBTs, online and over the counter in LBOs differently for VAT purposes during the Claim Period breached the principle of fiscal neutrality.

*FOBT virtual card games and online virtual card games*

95. The virtual card games on FOBTs and online are electronic versions of well-known card games such as blackjack and poker. They were available on FOBTs from 1 September 2007 to the end of the Claim Period. Blackjack, of which we were shown an example, was the most popular virtual card game. The core features of the blackjack game were that players were dealt or issued with virtual cards. The players were asked whether they wanted a further virtual card by the virtual dealer. Once the player had stopped asking for more cards, and assuming that the score of the cards in their hand had not exceeded 21, the virtual dealer (i.e. the computer) would reveal its hand. The virtual dealer might take additional cards until it stopped or exceeded 21. As with real blackjack, the player would win if their score was higher than the virtual dealer's but not higher than 21.

96. The Appellants did not seek to argue that all virtual card games fell within the same category or were similar to one another. The Appellants submitted that the evidence showed that there were no substantive differences between the blackjack games offered on FOBTs and those offered online. HMRC contended that the games were not similar relying on differences in terms of accessibility, speed of play and stakes and prizes referred to in relation to online roulette above. They also contended that the Appellants had led virtually no evidence on the comparability of virtual card games on FOBTs and online beyond a visual demonstration of a blackjack game.

97. In our view, virtual card games on FOBTs and online fall within a single category because they were materially identical being electronic or virtual versions of card games. We consider that treating the different virtual card games played on FOBTs and online as falling within the same category is no different to the CJEU, at paragraph 55 of *Rank*, treating different games played on different slot machines as being in the same category, namely slot machines. There were some differences between the virtual card games played on FOBTs and online which we consider below.

98. The FOBTs were terminals located in LBOs so the FOBT card games could only be played in such places whereas the online games could be played on any device connected to the internet, such as a laptop or mobile phone, in any location. However, the CJEU said, in paragraph 47 of *Rank*, that differences in the setting in which games of chance are made available and, in particular, accessibility in terms of location and opening times and atmosphere, are not relevant. In our view, the differences in availability or ability to play the virtual card games in different locations are not relevant to the question of whether games played on FOBTs and online are similar.

99. The maximum stake on FOBTs during the Claim Period was £100 and the maximum prize was £500 whereas there were no limits for virtual blackjack online. We were provided with evidence of average stakes for virtual card games. The average stake varied widely between different providers of the same games, whether on FOBTs or online. For FOBTs, the average stake varied between £5.27 to £10.18 and, for online virtual card games, it was between £1.94 and £62.73. It appears to us that the wide range suggests that the amount that could be staked did not have a significant influence on

customer choice. Our view is that the fact that the amounts varied so widely shows that some players would want to and did stake more or less than others. As the variation in average amounts staked was seen within the different versions, ie on FOBTs and online, and, in all cases, were less than the maximum stake limit for FOBTs, we conclude that the difference in maximum stake on FOBTs and online did not have a significant influence on the decision of the average consumer to play virtual card games either on a FOBT or online.

100. The evidence showed that the return to player percentages for blackjack on FOBTs and online were virtually identical. For virtual blackjack on FOBTs, the return to player varied between 95.84% and 97.31% whereas the return to player for online blackjack was between 97.4% and 98.5%. In our view, those were insignificant differences that would not be noticeable by players and so would not have had a significant influence on a customer's choice to play on a FOBT rather than online or vice versa.

101. The average speed of play varied greatly between the different providers. Coral was the only provider of blackjack on FOBTs for whom we had evidence about speed of play which was that an average game took 23.3 seconds whereas the average speed of a game provided by Coral online was 17.1 seconds. The average speed of other online providers' games of blackjack at different times during the Claim Period varied between 15 seconds and 42.4 seconds. Variation within the same channels suggests that it does not have a significant influence on the decision of the average customer to play one rather than the other.

102. As we have already stated, the core features and format of the virtual card games on FOBTs and online were materially identical. That meant that the possibility of interaction between the player and the machine/game, including the ability of the player to influence the outcome of the game by their play, was the same for both FOBTs and online versions.

103. For those reasons, we conclude that virtual card games on FOBTs and online were similar to each other and met the same need from the point of view of the average customer. Accordingly, our view is that treating virtual card games on FOBTs and online differently for VAT purposes during the Claim Period breached the principle of fiscal neutrality.

#### *FOBT bingo and comparator games of bingo*

104. We were shown videos of a bingo game on a FOBT and of an online bingo type numbers game. We did not have enough evidence to make a meaningful comparison between FOBT bingo and bingo type games on a B3A machine. On FOBTs, players bet on whether the numbers set out in automatically generated bingo cards would come up; the computer would randomly generate a series of numbers; if they matched the numbers on the customer's chosen bingo card(s), the customer would win a prize based on the amount of their stake. In the online game, a player chose a group of numbers and then won money depending on whether those numbers matched the numbers drawn by a random number generator.

105. In our view, bingo games on a FOBT and bingo type numbers games online fall within a single category because the core features of the game (matching randomly generated numbers to numbers allocated to or chosen by the player) were materially identical.

106. Although the evidence that we were shown was limited, we concluded on balance that there was no significant difference between the bingo and bingo type numbers games played on FOBTs and online. There was some difference in the average stakes but we do not regard it as significant. The average stake for bingo on a FOBT was between £0.53 and £3.59 for years between 2005 and 2013 whereas the average stake for online bingo type games between 2009 and 2013 was £1.53 (2009) reducing to £0.86 (2013).

107. There was little or no evidence about other elements such as chances of winning, return to player percentages and speed of play. However, on the basis of the games viewed by us, we conclude that the bingo game on a FOBT and bingo type numbers game online were not significantly different. They are both, it appears to us, straightforward and simple games offering little by way of player interaction and with outcomes determined randomly. We consider that, both on FOBTs and online, the bingo type games met the same needs of the typical consumer and such differences as there were would be unlikely to have significantly influenced the average customer to play one version rather than the other. Our conclusion is that treating bingo games on FOBTs and bingo type numbers games online differently for VAT purposes during the Claim Period breached the principle of fiscal neutrality.

*FOBT other games and comparator other games*

108. The Appellants also sought to argue that the different treatment of other games, such as Spoof, on FOBTs and online breached the principle of fiscal neutrality. HMRC observed that the Appellants led virtually no evidence on the comparability of other FOBTs games and other online games beyond the visual demonstration of a single game (Spoof).

109. In Spoof, the customer bet on how many virtual coins a series of virtual hands would have within them. In other games, the customer would bet on whether the next number in a series would be higher or lower than the previous number rolled, or on dice rolls, or on the outcome of the spin of a wheel. Mr Young said that the online versions of Spoof and High Low games were similar to those available on FOBTs. The average stakes during the Claim Period for these other games was very similar being approximately £3.50 for FOBT Spoof and £0.97 rising to £4.22 for some of the other online games.

110. We consider that the evidence shows that Spoof is the same game both on FOBTs and online and. In our view, treating Spoof on FOBTs and online differently for VAT purposes during the Claim Period breached the principle of fiscal neutrality. We are not able to reach any conclusion in relation to the other games as there was insufficient evidence.

**Decision**

111. For the reasons set out above, the Appellants' appeals are allowed save as the 'other games' just described.

112. We direct that if the parties are unable to agree the quantum of the repayment due to the Appellants then they must inform the Tribunal of that fact within three months of the date of release of this decision to enable the Tribunal to make such directions as it considers necessary to determine the issue of quantum.

**Right to apply for permission to appeal**

113. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this Decision Notice.

**GREG SINFIELD  
TRIBUNAL JUDGE**

**RELEASE DATE: 25 JULY 2018**