TC02707

Appeal number: TC/2011/02832

Amusement Machine Licence Duty – Machine described as "Touchscreen Lottery Terminal" operated by a Private Members' Club – Whether "Amusement Machine" – Betting, Gaming and Duties Act 1981 s 25 and s 23 VATA 1994 – Yes – Appeal disallowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE BATTLE CLUB **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE MICHAEL S CONNELL
GILL HUNTER

Sitting in public at Bedford Square, London on 12 – 13 November 2012

Mr Peter Crathern and Mr Michael Doncaster Vice Chairman and Chairman respectively of the Appellant

Mr Ewan West, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a decision of the Respondents ("the Commissioners"), contained in a letter dated 13 August 2010, to issue the Appellant with a default Amusement Machine Licence ("AM Licence") pursuant to paragraph 3 of Schedule 4A Betting and Gaming Duties Act 1981 ("BGDA 1981") and to assess the Appellant to Amusement Machine Licensing Duty ("AMLD") in the amount of £8,095, subsequently reduced to £5,630 by way of a further decision dated 28 November 2011.

2. The Appellant appealed to the Tribunal on 1 April 2011 and requested that the appeal be stayed behind the First-tier Tribunal hearing of the appeal in *Dransfield Novelty Company Limited & others v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 348 (TC) ("*Dransfield*"). The Appellant's first stated ground of appeal was that an electronic lottery machine on the Appellant's premises was not an amusement machine as claimed by the Commissioners, and that accordingly AMLD was not payable. The Appellant's second ground of appeal was that any liability for AMLD was payable by the supplier of the machine, and not the Appellant.

Background and Facts

3. The Appellant is a private members' non-profit making club located in Battle, East Sussex, founded in 1932 and providing social activities for members of the local community. The club is owned by its members, and its premises vested in trustees.

4. During periods between 25 February 2007 and 24 February 2010, the Appellant had a machine on its premises supplied by In Touch Games Limited. The machine installed on the Appellant's premises was one of a kind sometimes referred to as "an electronic lottery terminal" advertised under the name, "Touchscreen Lottery Terminal". The machines were advertised by the supplier as being designed specifically for use in private members clubs under social law provisions. This was a reference to the legislation contained in the Lotteries and Amusement Act 1976, Gaming Act 1968 and later Part 11 of the Gambling Act 2005, which regulate gaming and licensing, and allow members clubs and private societies to operate lotteries.

5. Takings from machines, such as those which dispense scratch cards, were accepted by HMRC as excepted from AMLD as they were regarded as simply dispensing cards which had a predetermined result as either a winning or losing card, and that the result was not determined by the machine. Similarly, lottery terminals did not fall within the definition of 'gaming machines', which were defined as machines "constructed or adapted for playing a game of chance by means of the machine". The In Touch machines were therefore held out by the suppliers as not being gaming machines and not subject to VAT or to AMLD on the basis that they operated as an "electronic lottery machine".

6. The In Touch Machine offers a choice of three games: roulette; poker; and fruit reels. It is operated by touch screen technology and offers players the chance to tender stakes to the value of 20p, 50p, £1 or £2 on the poker and fruit reels options, with maximum wins of £200, £500, £1,000 and £2,000 respectively. For the roulette

option, the largest chip is £2 with a maximum win of £82. The Appellant says that it was assured by the supplier that Amusement Machine Licence Duty and VAT was not payable.

7. The supplier preloads either 20,000 or 40,000 virtual or electronic tickets onto the hard drive supplied with the In Touch Machine.

8. Depending on the game selected, the machine's screen displays a hand of five cards being dealt, a roulette wheel being spun or four fruit wheels spinning. When one of the options is selected, the visual display of the In Touch Machine appears to show the selected game being played in the same way as a traditional machine. However, the actions of the player have no influence on the result that is displayed. If the next electronic ticket is a winning ticket, the screen displays a winning result and if not it displays a losing result. The order of the "ticket" and the result displayed by the machine is not random, but is determined by the sequence of their preloading by the supplier.

9. If the screen displays a winning result then a paper ticket is produced by the machine showing the amount won, (based on the amount staked), and the player redeems the ticket from the club. The machine does not pay out any cash winnings.

10. When someone plays a game on the machine, whether or not he receives a winning ticket is therefore based on chance. The games are presented as involving an element of chance, there being no skill or indication of skill being involved in playing the games.

11. The In Touch Machine operates in essentially the same way as those considered by the Tribunal in *Dransfield*, the only material difference being that that the ticket stack in the Dransfield machine is reused, whereas the In Touch Machine downloads new ticket stacks onto the machine via a modem line once all the original tickets loaded onto the machine have been used. From readings on their central computer, the supplier, when emptying the machines, deducts the amount paid out from the total recorded as paid into the machine, and invoices the Appellant an agreed percentage of the net amount.

12. HMRC first became aware of "electronic lottery terminals" in 2007. Enquiries were made of the suppliers and there were also discussions with the British Amusement Catering Trade Association about the potential AMLD and VAT liability. It appears that HMRC's Policy Unit did not fully conclude its review of the position until 2009, when HMRC brief 70/09 was published and suppliers were required to provide details of the clubs they had supplied with electronic lottery terminals.

13. Although a useful source of funds for small private members clubs, takings from lottery machines were usually quite modest and depending on the percentage split of profit agreed with the supplier, it was sometimes not financially viable to operate a machine.

14. Historically AMLD had not been charged on lottery machines because they fell outside the definition of amusement machine. However, on 24 February 2010, based on information provided by the suppliers of the In Touch Machine and legislation current at that time, the Commissioners sent the Appellant a default notice pursuant to paragraph 2 of Schedule 4A BGDA 1981, informing the Appellant that they believed the In Touch Machine was a gaming machine designed for use by individuals to

gamble (whether or not it could also be used for other purposes e.g. a lottery) and that accordingly a machine had been provided for play on the Appellant's premises when an appropriate AM Licence was not in force.

15. Legislation allows HMRC to correct what they regard as errors by assessing for unpaid duty going back three years. The default period specified was 25 February 2007 to 24 February 2010.

16. Machines are categorised by the cost of playing the games. Because the cost to play once did not exceed £2.00 and the prize money in any one game did not exceed £4,000.00, the In Touch Machine was categorised as B1, as a result of which the duty payable was £2,815.00 per machine annually. The Commissioners stated they considered the Appellant to be the "responsible person" (or representative for the "responsible person") for the In Touch Machine, and accordingly jointly and severally liable with the supplier for the duty payable.

17. The Appellant informed the Commissioners that the In Touch Machine had been operated from 5 April 2007 to 22 January 2010, when it was removed from the Club by the supplier. The Appellant further indicated that it did not believe that it was the "responsible person" and asked for the default notice to be cancelled.

18. Where, following service of a default notice, a licence is not produced, the Commissioners may grant a default AM Licence pursuant to paragraph 3 of Schedule 4A BGDA 1981. The Commissioners may then assess an amount equivalent to the amount of duty that would have been payable if the default AM Licence had been granted pursuant to Schedule 4 BGDA 1981, i.e. as a normal AM Licence. Such assessment must be made to the Commissioners' best judgment. Once assessed, pursuant to paragraph 5 of Schedule 4A BGDA 1981, that amount may be recovered from the responsible person.

19. On 13 August 2010 the Commissioners issued a default AM Licence for the default periods between 5 April 2007 and 22 January 2010 and sought AMLD in the amount of £8,095. That is, £2,815.00 for the two years 5 April 2007 to 4 April 2009 and £2,465.00 for the part year 5 April 2009 to 22 January 2010.

20. On 28 November 2011, following the Tribunal's decision in *Dransfield*, the Commissioners decided not to pursue AMLD for the period 21 July 2009 to 22 January 2010. The Commissioners only sought AMLD in relation to the period from 1 November 2006 to 20 July 2009 (the reasons for which are explained below) and reduced the amount of assessment by £2,465 to £5,630.00.

Legislation

21. "Lottery machines" had traditionally been outside the definition of a gaming machine under social legislation. The machines had also been exempt from AMLD. However the legislative provisions governing the liability to AMLD changed a number of times in the period prior to the default period.

22. During the default period the relevant legislation relating to AMLD is contained in section 25 BDGA 1981 and s 23 VATA 1994 (set out below). However, it is necessary to summarise the legislation for the periods before and after the default period, when AMLD was not payable on lottery machines, in order to illustrate how changes in regulations resulted in duty becoming payable on lottery machines.

23. In the period up to 18 July 2006 (that is prior to the default period) no duty was charged on machines, which could properly be described as lottery machines falling outside the definition of "gaming machine" under s 25 BGDA 1981. The version of s 25 BGDA in force in the period up to 18 July 2006 provided that :

> *"(1) A machine is an amusement machine for the purposes of this act if –*
>
> *(e) The machine is a gaming machine*
>
> *(1A) A machine constructed or adapted for the playing of a game is a gaming machine for the purposes of this Act if –*
>
> *(b) a game which is played by means of the machine is a game of chance, a game of chance and skill combined or a pretended game of chance or of chance and a skill combined; and*
>
> (c) *the outcome of a game is determined by the chances inherent in the actions of the machine, whether or not provision is made for the manipulation of the machine by a player"*

Machines such as lottery machines were therefore exempt from AMLD, because the result of the game played was pre-determined by the order of the tickets in the stack, and not by "means of the machine" or "the actions of the machine".

24. On 19 July 2006 the 1981 Act was amended to contain a cross-reference to a definition in s 23 VATA, which in turn made the definition of amusement machine, dependent on the definition of "gaming" in s 6 of the Gambling Act 2005 which provides in material part:

Section 6

> *"(1) In this Act "gaming" means playing a game of chance for a prize.*
>
> *(2) In this Act "game of chance" –*
>
> *(a) includes-*
>
> *(i) a game that involves both an element of chance and an element of skill*
>
> *(j) a game that involves an element of chance that can be eliminated by superlative skill, and*
>
> *(k) a game that is presented as involving an element of chance...."*

25. Section 14 of the 2005 Act provided:

> *"(1) For the purposes of this Act an arrangement is a lottery, irrespective of how it is described, if it satisfies one of the descriptions of lottery in subsections (2) and (3).*
>
> *(2) An arrangement is a simple lottery if-*
>
> *(a) persons are required to pay in order to participate in the arrangement.*
>
> *(b) in the course of the arrangement one or more prizes are allocated to one or more members of a class, and*
>
> *(c) the prizes are allocated by a process which relies wholly on chance."*

26. Where a machine ranked as both an "amusement machine" (and therefore subject to duty) and was also a machine which provided a "lottery" within s 14 (and was therefore exempt from duty), s 17 of the 2005 Act provided:

> *"(1) This section applies to an arrangement which satisfies-*
>
> *(a) the definition of a game of change in section 6, and*
>
> *(b) the definition of a lottery in section 14.*
>
> *(2) An arrangement to which this section applies shall be treated for the purposes of this Act as a game of chance (and not as a lottery) if a person who pays in order to join the class amongst whose members prizes are allocated is required to participate in, or to be successful in, more than three processes before becoming entitled to a prize*
>
> *(3) An arrangement to which this section applies shall, …….. be treated for the purposes of this Act as a lottery (and not as a game of chance) if-*
>
> *(a) it satisfies paragraph 1(1)(a) and (b) Schedule 11.*
>
> *(b) it satisfies paragraph 10(1)(a) and (b) of Schedule 11.*
>
> *(c) it satisfies paragraph 11(1)(a) and (b) of Schedule 11.*
>
> *(d) it satisfies paragraph 12(1)(a) and (b) of Schedule 11.*
>
> *(e) it satisfies paragraph 20(1)(a) and (b) of Schedule 11.*
>
> *(f) it satisfies paragraph 30(1)(a) and (b) of Schedule 11, or*
>
> *(g) It is promoted in reliance on a lottery operating licence."*

27. Paragraph 9 of Schedule 11 (exempt lotteries) provides:

> *"9(1) A lottery is exempt if-*
>
> *(a) it is a private society lottery, a work lottery or a residents' lottery within the meaning of paragraphs 10 to 12, and.…*
>
> *10(1) A lottery is a private society lottery if-*
>
> *(a) it is promoted only by authorised members of a society, and*
>
> *(b) each person to whom a ticket is sold is either a member of the society or on premises wholly or mainly used for the administration of the society or the conduct of its affairs (society premises").*
>
> *(2) In this Part "society" means any group or society established and conducted for purposes not connected with gambling.*
>
> *(3) In sub-paragraph (1)(a) "authorised" means authorised in writing by the society or, it if has one, its governing body."*

28. Section 17 of the 2005 Act therefore provided a "tie-breaker rule" which deemed a game of chance that also ranked as an exempt lottery not to be a game of chance, and therefore not "gaming", and accordingly not subject to duty.

29. From 1 November 2006 to 20 July 2009 the 1981 Act also cross-referred to s 23 VATA, but this had been amended to contain a self-standing definition, which although virtually the same as before, did not contain a cross-reference to the 2005 Act. The relevant legislation is set out in paragraph 28 below.

30. Because a "game of chance", during the default period, had a stand-alone definition, there was no cross-reference to the Gambling Act, and so no tie-breaker. Therefore it was not possible to remove from "game of chance" any activity that may be both a "game of chance" and an "exempt lottery". This appears to have been an unintended consequence of Parliament's intention to provide for any necessary amendments to s 6 Gambling Act as to what types of gaming came within the definition of "game of chance", without also affecting their VAT and AMLD treatment and an error on the part of the parliamentary draftsman.

31. From 21 July 2009 the 1981 Act was amended by the Finance Act 2009 and no longer referred to s 23 VATA, but directly to s 6 of the Gambling Act 2005, which once again brought the tie-breaker rule into operation.

32. The legislation in force during the relevant default period provided, in material part, as follows :

Section 22 BGDA 1981

"(1) A duty of excise shall be charged on amusement machine licences and the duty on a licence shall be determined in accordance with section 23 below"

Section 25 BGDA 1981

"(1) A machine is an amusement machine for the purposes of this Act if it is –

(a) a gaming machine, and ---

(b) a prize machine

(1A) In this Act "gaming machine" means a machine that is a gaming machine for the purposes of section 23 of the Value Added Tax Act 1994 (c.23)

(1C) For the purposes of this Act a machine is a prize machine unless it is constructed or adapted so that a person playing it once and successfully either receives nothing or receives only-

(a) an opportunity, afforded by the automatic action of the machine, to play again (once or more often) without paying, or

(b) a prize, determined by the automatic action of the machine and consisting in either –

(i) money of an amount not exceeding the sum payable to play the machine once, or

(ii) a token which is, or two or more token which in the aggregate are, exchangeable for money or an amount not exceeding that sum.

Section 23 Value Added Tax Act 1994:

"(4) In this section "gaming machine" means a machine which is designed or adapted for use by individuals to gamble (whether or not it can also be used for other purposes).

(5) But-

(a) a machine is not a gaming machine to the extent that it is designed or adapted for use to bet on future real events,

(b) a machine is not a gaming machine to the extent that-

(i) it is designed or adapted for the playing of bingo, and

(ii) bingo duty is charged under section 10 of the Betting and Gaming Duties Act 1981 (c. 63) on the playing of that bingo, or would be charged but for paragraphs 1 to 5 of Schedule 3 to that Act, and

(c) a machine is not a gaming machine to the extent that-

(i) it is designed or adapted for the playing of a real game of chance, and

(j) the playing of the game is dutiable gaming for the purposes of section 10 of the Finance Act 1997 (c. 16), or would be dutiable gaming but for subsections (3) and (4) of that section.

(6) For the purposes of this section -

(a) a reference to gambling is a reference to -

(i) playing a game of chance for a prize, and ---

(f) "game of chance" includes -

(i) a game that involves both an element of chance and an element of skill,

(ii) a game that involves an element of chance that can be eliminated by superlative skill, and

(iii) *a game that is presented as involving an element of chance, but does not include a sport,"*

33. Schedule 4 BGDA 1981 made provision for the assessment of the "responsible person":

"(4) Assessment of amount equivalent to duty

(1) This paragraph applies where a default licence is granted in relation to an unlicensed machine.

(2) The Commissioners may……assess to the best of their judgement the amount which would have been payable under this Act as Amusement Machine Licence Duty if the default licence had been an amusement licence granted under s 4 of this Act.

(5) Liability to pay

(1) Where an amount has been assessed under paragraph 4 above and notified to a responsible person or its representative, that amount-

(a) shall be deemed to be an amount of duty charged in accordance with section 22 of this Act or an amusement machine licence within the meaning of section 21 of this Act,

(b) shall be due from the responsible person..

(2) The responsible persons to whom an assessment may be notified are any one or more of the persons who are or appear to be, or at any time during the period to which the assessment relates were or appear to have been, responsible persons in relation to the unlicensed machine or the relevant premises.

(4) General interpretation

(1) The following provisions of this paragraph apply for the purposes of this schedule

(2) A person is a responsible person in relation to an amusement machine at a particular time if, at that time he is or was-

(a) the owner or hirer of the machine, or

(b) a party to any contract under which the machine may be, or may have been, or is or was required to be, on the relevant premises at that time."

Previous Tribunal Decisions

34. The fiscal treatment of lottery machines has been considered in two recent decisions.

35. In *Oasis Technologies (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2010] UKFTT 292 (TC) ("*Oasis*"), the Tribunal determined that a machine supplied by Oasis Technologies ("The Oasis Machine") did fall within the relevant definition of a "gaming machine" in VATA 1994 at all periods relevant to that appeal, and accordingly was excepted from exemption from VAT under Note 1(d) to item 1 (the provision of facilities for playing games of chance) of Group 4 (betting gaming and lotteries) Schedule 9 VATA 1994 (which itemises exempt supplies of goods and services). However, the Oasis Machine also granted the right to participate in a lottery and so fell within the separate exemption provided by item 2 of Group 4 (the right to participate in a lottery). The Tribunal decided that the takings from the Oasis Machine were exempt from VAT because the exception from exemption under Note 1(d) did not render unavailable the exemption contained in Item 2. There was no appeal in Oasis in relation to AMLD. The Tribunal released its decision on 1 July 2010.

36. Following *Oasis*, the Commissioners issued Revenue and Customs Brief 01/11 on 19 January 2011, confirming that the takings from lottery machines generally would not be liable for VAT provided they met certain specified conditions :

- the machine must provide a game of chance;
- the tickets must be randomly distributed;
- the player, operator or manufacturer must not be able to influence the order in which a ticket is revealed.

Accordingly, if a machine shares the same essential characteristics as the Oasis Machine, it would be treated by HMRC as granting the right to participate in a lottery, and may therefore benefit from the VAT exemption contained in Note 2 of Group 4 Schedule 9 VATA 1994.

37. Against that background, *Dransfield* considered the liability to AMLD of a different lottery machine, manufactured by Reflex Gaming Limited ("the Reflex Machine"). The Tribunal had to decide whether the Reflex Machine fulfilled the definition of an "amusement machine" in s 25 BGDA 1981, which had changed over four different periods, only the latter two of which are relevant to this appeal. The Appellants in *Dransfield* conceded for the purposes of the appeal that the Reflex Machine did provide the playing of a "game of chance for a prize", so that issue (and

therefore any difference between the Reflex Machine and the Oasis Machine) was not before the Tribunal.

38. The Tribunal concluded that the Reflex Machine did fulfil the definition of an amusement machine for what it referred to as period 3, i.e. 1 November 2006 to 20 July 2009, but not for the later period. The Commissioners did not contest the Appellant's assertion that duty was not payable for the periods prior to 31 October 2006.

Evidence and Documentation before the Tribunal.

39. The Tribunal was supplied with a bundle of documents including relevant legislation, case law authorities (as referred to in this decision) a copy of the exchange of correspondence between HMRC and the Appellant relating to the issue of the default notice and a witness statement by Glenda Bloxham who is an Officer employed by HMRC working as a senior avoidance investigator, and who issued the decision letter of 13 August 2010. Mrs Bloxham gave evidence for the Respondent. Both Mr Doncaster, Chairman of the Appellant, and Mr Peter Crathern, Vice Chairman of the Appellant, gave evidence for the Appellant.

The Appellant's Case

40. In the Appellant's Notice of Appeal to the Tribunal, two grounds of appeal are advanced.

41. The first ground of appeal is that the In Touch Machine was operated as a lottery and as such should not be liable for AMLD. Mr Crathern, on behalf of the Appellant, said that the In Touch Machine was supplied as providing for an exempt private lottery promoted by members of a society under the Lotteries and Amusement Act 1976, and later an exempt gaming machine under the Gambling Act 2005. Sections 4 and 5 of the 2005 Act exempted private lotteries and members clubs, which enabled clubs and societies of that type to conduct lotteries and operate gaming machines for raising money for charitable, sporting, cultural or some other similar activities, provided the purpose of the lottery or activity was not to result in a private gain or benefit to any person or commercial undertaking.

42. Mr Crathern at the hearing said that it was clear that the provisions of the 1976 and 2005 Acts reflected Parliament's intention to exempt private lotteries and private members clubs from regulations relating to gambling, betting and gaming. He said that the legislation was complex, particularly with regard to the interaction of the social legislation with the Betting, Gaming and Duties Act 1981, and that it was virtually impossible for a voluntary organisation such as the Appellant to identify and interpret how it affected a small members' club.

43. Mr Crathern said that having read the Respondents' Statement of case, the Appellant now accepted the Commissioners' assertion that the In Touch Machine was an amusement machine within BGDA 1981, but he questioned whether in fact it had been the intention of Parliament to tax private clubs and societies on gaming machines. Whilst he was prepared to accept that technically the Respondents were correct in their assertion that the amusement machine was a gaming machine and therefore caught by the relevant provisions of the BGDA, he did not believe that it was Parliament's intention that private members clubs should be liable to AMLD. In a

letter to the Tribunal following the hearing, Mr Doncaster asked to what extent the provisions of the 2005 Act took effect independent of the provisions of the 1981 Act. The Tribunal fully understands the confusion that has been brought about by the various changes in legislation, which resulted in amusement machines operated by private members' clubs being subject to AMLD. The point raised by Mr Doncaster has been considered by the Tribunal and answered in the conclusion to this decision.

44. The second ground of appeal is pleaded as an alternative, namely that if the In Touch Machine is subject to AMLD, then the "responsible person" for the purposes of Schedule 2A BGDA 1981 should be In Touch Games Limited and not the Appellant. Mr Crathern said that they were given assurances by the supplier that the In Touch Machine would not be subject to AMLD, and that the Commissioners should have pursued the suppliers for the duty and not the Appellant. He also queried why it had taken the Commissioners from February 2007 till late 2009 to pursue the Appellant for AMLD. The delay had inevitably increased the amount of back duty payable.

The Commissioners' Case

The Appellant's first ground of Appeal

45. Mr West, for the Commissioners, submits that the Appellant's first ground of appeal is fundamentally flawed because during the default period, whether or not the In Touch Machine allows the right to participate in a lottery is of no relevance to the question of whether the machine is a gaming machine that is subject to the licensing requirements of AMLD. That a machine provides the right to participate in a lottery is relevant only to the exemption of VAT arising from item 2 of Group 4 Schedule 9 VATA 1994.

46. The only relevant question is whether the In Touch Machine falls within the definition of an amusement machine in section 25 BGDA 1981, which for periods between 1 November 2006 and 20 July 2009, requires consideration of s 23 VATA 1994. It is the fulfillment of that definition that gives rise to liability to AMLD for any period between those dates.

47. The Appellant does not explain why the In Touch Machine does not meet the definition of an amusement machine in s 25 BGDA 1981 for the period for which the default AM Licence was granted. Mr West argues that, put simply, under s 25 BGDA 1981, a machine will fall within the definition of an "amusement machine" if it is a "gaming machine" and a "prize machine".

48. A gaming machine is defined by reference to s 23 VATA 1994. That requires consideration of various elements.

49. First, the machine must be designed or adapted for use by individuals to gamble, regardless of whether it can be used for any other purpose. The fact that the In Touch Machine may provide a lottery is therefore expressly to be disregarded.

50. Second, gambling is defined as "playing a game of chance for a prize". The definition of a "game of chance" in s 23(6)(f) VATA 1994 is non-exhaustive and merely provides three specific examples. The In Touch Machine involves the playing of a game, according to the standard dictionary definitions of a game. It is moreover a game of chance because the game is in effect a lucky dip. The player has no control

over the process: whether or not the player is successful depends entirely upon which pre-loaded virtual ticket appears when the game is played.

51. Further or alternatively, the In Touch Machine falls directly within the specific identified example of a game of chance in s 23(6)(f)(iii) VATA 1994 because it involves a game that is presented as providing an element of chance, by virtue of its operation and appearance, precisely as was the case with the Oasis Machine previously considered by the Tribunal.

52. Third, the game played on the In Touch Machine is played for a prize, i.e. a ticket that can be exchanged for money.

53. Fourth, none of the exclusions in s 23(5) VATA 1994 apply.

54. Fifth, the definition of a "machine" is fulfilled because the In Touch Machine uses electrical power.

55. As to the requirement that the In Touch Machine must also qualify as a prize machine, Mr West submits that this condition is clearly fulfilled because, pursuant to s 25 BGDA 1981, a machine qualifies as a prize machine for the purposes of AMLD unless the conditions specified in section 25(1C) BGDA are met. Mr West submits they are not :

a. the successful player playing the In Touch Machine once and successfully does not receive nothing but on the contrary receives a prize; and

b. the prize is more than an opportunity to play again and, however disbursed, more than the amount payable to play the machine once.

56. Mr West submits that whereas the *Oasis* and *Dransfield* decisions are confined to the specific machines under consideration, the In Touch Machine shares all the same relevant characteristics. There is no material point of distinction in the machines.

Appellant's second ground of appeal

57. Mr West says that the Appellant's second ground of appeal is also misconceived because the argument is based on the incorrect assumption that the responsible person must be the owner of the In Touch Machine, that is In Touch Games Limited. Paragraph 5(2) of Schedule 4A BGDA 1981 provides that there may be more than one responsible person in relation to any one machine at any one time. The Commissioners may raise assessments upon any or all of them. Pursuant to paragraph 5(5) of Schedule 4A all responsible persons who have been notified and assessed have joint and several liability for the AMLD that is due in respect of the relevant machine.

58. The Appellant meets the definition of a responsible person in relation to the In Touch Machine pursuant to paragraph 7(2) of Schedule 4A BGDA in that:

a. under the agreement between the Appellant and In Touch Games Limited dated 5 April 2007 the Appellant was the hirer of the In Touch Machine from In Touch Games Limited at the relevant time (paragraph 7(2)(a)); and/or

b. the Appellant was party to a contract under which the in Touch Machine was at the relevant time on the relevant premises (paragraphs 7(2)(b)).

59. The Appellant was further a responsible person in relation to the relevant premises (i.e. the Battle Club) at the relevant time (i.e. the period covered by the default AM Licence) pursuant to paragraph 7(3) of Schedule 4A BDGA 1981 in that:

a. the Appellant was the occupier of the relevant premises, namely the Battle Club (paragraph 7(3)(a)); and/or

b. the Appellant was responsible for controlling the use of the amusement machine on the relevant premises (paragraph 7(3)(c)); and/or

c. the Appellant was responsible for controlling the admission of persons to the relevant premises, it being a private members' club to which the public has no right of access (paragraph 7(3)(d)).

60. Mr West submits that once it is established that the Appellant is a responsible person, the Commissioners are entitled to fix liability for payment of AMLD upon it pursuant to paragraph 2 of Schedule 4A BGDA 1981. There is no obligation on the Commissioners to fix liability on the supplier.

Conclusion

61. Social legislation regulating betting, gaming and lotteries was, until 2007, contained in the Betting and Gaming Act 1963, the Gaming Act 1968 and the Lotteries and Amusement Act 1976. These Acts were repealed by the Gambling Act 2005 (s 356) which came into effect on 1 September 2007.

62. The Lotteries and Amusement Act 1976 s 4 contained provisions which exempted private lotteries from the Act, and the Gambling Act 2005 s 235(2)(d) exempted from the definition of gaming machines a machine where the results of the game are not determined by the means of the machine. Certain categories of machine (B3A in this instance) could be sited in members' clubs and miners' welfare institutes exempted from the full provisions of the legislation.

63. The Gambling Act 2005 (and prior legislation) regulated gambling and the operation of betting, gaming and lotteries with regard to licensing and permits. The 2005 Act is not tax law.

64. It is the amusement machine licence duty legislation in the Betting, Gaming and Duties Act 1981, which determines the duty treatment of gaming machines. The definition of an amusement machine is contained in s 25 BGDA, being a machine used for the playing of a game of chance for a prize. Some small prize gaming machines are exempted from the definition of gaming machine, but the In Touch Machine on the Appellant's premises did not fall into any of the exemptions.

65. There is little doubt that Parliament intends tax legislation to compliment social legislation in order to avoid conflict and ambiguity. The Betting, Gaming and Duties Act 1981 and Gambling Act 2005 originally exempted lottery machines from AMLD, and this was achieved through the tie-breaker rule contained in s 17 of the 2005 Act. Unfortunately, for the reasons explained in paragraphs 29 and 30 of this decision, amendments to the legislation brought about by the Finance Act 2006 meant that amusement machines such as the In Touch Machine became subject to AMLD. As Mr West says, the task of the Commissioners is to implement fiscal legislation and collect taxes where they are due. Parliament decides which activities are to be taxed. The

Commissioners have no discretion to interpret legislation other than strictly in accordance with its provisions.

66. With regard to the Appellant's first ground of appeal, we accept Mr West's submissions that on the basis of legislation current during the default period and the decisions in *Oasis* and *Dransfield*, providing a machine meets the conditions in Revenue and Customs brief 01/11 (see paragraph 36 above), its takings will be exempt from AMLD. However, if those takings would otherwise be liable to VAT because the relevant machine fulfils the definition of a gaming machine in section 23 VATA 1994, the machine will require an AM Licence pursuant to the provisions of BGDA 1981 in respect of any period between 1 November 2006 and 20 July 2009. Establishing liability to AMLD for this period thus effectively requires first establishing that the definition of a gaming machine in section 23 VATA 1994 is fulfilled.

67. The interpretation of section 23 VATA 1994 does not involve any consideration of whether a machine might also fulfil the definition of an exempt private lottery as defined in social legislation.

68. With regard to the Appellant's second ground of appeal, the Tribunal is strictly limited on appeal to consideration of the types of decision listed at paragraph 6(2) of Schedule 4A BGDA 1981. The Tribunal may therefore determine on appeal whether a default AM Licence should have been issued to the Appellant, whether the Appellant was a responsible person, and whether the liability to AMLD was properly assessed. However, the Tribunal may not consider on appeal whether the Commissioners should have assessed any other responsible person to AMLD as well as, or in place of the Appellant.

69. It does not therefore assist the Appellant that there may be other persons who would fall within the definition of a responsible person. The only relevant question is whether the Appellant would fall within that definition.

70. Our conclusion is therefore that the Commissioners correctly issued the Appellant with the default AM Licence and assessed the appropriate amount of duty upon it.

71. We find that neither of the Appellant's grounds is sustainable and the Appeal is accordingly dismissed.

72. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this 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.

MICHAEL S CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 16 May 2013