[2020] UKUT 117 (TCC)

Appeal numbers: UT/2018/0149
UT/2018/0150

VALUE ADDED TAX – exemption – betting and gaming – gambling supplies through fixed odds betting terminals and certain slot machines – whether other gambling supplies with different VAT treatment were similar – the EU principle of fiscal neutrality considered – whether FTT erred in applying that principle - appeals dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

(1) THE RANK GROUP PLC
(2) DONE BROTHERS (CASH BETTING) LIMITED
TOTE (SUCCESSOR) COMPANY LIMITED
TOTE BOOKMAKERS LIMITED **Respondents**

TRIBUNAL: MR JUSTICE MANN
JUDGE THOMAS SCOTT

Sitting in public at The Rolls Building, Fetter Lane, London on 14 and 15 January 2020

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

Jonathan Peacock QC and Valentina Sloane QC, instructed by Deloitte LLP, for the Respondents

DECISION

Introduction

1. HMRC appeal against two decisions of the First-tier Tribunal ("FTT") relating to VAT in respect of supplies to retail customers of the ability to play various games of chance on gaming machines. The decisions are *The Rank Group plc v HMRC* [2018] UKFTT 405 (TC) ("the Rank Decision") and *Done Brothers (Cash Betting) Limited, Tote (Successor) Company Limited and Tote Bookmakers Limited v HMRC* [2018] UKFTT 406 (TC) ("the Done Brothers Decision"). In this decision we refer to The Rank Group plc as "Rank" and the appellants in the Done Brothers Decision as "Done Brothers".

2. Although the two FTT decisions relate to separate appeals on separate issues, the appeal before this Tribunal relates to a single issue which is common to both decisions. The parties requested that we provide a single judgment in respect of both appeals, and that is what we have done. However, where relevant we consider and discuss each FTT decision separately below.

3. As will become apparent, it was not straightforward to pin down the precise ambit of HMRC's appeal, but in broad terms HMRC submit that in both decisions the FTT erred in law in relation to the evidence which it took into account in applying the EU test of fiscal neutrality.

Background

The Rank Appeal

4. The dispute before the FTT concerned the VAT liability of supplies by Rank of gambling made using certain slot machines during the period from 1 October 2002 to 5 December 2005 ("the Rank Claim Period"). The relevant slot machines were commonly referred to in the industry as section 16/21 machines and section 31/34 machines, after the provisions of the Gaming Act 1968 and the Lotteries and Amusements Act 1976 which applied to them.

5. Article 13B(f) of EU Directive 77/388 requires Member States to exempt from VAT "betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State". That exemption was implemented in the United Kingdom by section 31 and Group 4 of Schedule 9 to the Value Added Tax Act 1994 ("VATA").

6. During the Rank Claim Period, while supplies of gambling made through section 16/21 machines and through fixed odds betting terminals ("FOBTs") were treated by HMRC as exempt from VAT, supplies made through section 31/34 machines were treated as standard rated, on the basis that they were "gaming machines", which were excluded from the exemption in Group 4.

7. Rank claimed from HMRC repayment of VAT accounted for on section 31/34 machines during the Rank Claim Period. The basis of the repayment claim was that

supplies of gambling made through section 31/34 machines and through FOBTs was similar and treating them differently for VAT purposes was contrary to the EU law principle of fiscal neutrality.

8. In addition to refusing that claim, HMRC subsequently issued VAT assessments to Rank for supplies made through section 16/21 machines during the relevant period, on the ground that they were also "gaming machines" and therefore excluded from the VAT exemption. Rank also appealed against that decision as infringing fiscal neutrality.

9. The procedural history of Rank's claims has been long and tortuous, involving decisions of the VAT and Duties Tribunal (in 2008), the FTT, Upper Tribunal, Supreme Court and CJEU. The leading authority in relation to fiscal neutrality, both in the gambling sector and generally, is now *HMRC v The Rank Group plc* (Joined Cases C-259/10 and C-260/10) [2012] STC 420 ("*Rank CJEU*").

The Done Brothers Appeal

10. As explained above, prior to December 2005 supplies of gambling by means of FOBTs were exempt from VAT. In December 2005, the UK legislation was changed with the effect that such supplies became standard rated. Supplies of gambling by means of casino, online and electronic roulette machines continued to be exempt.

11. The effect of the 2005 change was that the supply of a game of (for example) roulette was exempt from VAT when played online, in a casino or on an electronic roulette machine, but standard rated when played on a FOBT. Although the decision in *Rank CJEU* was reached in 2011, it was not until January 2013 that the UK VAT legislation was amended to remove the different treatment of supplies of games on FOBTs. From that date, all supplies of gambling through FOBTs again became exempt from VAT.

12. The appeal before the FTT related to supplies of gambling by means of FOBTs for prescribed accounting periods between 6 December 2005 and 31 January 2013 ("the Done Brothers Claim Period"). Done Brothers claimed that during that period the difference in treatment of supplies of games through FOBTs offended against the principle of fiscal neutrality because those supplies were sufficiently similar to other supplies which were exempt.

The EU Principle of Fiscal Neutrality and its application to games of chance

13. The FTT dealt at length with the principle of fiscal neutrality, particularly in relation to supplies of gambling, in both decisions. HMRC do not argue that the FTT misunderstood or failed properly to describe the relevant principles. In both decisions, the FTT referred to paragraphs 43 to 44 of the decision in *Rank CJEU*, 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…"

14. The FTT summarised the guidance in *Rank CJEU* in both decisions. In the Rank Decision, it did so at paragraph 27 as follows:

> "27. The CJEU's guidance in *Rank CJEU* 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 machine."

The FTT Decisions

15. The FTT's conclusions in both decisions were that such differences as there were between the various comparator games in terms of their relevant characteristics did not have a significant influence on the decision of the average customer to use one machine or another. The games treated as liable to VAT in the two appeals were similar for the purposes of fiscal neutrality to the versions of those games played on other machines or by other means which were treated during the relevant claim periods as exempt for VAT purposes. The FTT concluded that these differences in

treatment breached the principle of fiscal neutrality, with the result that the taxpayers succeeded in their appeals.[1]

HMRC's appeal

16. HMRC was refused permission to appeal in respect of both decisions by the FTT and then by the Upper Tribunal (Judge Berner). Following an oral hearing, Judge Scott of this Tribunal granted permission to appeal both decisions on a single ground, namely that "the FTT had erred in law because it failed to identify the characteristics of the "average consumer" as it was required to do by the decision of the CJEU in *Rank CJEU* ".

17. Precisely what HMRC understood and intended by an alleged failure to identify the average consumer's "characteristics" has caused considerable confusion. It appears to have been understood by each of the FTT and Upper Tribunal in considering the applications for permission to appeal, and indeed by the Respondents, to have been a reference to the demographic characteristics of the typical consumer. This might encompass, for instance, gender, age, ethnicity, disposable income and so on.

18. There was no dispute between the parties that in determining the similarity of two supplies for the purposes of the fiscal neutrality test, it was necessary to do so by reference to the "needs" and "point of view" of the average consumer. Nor was there any dispute that in both decisions that is precisely what the FTT had attempted to do. So, it was natural in our view to assume that in referring to a failure to identify the average consumer's "characteristics", HMRC were alleging an error by the FTT other than a failure to identify the average consumer's needs or point of view.

19. Understood as a reference to characteristics of a demographic nature, this submission is essentially a "missing step" argument. As HMRC's skeleton argument put it, "it is axiomatic that the *needs* of the average consumer cannot be identified without first determining who the average or typical consumer *is*. This was a step which…the FTT simply missed". HMRC submitted that because of this missing step, the FTT's conclusions were "without foundation".

20. However, it became apparent in the course of the hearing and in response to our questions to Mr Peretz that this was not the error of law which HMRC were alleging. The sands of HMRC's argument had begun to shift in its skeleton argument. At various points, it referred to the onus on the FTT to identify "the needs and characteristics" of the average consumer and its failure to do so, and to the necessity first to identify "the needs, views and characteristics" of the average consumer. Further, the skeleton contained no assertion or discussion as to which "characteristics" of the average consumer in these appeals should have been considered and determined by the FTT.

[1] There was one minor exception in the Done Brothers Decision for certain "other games".

21. It became apparent that in fact HMRC were using the terms "needs", "point of view" and "characteristics" as if they were synonymous. Their real argument was not that the FTT should first have considered the demographic characteristics of the average consumer (as suggested by "who the average consumer *is*"). It was that the FTT had erred in the *way* in which it had determined the needs of the average consumer, because it had considered evidence which showed average behaviour, and based its analysis of similarity on that evidence, without also considering evidence as to the preferences and possible preferences of individual consumers.

22. HMRC's true position is illustrated by the following passage from its skeleton argument:

> "At [48] of its decision in *Rank*, for instance, the FTT considered the impact of stake and prize limits on the "decision of the average consumer" to play on section 16/21 or section 31/34 machines rather than on a FOBT. The FTT relied on evidence…that customers would play both types of machine. But that analysis simply assumed, without consideration, that the characteristics and needs of the "average consumer" did not include the placing of a larger stake that would have exceeded that which was possible on a section 16/21 or section 31/34 machine: the mere fact that the same customers would play both those machines and FOBTs did not rule out the possibility that the "average consumer" valued the opportunity, at times during a session, to place such larger bets—and that need could only be met by a FOBT.
>
> Similarly, at [63] of its decision in *Done Brothers*, the FTT considered the impact of stake and prize limits on the "decision of the average consumer" to play electronic roulette vis-à-vis FOBT roulette. The FTT relied on statistics to the effect that the amounts staked on each type of machine were broadly the same. But the analysis simply assumed, without consideration, that the characteristics and needs of the "average consumer" did not include the placing, at least at times, of a larger stake that would have exceeded that which was possible on a FOBT: the mere fact that the average amounts staked on both FOBTs and electronic roulette were similar did not rule out the possibility that the "average consumer", correctly defined, valued the opportunity, at times during a session, to place larger bets.
>
> Further, at [66] in *Done Brothers*, the FTT first concludes that "different customers liked to play at different speeds" (which would indicate that, generally, customers regarded speed as an important factor, but had different preferences in relation to speed) but then states that "some customers liked to play at different speeds" (which would indicate that only an unspecified proportion of customers regarded speed as an important factor). The FTT's account of whether the need, or point of view, of the average consumer included playing games at different speeds is therefore unclear."

23. In his closing reply, Mr Peretz set out HMRC's position (which he described as "the difference between the parties") as follows. In order to establish the average consumer's needs as required by *Rank CJEU*, the FTT cannot rely only on evidence as to the behaviour of average consumers, or even mainly on such evidence. Actual

behaviour is "inherently ambiguous", and what must be established are the consumers' actual reasons for making the choices they do. Actual use of a supply is "not determinative, and may not tell you anything useful" in applying the test of fiscal neutrality. Data as to use cannot tell us, for instance, whether individual consumers might occasionally value the opportunity to place a bet at different stakes on a comparator game of chance. The FTT erred in law in not understanding this and adopting this approach at the outset.

24. It is not for this Tribunal to articulate either party's case. However, it is unfortunate that HMRC expressed their ground of appeal by reference to a failure to identify the "characteristics" of the average consumer. We considered whether HMRC's argument as presented before us was within the scope of the permission to appeal which was granted. We have given HMRC the benefit of the doubt and considered their appeal on the basis set out in the preceding paragraph, and by reference to the examples set out in HMRC's skeleton argument. We are satisfied that Mr Peacock and Ms Sloane, being alive to the shifting sands, had sufficient opportunity to respond to the argument so framed, and, to their credit, they did not seek to persuade us otherwise.

Arguments of the parties

Issues not in dispute

25. It was common ground between the parties that the FTT had correctly identified the approach to the question of fiscal neutrality set out in *Rank CJEU*. So, the task before the FTT in each appeal was to determine whether the relevant supplies were sufficiently similar to supplies with a different VAT treatment during the relevant claim periods. That evaluation was to be carried out taking into account the needs and point of view of the average consumer. We see no material distinction for this purpose between the words "average" and "typical" or between the words "consumer" and "customer".

26. HMRC did not argue that the FTT had misdirected itself as to those features of the supplies being compared which should be taken into account and those which should be left out of account in carrying out this exercise, on the basis of the relevant CJEU case law.

27. Mr Peretz was adamant that HMRC were not seeking to challenge the FTT's findings of fact on a basis which fell within our jurisdiction in accordance with the principle in *Edwards v Bairstow* [1956] AC 14. Ms Sloane and Mr Peacock put to us that in substance HMRC's appeal was a disguised *Edwards v Bairstow* attack. We have some sympathy with Ms Sloane's and Mr Peacock's argument, but we have reached our decision on the basis of the sole ground for which HMRC was granted permission to appeal, interpreting that ground as articulated in the hearing by Mr Peretz, as we have explained above.

HMRC's submissions

28. HMRC's submissions as they developed in the hearing before us are summarised at paragraphs [22] to [24] above. In support of HMRC's "missing step" proposition, Mr Peretz referred us to the decisions of the CJEU in *Commission of the European Communities v French Republic* [2001] EUECJ C-481/98 ("*French Republic*"), *K Oy* [2014] EUECJ C-219/13 ("*K Oy*") and *FG Roders BV v Inspecteur der Invoerrechten en Accjinzen* [1995] EUECJ C-367/93 ("*FG Roders*").

Rank and Done Brothers' submissions

29. Mr Peacock and Ms Sloane made the following points:

(1) There is nothing in any of the authorities, including those cited by HMRC, to support HMRC's proposition.

(2) In substance, the appeal is a disguised attack on the factual evaluations carried out by the FTT. HMRC have no permission to appeal on an *Edwards v Bairstow* basis and have come nowhere near satisfying the requisite conditions for such a challenge.

(3) The authorities in relation to fiscal neutrality establish that what is necessary is for the court to establish the relevant objective characteristics of the two supplies which are asserted to be similar, and to establish whether from the point of view of the average consumer of those supplies the relevant differences in those characteristics are or are not a significant influence on that consumer's choice of supply. *Rank CJEU* establishes those objective characteristics likely to be relevant, without setting out an exhaustive list, and *Rank CJEU* and other case law establishes which extraneous factors should be left out of account. That is the approach which the FTT adopted and it was correct in law to do so.

(4) The argument now raised by HMRC was not advanced before the FTT, and that is why they did not deal with it. If it had been advanced, the parties could have produced additional evidence.

(5) The approach suggested by HMRC would risk losing focus on the needs of the average consumer. The best evidence of the needs of the average consumer is evidence of their actual behaviour. It is not apparent what reliable evidence could be obtained of the hypothetical possibilities posited by HMRC.

(6) The case law in the area of single composite supplies, while not binding in this area, indicates that HMRC's approach is not desirable.

(7) In any event, the FTT did not only rely on evidence as to average behaviour and preferences. It also had before it, particularly in the Done Brothers Decision, data as to actual behaviour and choices by individual consumers, and it took account of that data.

Discussion

The FTT's approach

30. Since HMRC's appeal is based on *how* the FTT determined the needs of the average consumer, we begin by considering the approach which it took to that question. Since the majority of the specific errors asserted by HMRC relate to the Done Brothers Decision, we begin with that decision.

31. The FTT set out its approach at paragraphs [40] to [49]. At [42] it stated as follows:

> "…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*."

32. The FTT received evidence from six witnesses for Done Brothers. The FTT found them all to be credible and fully accepted their evidence: [51]. HMRC produced some documents but no witness evidence. The decision records that in the absence of any evidence from HMRC to show that FOBT games were not regarded by the average consumer as similar to the comparator games, Mr Peretz (who also represented HMRC below) relied on cross-examination of the witnesses and forensic criticism of the physical evidence to submit that Done Brothers had failed to discharge the burden of proof as to similarity: [52].

33. The FTT then compared the different types of game and their comparator games by reference to the relevant characteristics it had identified. In each case it determined "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": [53].

34. In considering *how* the FTT dealt with this determination, an illustrative example is its approach to stakes in comparing FOBT roulette and comparator games of roulette. Its general focus was on whether any characteristic had a significant influence on the decision of the average consumer to play roulette in a particular form: [59]. In relation to stakes, the FTT recorded consistent evidence from several witnesses to the effect that in practice "only a very small proportion of bets staked online or on electronic roulette terminals were £100 or more", and that the average stake across all machines was £12.50 or less: [61]. The FTT had available and took into account not only documentary and witness evidence as to average stakes placed

by the average consumer, but also corroborating evidence of the stakes actually placed by individual customers, in data called a "bin distribution table": [61]. We were taken through this distribution data by Ms Sloane and Mr Peacock, and we accept both that it did show evidence of actual behaviour by individuals and that the results were consistent with the evidence given by the witnesses.

35. HMRC's challenge to this evidence before the FTT, which was consistent with similarity for the purposes of fiscal neutrality, was not made on the same basis as this appeal. Rather, it focused on what could be drawn or inferred from representations made by the gambling industry to the government proposal to reduce maximum stakes on FOBTs, and from regulations relating to the need for customers in some situations to have an account with the operator: [62]. The FTT found these points of no assistance, because it accepted Done Brothers' submission that it "should have regard to what customers actually did during the Claim Period". In determining the issue of whether the average consumer was influenced by available maximum stakes or prizes during the Claim Period, speculation as to what the position might have been or as to the potential impact of regulatory changes was not relevant. The FTT's approach to the evidence is set out clearly at [63], as follows:

> "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."

36. The FTT analysed the other relevant characteristics in broadly the same way, although we note that it did not have before it bin distribution data for most other elements.

37. Turning to the Rank Decision, the FTT set out the same general approach as that in the Done Brothers Decision, again recording that in the absence of any direct

evidence as to the needs of the average consumer, the FTT approached the question of significant influence on the consumer's decision as a question of fact to be evaluated "based on the evidence that was available to us": [32]. In the Rank appeal, as well as witnesses for Rank the FTT considered witness statements for HMRC: [35]. The FTT accepted the evidence of all the witnesses but afforded more weight to the views of the witnesses for Rank, on the basis that, as providers or operators of the relevant gaming machines, their views were more likely to reflect the average customer's experience and needs: [38]. In relation to the analysis of stakes, the FTT considered evidence both as to average stakes and the distribution of actual individual stakes: [43]. Having considered evidence and submissions from both parties, the FTT set out its conclusion on this feature of the games as follows, at [48]:

> "48. We find that the difference in upper limits for stakes and prizes did not have a significant influence on the decision of the average customer to play on one machine or another. We accept that higher stakes and prizes available on FOBTs compared to some other machines made the FOBTs more attractive to certain customers, namely those who wished to play for higher stakes, but they were a minority and not typical of customers."

38. In both decisions, the FTT conducted a detailed analysis of each relevant characteristic, on the evidence before it, in reaching its conclusions in favour of the taxpayers.

Did the FTT err in law in taking this approach?

39. HMRC say that the FTT erred in law in the evidence it relied on in reaching its conclusions. As Mr Peretz put HMRC's case, it was an error of law to determine the needs of the average consumer by reference to evidence of their actual behaviour, because what was necessary was to determine the real reasons for their decisions. In relying on data as to average behaviour, the FTT further erred because in establishing needs it was also necessary to establish the preferences and potential preferences of individual consumers, such as whether they might occasionally value the opportunity to bet at a higher stake than that permitted on a particular machine.

40. The CJEU authorities to which Mr Peretz referred us do nothing to advance HMRC's argument. *French Republic* concerned fiscal neutrality in relation to two categories of medicinal products. Mr Peretz relied on paragraph 66 of the Advocate General's opinion in that case, which refers to the fact that one of those categories carried the intrinsic advantage of a right of reimbursement under the social security system. In relation to HMRC's proposition it is nothing to the point. He referred to *K Oy*, which dealt with fiscal neutrality as between books published in paper and books published on other physical supports such as CDs and USB keys. That decision reiterates (at paragraph 31) that in assessing similarity, the court must use "the criterion of whether their use is comparable, in order to ascertain whether or not the differences between them have a significant or tangible influence on the average consumer's decision to choose one or other of those books". Nothing in that statement supports HMRC's assertion as to how that exercise must be performed. Mr Peretz also took us to paragraph 30 of the decision, but that deals only with the point that the

"average customer" may vary as between EU Member States. *FG Roders* in fact supports Mr Peacock's description of the relevant test, in that it makes clear that in addition to considering the "objective characteristics" of the supplies being compared, the court must also consider whether both supplies are capable of meeting the same needs from the point of view of consumers. That says nothing about how those tasks should be carried out.

41. There is no authority for the proposition put forward by HMRC that in assessing the needs of the average consumer the FTT *must* have before it and take into account evidence as to the "reasons" and possible preferences of individual consumers.

42. The assessment of the needs and point of view of the average consumer in any particular case is to be assessed by the fact-finding tribunal or court on the basis of all the relevant evidence. That is made clear in *Rank CJEU* at paragraph 56 of the decision:

> "… the determination whether games of chance which are taxed differently are similar, which it is for the national court to make in the light of the circumstances of the case (see, to that effect, Joined Cases C-443/04 and C-444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, paragraphs 42 and 45, and *Marks & Spencer*, paragraph 48), must be made from the point of view of the average consumer and take account of the relevant or significant evidence liable to have a considerable influence on his decision to play one game or the other.
>
> …
>
> 58 In the light of the foregoing considerations, the answer to the second question in Case C-260/10 is that, in order to assess whether, in the light of the principle of fiscal neutrality, two types of slot machine are similar and require the same treatment for VAT purposes it must be established whether the use of those types of machine is comparable from the point of view of the average consumer and meets the same needs of that consumer, and the matters to be taken into account in that connection are, inter alia, the minimum and maximum permitted stakes and prizes and the chances of winning."

43. This passage does not set out any prescribed methodology which must be adopted or evidence which must be available in making the necessary determination. If there *is* evidence available to the tribunal of actual behaviour by consumers, such as the bin distribution data in these appeals, then it is for the FTT to decide whether to admit it and, if so, what weight to give it. In these appeals, we consider that the FTT was right to admit that evidence, and it was open to the FTT to afford it the weight they did. However, there is absolutely no warrant in our view for a requirement that a determination of similarity in relation to fiscal neutrality can only validly be made on the basis of evidence as to (1) the average consumers' "real reasons" for behaving as they have, and (2) whether those consumers "might occasionally have valued the opportunity" to behave differently.

44. An illustration of the correct approach can be seen in the recent decision of the Court of Appeal in *LIFE Ltd v Revenue & Customs* [2020] EWCA Civ 452. The

Court rejected an argument by the taxpayer that the Upper Tribunal had not been entitled to reach a particular conclusion in its determination of fiscal neutrality in the absence of certain types of evidence. It stated, at paragraph 70 of the decision:

> "70. Counsel for LIFE submitted that this assessment was not open to the UT because there was no evidence to support it. There is no indication in any of the judgments of the CJEU in this field, however, that a national court requires evidence such as a consumer survey or expert report in order to determine whether services are regarded as similar by consumers for these purposes. While the case law does not rule out such evidence being admitted in cases of difficulty, it is clear that in most cases the national court is expected to make an assessment using its own experience of the world."

45. In both the Rank Decision and Done Brothers Decision, we consider that the FTT's approach to the determination of similarity was correct in principle on the basis of established CJEU case law, and that its conclusions were clearly ones which it was entitled to reach on the available evidence.

46. While that is sufficient to dispose of HMRC's appeals, we also accept the force of Mr Peacock's submission that in arguing their case before the FTT, HMRC did not rely on the ground raised in this appeal, and that, if they had, the evidence and the approach to it would be likely to have been different.

47. Since it may be relevant in the many other cases which are in practice standing behind this appeal, we should also record that we do not accept Mr Peretz's core submission that evidence of the actual behaviour of average consumers of the supplies being compared is inherently unreliable, since what matters is establishing the real reasons for their decisions. A tribunal tasked with determining the needs and point of view of average consumers is fully entitled to give the weight which it considers appropriate to the available evidence of actual behaviour. Since the determination of fiscal neutrality requires the tribunal to assess whether differences in the relevant characteristics of the compared supplies have a significant influence on the decisions made by average consumers of those supplies, evidence of the decisions which they have actually made in that regard (their actual behaviour) is undoubtedly relevant. As we have said, if in fact evidence is in any particular case available of the actual needs or point of view of consumers, then it is for the tribunal to determine what weight should be given to that evidence. The critical assessment in determining whether a differing VAT treatment between two supplies offends against the principle of fiscal neutrality is not an assessment of the needs of average consumers, let alone individual consumers. It is whether the two compared *supplies* are sufficiently similar, from the point of view of the average consumers and their needs. Although we place no weight on it in reaching our decision, we note that the case law in relation to fiscal neutrality in another context, namely whether a supply is a single composite supply, contains no support by analogy for the propositions put forward by HMRC: see, for instance, the CJEU's observations in *Mesto Zamberk v Financni reditelsvi v Hradci Kralove* Case C-18/12 [2014] STC 1703 at paragraph 32 of that decision.

Disposition

48. For the reasons given, we dismiss HMRC's appeals in both cases.

MR JUSTICE MANN
JUDGE THOMAS SCOTT

RELEASE DATE: 15 April 2020