

That's the gamble!

*A recent tax tribunal upheld a taxpayer's appeal in respect of remote gaming duty.
Liam McKay explains why*

In *L & L Europe Ltd v HMRC* [2024] UKFTT 00144 (TC), the First-tier Tribunal (FTT) allowed the taxpayer's appeal against HMRC's assessment of underdeclared Remote Gaming Duty (RGD), finding that cashback payments constituted prizes won, for the purposes of section 157, Finance Act 2014 (FA 2014).

Background

L & L Europe Ltd (Europe) operated online casinos providing the facility for customers to gamble by way of games simulating slot machines and live dealer games.

Whether the customer would win or lose was a matter of chance. To that end, Europe set a return to player (RTP) ratio for each game and, once set, the game would pay out according to the RTP, but not uniformly. Thus, over time and across players, if an RTP was set at 96%, then 96% of the payments made by customers would be paid out as prizes leaving a profit of 4%.

Europe treated all payments made to a customer on the outcome of each game as winnings whether or not the payment was greater or less than the payment to participate. All winnings were credited to the customer's 'cash wallet' and represented a real cost to Europe. Europe also operated 'cashback' payments, which were made to customers who, over a session, had lost all of the deposits they had made in that session. Customers in that situation were entitled to activate, and thereby claim, a cashback payment calculated as 10% of the lost deposits. No conditions were attached to the use of the cashback payment which, in real and economic terms, was cash belonging to the customer.

The right to cashback was an inherent feature of the game of chance offered by Europe, and customers participated on the basis that they may win a sum greater or less than the initial payment to participate, or in the event of losing they would have the right to activate and be paid a cashback amount. Cashback was offered as a way of giving customers a sense of satisfaction that they never had to walk away having lost everything and had the effect of ensuring every player was allocated a proportion of the RTP in a way that could not be achieved by varying the RTP itself. HMRC initiated a project under which it examined incentives offered by operators registered for RGD in the UK under Part 3, Chapter 3, FA 2014. As part of this project, HMRC sent Europe an enquiry letter regarding the incentives it offered and a breakdown of the calculation of RGD in respect of two RGD returns rendered by Europe.

In correspondence with HMRC, Europe explained the nature of the cashback payments. Europe considered it was entitled to deduct the payment from the RGD profits calculation under section 157, FA 2014, on the basis that they met the definition of a 'prize' in section 160, FA 2014. HMRC determined the cashback payments were not deductible because the payments were made to losing players and they could not be said to have been 'won' by such players, and the payments were not expenditure on prizes for the purposes of the profits calculation. HMRC also considered the payments were too far removed from the original gaming payment to properly be considered a return of such gaming payments. HMRC therefore assessed Europe to under declared RGD in the sum of £807,284, which was upheld following an internal review. Europe appealed to the FTT.

FTT decision

The appeal was allowed.

The FTT accepted Europe's primary position that the cashback payment was a prize won by the customer for the purposes of section 157, FA 2014. The FTT held that the correct interpretation of 'prize won' was any sum paid out directly as a consequence of the inherent features of the game of chance contractually offered and delivered by the provider whether that be by way of cashback or RTP. The FTT considered that such an interpretation was consistent with both the purpose of the tax and the context of the language used.

In that regard, the FTT was of the view that cashback was an inherent feature of the gaming offered by Europe, and customers made a gaming payment knowing they might win a sum greater or less than the amount staked on a spin but, in the event that they lost, they would be entitled to activate their cashback and receive 10% of their lost deposits. The FTT considered that the cashback outcome could not be anything other than a potential to be paid 10p in every £1 deposited, staked and lost in a game of chance, such that there was no relevant difference between 10p won immediately as a consequence of the spin, 10p as part of an accumulated series of games and 10p cashback. Each outcome simply depended on a different potential outcome or chance in the game.

Although not necessary given this finding, the FTT went on to consider Europe's alternative contention that the cashback payment was a return of part of the money wagered by the customer and thereby deemed to be a prize won by virtue of section 160(3), FA 2014. The FTT determined that the only coherent reading of section 160(3), within the context and purpose of RGD, was that it provided a mechanism of ensuring that RGD was charged on the real-world difference between gaming receipts and sums paid out to customers as an inherent part of gaming.

Accordingly, if there was a restricted interpretation of 'prizes won' for the purposes of section 157(2), FA 2014, it was deliberately expanded through the deeming in section 160(3) to include any amount of the gaming payment returned to the customer under the contract for gaming. Thus, if a prize less than the stake was not

a 'prize won' in a pure sense, in the view of the FTT, it should be treated as such by section 160(3) and similarly for a cashback, which represented a real cost to Europe that was contractually and economically the return of part of a gaming payment from the customer.

Comment

RGD is often considered a somewhat niche area of taxation and, unsurprisingly, the tax tribunals and courts have not been called on to consider the relevant legislative provisions on many occasions. The FTT's decision will therefore provide some helpful clarity to operators in the gaming industry in relation to the correct interpretation of those provisions.

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