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Case No: CO/4813/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2015

Before: **Mr Justice Charles**

Between :

THE QUEEN (on the application of)
THE GIBRALTAR BETTING AND GAMING ASSOCIATION LIMITED

Claimant

-and

(1) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
(2) HER MAJESTY'S TREASURY

Defendants

(1) HER MAJESTY'S GOVERNMENT OF GIBRALTAR

Interested Party

Dinah Rose QC, Brian Kennelly and Jessica Boyd (instructed by **Olswang LLP**) for the **Claimant**
Kieron Beal QC, Sarah Wilkinson and Oliver Jones (instructed by **HMRC legal**) for the **Defendants**
Lord Pannick QC and Ravi Mehta (instructed by **Mishcon de Reya**) for the **Interested Party**

Hearing dates: 23 to 25 March and 1 May 2015

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Charles J :

Introduction to the issues

1. The Finance Act 2014 introduced a new tax regime relating to remote gambling (the New Tax Regime). It did so by Part 3 and Schedules 28 and 29. The New Tax Regime takes effect without prejudice to, or subject to, directly enforceable EU law rights of nationals of any member state of the EU (see, for example, the speech of Lord Nolan in *ICI v Colmer (Inspector of Taxes) No 2* [1999] 1 WLR 2035 at 2041 A/G).

2. The Claimant is a trade association whose members are primarily Gibraltar- based gambling operators who provide remote gambling services to customers in the UK. It argues that the New Tax Regime is incompatible with Article 56 of the Treaty on the Functioning of the European Union (the TFEU) which provides that:

> Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person to whom the services are intended.
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provides services and who are established within the Union.

3. This is a fundamental right.

4. The Defendants (who I shall refer to as the Revenue) advance a number of arguments to support their position that this claim for judicial review should be dismissed. These include arguments to the effect that:

   i) the court should not entertain the claim because (a) there is an alternative remedy, and (b) the Claimant cannot seek to override the UK legislation because it has no directly effective EU law rights,

   ii) the Claimant's members have no enforceable EU law right and so the substantive points of law relating to the application of Article 56 to the New Tax Regime do not arise for consideration in these proceedings, and

   iii) if I was to find or assume that for the purposes of Article 56 Gibraltar is to be treated as a Member State and for that, or other reasons, the Claimant or its members have directly enforceable EU rights, those rights are not engaged.

5. I shall refer to these three strands of the Revenue's arguments as giving rise to (i) the preliminary issues, (ii) the constitutional issues and (iii) the Article 56 issues. I acknowledge that these are shorthand and inaccurate descriptions. In my view, all of the preliminary issues fail and I shall deal with them at the end of this judgment.

6. The constitutional issues and the Article 56 issues both raise points of European Law and provide alternate routes to success for the Revenue. To succeed the Claimant has to win on both the constitutional and the Article 56 issues. So a decision on this

judicial review could be based on an assumption in favour of the Claimant on the constitutional issues.

7. On the final day of the hearing the Claimant and the Interested Party (Gibraltar) submitted that I should refer both issues to the CJEU. The Revenue argued that I need not do so. Unsurprisingly there was common ground on the approach I should take to the determination of that dispute.

8. The making of references to the CJEU is covered by Article 267 TFEU. The CJEU has published Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01). These provide at paragraph 13 that:

> a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law, or where the existing case-law does not appear to be applicable to a new set of facts.

9. Guidance in relation to the exercise of that discretion was set out by Sir Thomas Bingham MR in R v International Stock Exchange ex p. Else [1993] QB 534 at 545. These principles were applied in Professional Contractors' Group v IRC [2002] STC 165, CA at paragraph 91 and recently in R (McCarthy) v Secretary of State for the Home Department [2012] EWHC 3368 (Admin) at paragraphs 109-111. In Dr Reddy's Laboratories (UK) Ltd v Warner Lambert Co [2012] EWHC 1791 (Pat) Roth J said:

> (4) A reference may be made at any stage of the proceedings: CPR 68.2(1) . Although it is often desirable for the court first to find the facts if they are not agreed, this is not necessarily the case: a reference may be made on assumed facts…
>
> (5) In exercising its discretion as to when to make a reference, the national court can take into account considerations of procedural organisation and efficiency, including whether significant trial cost would be avoided…
>
> (6) A reference should include all questions on which a ruling of the ECJ is required. It causes substantial additional delay and expense if the national court should have to make a further reference in the same case.
>
> (7) Accordingly, if a reference is to be made at a preliminary stage, the court must have confidence that the factual situation can be sufficiently defined and that all the relevant legal issues have crystallised such that the questions on which a ruling of the ECJ is necessary can be framed with precision

10. So the making of a reference is a matter of discretion and I must first be satisfied that answers to the questions are "necessary" for this court to give judgment on the issues in these proceedings. I should also be satisfied that the facts are sufficiently defined. First instance courts and tribunals can and often have made a reference.

11. In this case a relevant factor is the high probability that at some stage an English court will have to make a reference and in those circumstances the heavy case load of the CJEU points towards the making of a reference so that it joins the queue as soon as possible.

12. The high probability of a reference also points towards the making a reference on all the European law issues that arise in this case to avoid a further reference. In this context the constitutional issues provide the Revenue with a knock-out blow and so it seems to me highly likely, if not inevitable, that (a) the Revenue will always want to include them as an alternative even if it was to win on the Article 56 issues and (b) Gibraltar will want to be heard on them.

13. The Article 56 issues are potentially relevant to other questions of taxation and potentially of general importance, not only to the United Kingdom but also to other Member States, and to businesses and consumers throughout the EU. A reference to the CJEU would enable other States and the Commission to intervene and make submissions.

14. The constitutional issues are a matter of considerable constitutional importance for Gibraltar which has now arisen in a number of cases.

15. I have decided that I should refer both the constitutional and the Article 56 issues.

16. There has not been any oral evidence and any factual disputes are essentially ones of interpretation of published material. No factual disputes have been defined but if some emerge and are defined in the formulation of the questions to be put to the CJEU I will address them.

The Constitutional Issues

17. Gibraltar intervened to raise these issues. They are dealt with obiter by Green J in *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture Media and Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28 at paragraphs 221 to 260 (the First Judicial Review).

18. The First Judicial Review was directed to the new licensing and regulatory regime concerning remote gambling (the New Regulatory Framework) which is an important part of the background to the New Tax Regime. In short, and for present purposes, that framework requires companies registered in Gibraltar (and anywhere else including the UK) to obtain a licence if they want to engage in the business of providing remote gaming services to consumers in the UK. It was accepted that the New Regulatory Framework engaged Article 56.

19. The determinative issues in the First Judicial Review therefore related to justification of a national measure that it was common ground engaged Article 56. Green J dismissed the claim on the basis that the New Regulatory Framework was justified under EU law as it had a legitimate aim and was not disproportionate or discriminatory. Accordingly, he did not have to decide the constitutional issues or any issues dependent on his conclusion on them.

20. It is common ground that Gibraltar is not a Member State and the constitutional issue is whether and how Article 56 applies to nationals of (and so companies incorporated in) Gibraltar. The parties were broadly represented by the same legal teams in the First Judicial Review and none of them advance the obiter conclusion of Green J as their primary case before me. This is unsurprising because it does not represent the best result from their respective standpoints. Three choices were identified:

i) Gibraltar and the UK are parts of a single Member State for the purposes of EU law and so Article 56 does not apply, save to the extent that it can apply to an internal measure, (the Revenue's primary position and the fall back position of Gibraltar and the Claimant),

ii) Gibraltar is to be treated as a Member State for the purposes of Article 56 or as a separate territory with the effect that trade between Gibraltar and the UK is to be treated as intra-EU trade between Member States (the primary position of Gibraltar and the Claimant), and

iii) Gibraltar is a third country or territory with the effect that EU law is only engaged in respect of trade between the two in circumstances where EU law has effect between a Member State and a non-Member State (the obiter conclusion reached by Green J and the fall-back position of the Revenue).

21. On conclusions (i) and (iii), for Article 56 to be engaged at least a possibility has to exist that the relevant restriction on the provision of services exerts collateral or incidental effects upon trade with another Member State. This was addressed by Green J in the First Judicial Review.

22. Conclusion (iii) gives rise to the additional issue whether a company established outside the EU (and so in a third country or territory) can rely on EU law to avoid the impact of UK legislation. This issue was not addressed by Green J. In reliance on *Colmer (No 2)*, and the cases referred to in it, the Revenue submits that it could not. This was not challenged and, as the Revenue surmised, this may well be the reason why Gibraltar and the Claimant did not adopt the conclusion on the constitutional issue reached by Green J.

23. Green J concluded that the constitutional issues are par excellence issues for the CJEU. I agree. I do not see how it can be said that the answer is clear enough for me either:

i) to find in favour of any of the primary arguments put to me and therefore reject the obiter conclusion of Green J, or

ii) to depart from his view on the appropriateness of a reference.

24. The written and oral arguments indicate that it should be possible for the parties to agree the questions and relevant factual background on the constitutional issues and put them to me either for approval or for resolution of any disagreement on their content.

The Article 56 Issues

25. It would be possible to determine this judicial review on the assumption that the Claimant and Gibraltar are right on the constitutional issues and so on the hypothesis that as they assert (and the Revenue deny) the Article 56 issues arise and are determinative. This would accord with the approach taken by Green J in the First Judicial Review.

26. Gibraltar did not advance additional arguments to those advanced by the Claimant on the Article 56 issues and so in this context my references to the parties exclude Gibraltar.

27. *The arguments.* The Revenue's primary argument is that the relevant taxes imposed by the New Tax Regime do not engage Article 56 because:

    i) the taxes are internal (domestic) taxes, and

    ii) the taxes do not have a discriminatory impact.

    The Revenue accepts that for its primary argument to succeed it must be right on both points.

28. The first point turns on the nature and impact of the tax. It is a categorisation or characterisation point. The parties applied definitions in the OECD Glossary of Tax terms.

29. In argument, distinctions were made between a point of consumption (POC) tax and a point of supply (POS) tax. The Revenue argues that the new taxes are POC taxes.

30. In the alternative, the Revenue argues that if the New Tax Regime is an internal (domestic) tax but is discriminatory, it is justifiable.

31. The Claimant argues that Article 56 is engaged because the New Tax Regime is a national measure that is "*liable to hinder or make less attractive*" the exercise of the fundamental freedom it provides. Within its arguments it asserts:

    i) the taxes imposed by the New Tax Regime on its members are not internal (domestic) taxes and are POS taxes on the gross profits of the providers of gambling services,

    ii) the taxes are not restricted to consumption taking place in the UK because the customer (the chargeable person under the New Tax Regime) may not be in the UK at the time of the transaction,

    iii) it is discriminatory because it subjects the members of the Claimant to double taxation effects,

    iv) it is discriminatory because it creates differential treatment in respect of spread-betting operators and with regard to betting exchanges, and

    v) no valid basis for its justification exists. (It does not argue in the alternative that if an available justification exists it cannot be relied on because, for example, the measures taken are not proportionate.)

32. The Claimant's point (i) is or is to the effect that the taxes imposed under the New Tax Regime are restrictions within Article 56.

33. In reaching their different assertions on the Article 56 issues the parties rely on:

i) their respective analyses of the legislation that imposes the New Tax Regime, and

ii) their respective interpretation and application of a number of the same decisions of the CJEU and they both refer to opinions of Advocate Generals Kokott and Sharpston.

Initially both the Claimant and the Revenue asserted that the answers they advance on these issues of EU law are clear and so no reference on them was necessary or appropriate. But, as I have mentioned, the Claimant changed its position on this.

34. *The starting point for the arguments.* The nature and effect and so the classification or characterisation of the taxes imposed under the New Tax Regime is a fundamental starting point. It seems to me that an analysis of what the taxes are and how they work is of central importance and that any labelling is only convenient shorthand.

35. The Revenue argued that this was a national law rather than a European law issue. For many purposes I would agree, but for present purposes it seems to me that this fundamental starting point relates to the application and impact of Article 56 and so it falls to be determined by European law.

The New Tax Regime

36. It applies to General Betting Duty, Pool Betting Duty and Remote Gaming Duty. The representative provisions for present purposes relate to Remote Gaming Duty and include the following:

CHAPTER 3 REMOTE GAMING DUTY

154 Remote gaming

(1) For the purposes of this Part "remote gaming" is gaming in which persons participate by the use of—

(a) the internet,

(b) telephone,

(c) television,

(d) radio, or

(e) any other kind of electronic or other technology for facilitating communication.

(2) Remote gaming is "pooled prize gaming" for the purposes of this Part if all or any part of the gaming payment is assigned by or on behalf of the gaming provider to a fund (referred to in this Part as a "gaming prize fund") from which prizes are to be provided to participants in the gaming.

(3) Remote gaming is "ordinary gaming" for the purposes of this Part if it is not pooled prize gaming.

(4) The Treasury may by regulations—

(a) amend the definition of "remote gaming" in subsection (1), and

(b) make such consequential amendments of section 17(2A) of BGDA 1981 (cases in which bingo duty is not charged on bingo played by means of remote communication) as appear to the Treasury to be necessary.

(5) Nothing in subsection (4)(b) affects the generality of section 194(1).

155 Remote gaming duty

(1) A duty of excise, to be known as remote gaming duty, is charged on a chargeable person's participation in remote gaming under arrangements (whether or not enforceable) between the chargeable person and another person (referred to in this Part as a "gaming provider").

(2) In this Part "chargeable person" means—

(a) any UK person, and

(b) any body corporate not legally constituted in the United Kingdom if the person with whom the arrangements mentioned in subsection (1) are made knows, or has reasonable cause to believe, that at least one potential beneficiary of any prizes from remote gaming under the arrangements is a UK person.

(3) Remote gaming duty is chargeable at the rate of 15% of the gaming provider's profits on remote gaming for an accounting period.

(4) The gaming provider's profits on remote gaming for an accounting period are the aggregate of—

(a) the amount of the provider's profits for the period in respect of pooled prize gaming (calculated in accordance with section 156),

(b) the amount of the provider's profits for the period in respect of ordinary gaming (calculated in accordance with section 157), and

(c) the amount of the provider's profits for the period in respect of retained prizes (calculated in accordance with section 158).

(5) Where the calculation for an accounting period under subsection (4) produces a negative amount—

(a) the gaming provider's profits on remote gaming for the accounting period are treated as nil, and

(b) the amount produced by the calculation may be carried forward in reduction of the gaming provider's profits on remote gaming for one or more later accounting periods.

156 Profits on pooled prize gaming

(1) Take the following steps to calculate the amount of a gaming provider's profits for an accounting period in respect of pooled prize gaming.

Step 1

Take the aggregate of the relevant gaming payments made to the provider in the accounting period and deduct the aggregate of any of those payments that are assigned by or on behalf of the provider to gaming prize funds during the period.

Step 2

If in the accounting period any amount contained in a gaming prize fund to which relevant gaming payments have been assigned by or on behalf of the provider is used otherwise than to provide prizes to participators in pooled prize gaming, multiply each amount so used in the accounting period by the relevant proportion that applies in relation to it.

Step 3

Add the aggregate of the amounts calculated under Step 2 to the amount calculated under Step 1.

Step 4

If in the accounting period any top-up payment is assigned to a gaming prize fund by the gaming provider, multiply the amount of each top-up payment so assigned in the accounting period by the appropriate proportion that applies in relation to it.

Step 5

Subtract the aggregate of the amounts calculated under Step 4 from the amount calculated under Step 3.

(2) For the purposes of Step 2 the relevant proportion, in relation to any amount which is used otherwise than to provide prizes, is—

(a) if the amount relates to a specific game of chance, the proportion of that amount that consists of relevant gaming payments made to the provider in respect of that game,

(b) if the amount does not relate to a specific game of chance but relates to amounts assigned to the fund during a specific period, the proportion of that amount that consists of relevant gaming payments assigned to the fund by or on behalf of the provider during that period, and

(c) in any other case, the proportion of the total amount contained in the fund immediately before the amount is so used which consists of relevant gaming payments assigned to the fund by or on behalf of the provider.

(3) For the purposes of Step 4—

(a) a top-up payment is assigned to a gaming prize fund if the gaming provider assigns an amount (other than a gaming payment) to the fund to satisfy a guarantee given by the gaming provider that prizes of a specified minimum amount will be available in respect of gaming under arrangements made with the provider, and

(b) the appropriate proportion, in relation to such a top-up payment, is the proportion determined in accordance with a notice published by the Commissioners.

(4) A notice under subsection (3)(b) may provide for top-up payments to be ignored for the purposes of Step 4 in a specified case or class of cases.

(5) In this section "relevant gaming payment" means a gaming payment in respect of pooled prize gaming.

157 Profits on ordinary gaming

(1) To calculate the amount of a gaming provider's profits for an accounting period in respect of ordinary gaming—

(a) take the aggregate of the gaming payments made to the provider in the accounting period in respect of ordinary gaming, and

(b) subtract the amount of the provider's expenditure for the period on prizes in respect of such gaming.

(2) The amount of the gaming provider's expenditure on prizes for an accounting period in respect of ordinary gaming is the aggregate of the value of prizes provided by or on behalf of the provider in that period which have been won (at any time) by chargeable persons participating in ordinary gaming.

158 Profits on retained prizes

(1) The amount of a gaming provider's profits for an accounting period in respect of retained prizes is the aggregate of the amounts which cease to be qualifying amounts during the accounting period.

(2) An amount is a qualifying amount for the purposes of this section if, as a result of a person ("P") being notified as mentioned in section 160(1), it has been taken into account in calculating the provider's profits for any accounting period under section 156 or 157.

(3) An amount ceases to be a qualifying amount for the purposes of this section if, otherwise than by virtue of being withdrawn by P as mentioned in section 160(1), P ceases to be entitled to withdraw it.

(4) The Commissioners may by notice published by them direct that subsection (3) is not to apply in a specified case or class of cases.

162 Liability to pay

(1) A gaming provider is liable for any remote gaming duty charged on the provider's profits on remote gaming for an accounting period.

(2) If the gaming provider is a body corporate, the provider and the provider's directors are jointly and severally liable for any remote gaming duty charged on the provider's profits on remote gaming for an accounting period.

(3) Remote gaming duty which is charged on the gaming provider's profits on remote gaming for an accounting period may be recovered from the holder of a remote operating licence for the business in the course of which the gaming took place as if the holder of the licence and the provider were jointly and severally liable to pay the duty.

165 Accounting period

(1) For the purposes of this Part—

(a) a period of 3 consecutive months is an accounting period, but

(b) the Commissioners may by regulations provide for some other period specified in, or determined in accordance with, the regulations to be an accounting period.

(2) The first day of an accounting period is such day as the Commissioners may direct.

(3) The Commissioners may agree with a person to make either or both of the following changes for the purposes of that person's liability to general betting duty, pool betting duty or remote gaming duty—

(a) to treat specified periods (whether longer or shorter than 3 months) as accounting periods;

(b) to begin accounting periods on days other than those applying by virtue of subsection (2).

(4) The Commissioners may by direction make transitional arrangements for periods (whether of 3 months or otherwise) to be treated as accounting periods where—

(a) a person becomes or ceases to be registered, or

(b) an agreement under subsection (3) begins or ends.

(5) A direction under this section—

(a) may apply generally or only to a particular case or class of case, and

(b) must be published unless it applies only to a particular case.

186 UK person
(1) In this Part "UK person" means—

(a) an individual who usually lives in the United Kingdom, or

(b) a body corporate which is legally constituted in the United Kingdom.

(2) The Treasury may by regulations—

(a) amend the definition of "UK person" in subsection (1),

(b) make provision as to the cases in which a person is, or is not, a UK person for the purposes of this Part, and

(c) make provision about bets made, and arrangements to participate in remote gaming entered into, by bodies of persons unincorporate.

(3) The Commissioners may by notice published by them—

(a) specify steps that must be taken in order to determine whether a person making a bet or entering into arrangements to participate in remote gaming is a UK person,

(b) specify who must take those steps,

(c) specify circumstances in which a person making a bet or entering into arrangements to participate in remote gaming is to be treated as a UK person because of a failure to produce sufficient evidence to the contrary, and

(d) specify circumstances in which a person making a bet or entering into arrangements to participate in remote gaming is to be treated as not being a UK person on the basis of evidence of a description specified in the notice.

37. In broad outline, prior to the change introduced by the New Tax Regime, the relevant UK tax law had the general effects that:

i) providers of remote gambling services established in the UK paid tax in the UK on their gross profits (as defined) derived from remote gambling services to customers wherever they lived and so their worldwide remote gambling services at a rate of 15%. It was common ground before me that this could correctly be described a POS tax,

ii) providers of remote gambling services established in Gibraltar paid no tax in the UK on the remote gambling services they provided to and which were consumed by persons in the UK, and

iii) providers of remote gambling established in Gibraltar paid tax in Gibraltar on their remote gambling services worldwide (a) at a rate of 1% of turnover in respect of online fixed-odds betting and betting exchanges, and (b) at a rate of 1% of gross profit or gaming yield (as defined) in respect of online casinos (subject to an annual minimum and maximum payment). Again it was common ground before me that this could correctly be described as a POS tax.

38. After the introduction of the New Tax Regime:

i) the position in Gibraltar remains the same, but

ii) a duty (remote gaming duty) is charged on a chargeable person's (as defined) participation in remote gaming with the providers of remote gambling services whether they are established in the UK, in Gibraltar or elsewhere in the world (the gaming provider),

iii) the rate of that tax in the UK is 15% on the gaming provider's profits (as defined) for the relevant period,

iv) the tax is payable by the gaming providers, and as I understand it such payment is a condition of maintenance of their licence to provide the services, and

v) the providers of remote gambling services established in the UK no longer pay any other gambling duty on those services in the UK.

39. In my view:

i) the New Tax Regime applies in an indistinctly applicable manner to gambling operators established anywhere in the world,

ii) it applies equally to operators established in the UK as it does to those established in other EU Member States, or indeed the rest of the world, on the basis of the common feature for all of them is that in order to be subject to remote gambling duties, they have to supply relevant gambling services to UK persons (as defined), and

iii) the effect of the common feature mentioned in sub-paragraph (ii) is that each supplier of remote gambling services, wherever it is established, is liable to pay the tax charged on the supply of those services to UK persons (as defined) - and so the UK remote gambling market (so defined) - and, in that sense, the New Tax Regime can be said to create a "level playing field" between all of those suppliers in that market.

40. At least 55% of the remote gambling services provided to UK based customers is provided by companies based in Gibraltar and the evidence indicates that approaching 90% of the economic activity by UK based customers in the UK remote gambling market did not bear any excise duty for the UK exchequer. Accordingly, it is clear

that a main purpose of the New Tax Regime is to change this and to give the result that the providers of remote gambling services to UK customers wherever those providers are based should pay tax on this economic activity with their UK based customers.

41. Under the New Tax Regime a combination of the statutory definition and the Revenue's Guidance has the effect that a chargeable person is any person who normally lives in the UK and any body corporate registered in the UK. The Guidance sets out factors to be taken into account in identifying and determining who normally lives in the UK. Also, s. 155(2)(b) and the Guidance provide that UK persons cannot hide behind a corporation that is incorporated outside the UK.

42. Initially it was proposed that the definition of UK person would be based on where the person was when the transaction was entered into. This was changed after consultation with amongst others, the Claimant, to meet stakeholder concerns.

43. In its Addendum to Information Note No 1 the Revenue has set out a way to determine whether the person in question is a UK Person. If the person declares that they do not live in the UK this is verified against a series of indicators. The indicators in question (such as the address on a driving licence and the billing address for a credit card) are of a type that correlates with more than a transitory presence in the UK. The requirement for two to be met is designed to be a further safeguard that the net is not cast unnecessarily widely.

44. To be a chargeable person, the UK person or beneficiary who is a UK person does not have to be in the UK at the time the relevant remote gaming arrangements are entered into. So, the chargeable event is not limited to an arrangement with a person or corporate body in the UK at the time it takes place, but a significant amount of the relevant arrangements will be with such persons.

45. The Claimant has asserted that a UK person (as defined) may also satisfy two or more requirements showing residence in a different Member State. But it has not adduced any evidence to suggest that other Member States would treat a UK person in any given circumstance as being a customer in that Member State.

46. The Revenue also point out that it can reconsider the guidance from time to time.

47. Under the New Tax Regime, the UK exchequer no longer charges and receives tax on the remote gambling services provided by UK based companies to customers based outside the UK (applying the definitions and guidance). But it is apparent that under the New Tax Regime the UK exchequer will obtain a substantial increase in tax receipts from remote gambling.

48. It is also apparent that the providers of remote gambling services based in Gibraltar:

    i) will no longer be able to provide such services to UK persons (as defined) and so to the UK remote gambling market (so defined) free of UK tax,

    ii) will incur additional expense in complying with the New Tax Regime and the New Regulatory Framework,

iii) will, until a double taxation arrangement is put in place or Gibraltar changes its tax regime, pay tax in both the UK and Gibraltar on the same business activity with UK persons (as defined).

49. The Revenue argues that these results flow from the fiscal sovereignty of the UK (and Gibraltar) in respect of an internal (domestic) taxation regime that is non-discriminatory.

50. Counsel for the Revenue referred to the tax payable in the UK under the New Tax Regime as a tax on net stakes charged on a POC basis.

51. The Claimant maintained that the tax remained a tax on the profits of the supplier charged on a POS basis.

52. Unsurprisingly, it is arguable that each of those respective lines of submission fit with the results of the New Tax Regime.

53. This is because its effect is to charge tax on a defined part of the receipts of a provider less a defined part of the outgoings of the provider. The definition and so the assessment of that part of the profits relates to the source of the business, namely in broad terms the UK market.

54. Before the New Tax Regime came into effect those receipts and outgoings were taken into account in determining the profit of the provider but in its books and records they would not have to have been so identified. Since the introduction of the New Tax Regime that part of its income and outgoings does have to be identified and so isolated from other receipts and outgoings of the provider. The result of that identification could as such be taken forward into a calculation of the provider's profit from all of its activities. But, in any event and by definition, that result is identified and quantified without reference to any administrative or other expenses (e.g. rent and wages) or the 15% tax payable on that sum (i.e. on the difference between the defined receipts and the defined outgoings).

55. So the essential change and the essential effect of remote gaming duty is that it identifies and charges tax on a defined net return from an identified market and that market and that return are defined in the same way for all the providers of gambling services to that market.

56. It follows that both the difficulties in and the administrative needs for applying those definitions to identify the tax payable apply uniformly to all the providers in that market wherever they are based.

57. Thus the essential question on the categorisation or characterisation question is whether in the application of Article 56 and the authorities and opinions relied such a tax is:

i) an internal (domestic) tax because of its connection with an internal (domestic) market and so can be correctly and conveniently labelled a POC tax as the Revenue assert,

ii) an external tax on a part of the income (which is then taken into account in determining the profit or loss from all sources) of the provider and so can be correctly and conveniently labelled a POS tax as the Claimant asserts.

58. *The Revenue's argument by analogy to VAT.* The New Tax Regime is not directed to a tax that is harmonised but the Revenue points to changes made by the EU to VAT to show that:

i) an equivalent change from a POS regime to a POC regime was made to that tax for fiscal reasons, and

ii) a POC tax, and thus one directed at the economic activity at the point and place of consumption rather than its supply, is or includes a tax that is collected from, and assessed by reference to accounting periods of, the supplier of the goods or services.

59. As its name indicates VAT is a tax on added value. It is a tax based on turnover, it is levied on individual transactions, it is paid by the customer (who may or may or not be a VAT taxable person) to the supplier and, after making allowable deductions, the supplier accounts for it on an aggregate basis to the relevant exchequer. So it is a tax concerned with the consumption by the (or each) consumer of the goods or services in question.

60. Initially it was taxed under a POS regime and so:

i) the relevant supply (or taxable economic activity) was treated as taking place where the supplier was established, and

ii) the exchequer that received the VAT as part of its overall tax revenues was that of the state where the supplier was established.

61. The approach to the changes is shown by paragraph 3 of a Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee Review entitled "Review and update of VAT strategy priorities" dated 20 October 2003 (COM(2003)614 final). It is also reflected in the recitals of Directive 2008/8/EC. The changes were rolled out in stages initially to business to business supplies, and later to defined types of electronically supplied services from providers outside the EU. From 1 January 2015, Article 5 of Directive 2008/8/EC has made the place of supply for all electronically supplied services (regardless of where the supplier is located) the place where the consumer "is established, has his permanent address or usually resides" subject to "effective use and enjoyment" provisions in Article 59a.

62. The effect of the change is that:

i) the rate of VAT on a supply of such services by suppliers based in the UK and in other Member States is set by the UK, because this is the place where the new regime provides that the supply (or relevant economic activity) takes place, and

ii) the suppliers based in the UK and in other Member States will file VAT returns quarterly and, pursuant to arrangements made, will end up accounting to HMRC for VAT on such supplies and so such consumption of services by customers based in the UK.

63. The New Tax Regime works in the same way although the tax is calculated differently in that it is a tax on profits as defined (and so net stakes from a defined market) rather than turnover (gross receipts) less set offs of recoverable VAT (input tax).

64. I agree with the Revenue that this comparison supports the view that:

i) Member States can by their tax legislation charge tax such as VAT or tax on remote gambling services and thus tax an economic activity relating to the supply of goods or services which takes place or can be said to take place in two states by reference to the place where the supplier or the consumer is established,

ii) subject to other restrictions, it is open to the UK to charge tax on the supply of remote gaming on a POC basis, and

iii) such a tax regime, and so the New Tax Regime, is a POC tax regime on the supply of such services by reference to where they are consumed or taken up and not a tax on the profits of the suppliers akin to corporation tax or income tax.

65. *The Claimant's arguments.* It argues that the analogy with VAT is misplaced or points towards the opposite conclusion.

66. General points are that VAT is a harmonised tax and so:

i) the analogy with VAT falls on this basis, and

ii) this difference points in favour of a conclusion that absent harmonisation it would be recognised that the changes to VAT would or could hinder the free movement of services within the Union. In this context, the Claimant referred to and relied on Recital 4 of the Principal VAT Directive (Directive 2006/112/EC).

67. It also argues that the Revenue's analysis that the effect of the New Tax Regime is to tax the consumption of gambling services is incorrect and that its effect is to tax the supply of services.

68. In particular, it pointed out that:

i) the tax was not referable to or charged on each individual arrangement (and so not like a penny on a pint or VAT), that for an accounting period or an event like the Cheltenham Festival or the Grand National no tax may be payable because the supplier (the provider of the gambling services) paid out more than it took in from arrangements during that period or for that event,

ii) the tax was unlike the old gambling duty which was based on a percentage of total stakes and so a certain percentage of each sum placed by a customer,

iii) the tax payable does not have a necessary relationship to the amount or value of the services consumed by a (or each) customer but relates to the supplier's aggregate net receipts for a defined class of customers over a specified accounting period, and

iv) the effect of the deduction of winnings to identify and quantify the taxable sum cannot be correctly described as a matter of procedural mechanics, or a method of calculation, so as to found the result the Revenue asserts that the target and effect of the taxation is to charge economic activity in the UK and so the UK based consumer (as the chargeable person) effectively by reference to the turnover of the provider, because this process of calculation goes to the heart of what is being taxed.

69. In support of these arguments the Claimant pointed to Government publications describing the New Tax Regime as a tax on gross profits, to points made by the Revenue in its skeleton argument to the effect that the cost would fall on the suppliers rather than the consumers and the Revenue's analysis during the consultation process illustrated by the Tax Assessment which stated:

> the impact on individuals and households is expected to be negligible as this measure is not expected to have significant impact on availability, price, and payouts of remote gambling… companies based abroad will become liable to UK duty and consequently face an increase in their administrative burden and tax liabilities

70. *Conclusion.* I agree with the passing comment of Lord Pannick QC (counsel instructed by Gibraltar) to the effect that these rival arguments both have force.

71. I was taken to a great deal of case law in respect of the Revenue's primary argument but it was not submitted to me that any of those cases provided clear guidance on how, for the purposes of the application of Article 56, I should determine the fundamental starting point of that argument, and so determine:

i) which of the rival contentions summarised above on the nature and effect (and so the character) of the taxes imposed by the New Tax Regime is correct, or

ii) whether the point that the definition of a UK person means that a relevant transaction with a UK based customer (consumer) may take place whilst he is outside the UK is relevant or determinative.

72. It is clearly necessary to decide this fundamental starting point and in my view the absence of any clear guidance on it means that it should be referred to the CJEU.

Pausing here

73. For the reasons I have given both:

i) the answer to the fundamental starting point to the Article 56 issues, and

ii) the constitutional issues

involve issues of European law that are not *acte clair*.

74. So both of the Revenue's alternative routes and the Claimant's stepping stones to success involve the determination of such points of European law.

75. At the next stage of the Article 56 issues, namely whether a measure of indistinctly applicable internal taxation will only constitute an infringement of Article 56 TFEU where it operates against entities established in other Member States in a discriminatory way, either in law or in fact, I was referred to a large number of cases and heard a considerable amount of argument.

76. In my view the arguments based on those cases also need to be referred to the CJEU and I shall deal with them very briefly because no summary would do them justice not least because they involve detailed and differing analyses of the cases.

The next stage of the Article 56 issues

77. None of the cases to which I was referred contains in clear and explicit terms a statement by the CJEU of the principle of law on which the Revenue relies. However, I hasten to add (a) that this does not mean that they do not support the existence of that principle, and (b) that I am not expressing any view on whether the CJEU will or will not decide that the Revenue or the Claimant is correct. Rather, I rely on this and

    i) the point that the opinions of AG Kokott on which the Revenue rely provide different analyses for the result sought by the Revenue and indicate that her conclusion has not been clearly established by the case law, and

    ii) there is arguably a difference of opinion and approach between her and AG Sharpston

    to found my view that the existence or non-existence of the principle is not *acte clair* and so should be referred.

78. The opinions of AG Kokott are in Case C-134/03 Viacom [2005] ECR I-1167, ECJ (see in particular paragraphs 57 and 60 to 65), Case C-498/10 X NV [2013] 1 CMLR 33 (see in particular paragraphs 17 to 33) and Case C-686/13 X AB (see in particular paragraphs 38 to 45).

79. The opinion of AG Sharpston is in Case C-623/13 de Ruyter (see in particular paragraphs 44 to 53).

Discrimination

80. One argument is based on the double taxation of providers based in jurisdictions which impose a POS tax.

81. In short:

    i) the Claimant asserts that this gives rise to a differential burden between providers in the United Kingdom and such other providers. It also submits that this effect is contrary to the principle of neutrality as set out in the OECD

VAT Guidelines and the approach taken in Test Claimants in the Thin Cap Litigation Case C-524/04, [2007] 2 CMLR 31, and

ii) the Revenue asserts that this is incorrect. It argues that double taxation is not a feature of the New Tax Regime but of the tax regime in Gibraltar and the difference in treatment is a consequence of the parallel exercise of their fiscal sovereignty.

82. This issue is closely linked to, and the answer to it is likely to be determined or affected by, the argument of principle referred to under the last heading.

83. In this context there is a dispute as to whether the New Tax Regime will lead to a substantial exodus of overseas gambling operators from the remote gambling market in the UK. I will hear argument on whether and if so how I should make findings on this having regard to the questions posed for resolution by the CJEU and the findings of Green J in the First Judicial Review.

84. The Claimant also asserts that there is differential treatment in respect of spread-betting operators and with regard to betting exchanges.

85. Spread betting will remain taxed on a POS basis. It is regulated in a different way from fixed-odds betting and the question of whether spread betting activities should be changed to a POC regime under the FA 2014, or remain taxed on a POS basis, was subject to extensive consideration as part of the legislative process. Parliament did not make the change.

86. The Revenue argues that any differential treatment is justified by the different factors which apply to spread betting and, in particular, that it is a different and distinct market from the market for fixed odds betting. In contrast, the Claimant asserts that the distinction between spread betting and fixed odds betting is not clear at all.

87. Under the New Tax Regime a betting exchange operator is liable to duty to the extent of charges from UK Persons (see s. 141(2) FA 2014) which continues the pre-existing position.

88. I will hear any argument on whether and if so how I should make findings on the factual or other issues relating to spread betting and betting exchanges when the questions posed for resolution by the CJEU are finalised.

Justification

89. There is broad agreement on the aims that the legislation was intended to serve although the Claimant asserted that the Revenue sought to frame the objective of the legislation in a different way during argument before me, by relying on fiscal sovereignty or the need to ensure the proper allocation of taxing rights between jurisdictions.

90. I do not accept that the Revenue has changed its ground as it seems to me that fiscal sovereignty and the proper allocation of tax have always been at the centre of its arguments.

91. Other points relating to the aims of moving to a POC regime, and their formulation in various documents, overlap with points on discrimination. The Revenue are and have consistently stated that aims of the New Tax Regime were:

    i) to level the playing field between UK operators and overseas operators in the manner referred to in paragraph 39(iii) hereof,

    ii) to ensure that the UK can exercise proper fiscal supervision over this section of the gambling market. This aim includes minimising the risk of gambling service providers avoiding taxation on remote gambling, which would otherwise fall due on their economic activity with UK consumers, by relocating offshore. In other words, avoiding the situation (which in fact developed) in which a significant percentage of the relevant economic activity undertaken by persons and companies in the UK is not subject to the taxation regime intended to tax such economic activity,

    iii) to enable the UK to maintain the coherence of the UK tax system in relation to that activity and preserve the integrity of the tax base, and

    iv) to increase the UK's tax revenues.

92. Accordingly, I accept and the Revenue did not dispute the points made by Green J in paragraph 152 of his judgment in the First Judicial Review that the objectives and purposes of the New Tax Regime seek to address:

    i) current arrangements that were believed to "operate against the interests of the British economy by providing incentives for operators to base themselves abroad", or

    ii) a situation in which it is believed that "foreign operators [are] subject to less stringent regulatory regimes and thereby enjoy an unfair competitive advantage in the GB market".

93. However, I agree with the Revenue that the intention of Parliament in introducing the New Tax Regime and thus its objectives, purposes and aims did not include and were not based on an intention of the UK Government to compromise the competitive position of overseas providers. Rather, the intention of Parliament and the UK Government in introducing the New Tax Regime was to rectify what was seen by them as the non-taxation of an economic activity within its jurisdiction and to ensure that that activity was taxed on an equal basis among all of its service providers by providing that a remote gaming operator wherever it was established would pay the same remote gaming duty to the UK exchequer.

94. The principle, articulated in for example Case C-513/04 Kerckhaert and Morres [2007] 1 WLR 1685 relating to fiscal sovereignty is not disputed by the Claimant. Rather it disputes its application to the New Tax Regime because it asserts that the Revenue's position is premised on two false propositions, namely that:

    i) the imposition of duties such as those introduced by the New Tax Regime is a matter clearly within the UK's fiscal competence over which it may exercise its sovereignty, and

ii) the disadvantages to foreign providers that result from the New Tax Regime can be characterised as consequences of Member States' parallel exercise of such competence.

95. These issues are closely linked to and the answer to them is likely to be determined or affected by the argument of principle referred to under the heading: "The next stage of the Article 56 issues".

96. I will hear any argument on whether and if so how I should make any further findings on the factual or other issues relating to the arguments on justification when the questions posed for resolution by the CJEU are finalised.

The Preliminary Issues

The existence of an alternative remedy (here in the First-tier Tribunal).

97. It is only in exceptional cases that the court will, in its discretion, entertain a claim for judicial review if there is an alternative remedy and the availability of such a remedy is a well-established ground for refusing to grant permission to bring proceedings for judicial review. Also, when granting permission, a judge can reserve the issue of whether there existed an appropriate alternative remedy to the main hearing of the application. It was not reserved in this case.

98. The First-tier Tribunal has jurisdiction to decide whether a taxing provision is unlawful by reason of European law and there is powerful authority that a taxpayer should advance such arguments before the First-tier Tribunal and should not be permitted to do so by way of judicial review (see Autologic Holdings Plc v IRC [2006] 1 AC 118 in particular at paragraphs 12, 13, 16, 17 and 25 to 30 and CC & C Ltd v HMRC [2014] EWCA Civ 163 in particular at paragraph 40).

99. If that authority was directly applicable I would have been reluctant to decide against the Revenue as a matter of discretion on the basis that the judge granting permission did not reserve the argument on alternative remedy.

100. Fortunately, I do not have to do so. However I record that if I had I would have done so because:

i) I was not asked to deal with this objection as a preliminary point, the judge granting permission stated that the case raised "very significant points of principle and equally important practical issues for the enforcement of revenue collection", and I have heard full argument over four days, and

ii) members of the Claimant would then have to wait until they are individually assessed for tax before rearguing the merits of the case before the First-tier Tribunal and this would result in a waste of costs and delay.

101. I do not have to found my decision on the fact that the judge did not reserve the argument on alternative remedy because I agree with the Claimant that that authority is not directly applicable and the Revenue's argument is wrong because:

i) the Claimant is not any individual taxpayer and will never be assessed for tax. So, if the Claimant has standing to bring this case (and Green J held in the

First Judicial Review that it could bring those proceedings – see paragraphs 201-215 of his judgment), then it can only do so by means of judicial review,

ii) correctly, it was not asserted that the Claimant did not have standing to bring this judicial review as well,

iii) there is no principle of administrative law to the effect that the Court should refuse to hear a claim by a party who has standing simply because a different party would have an alternative remedy and such an approach would be contrary to the approach adopted by the House of Lords in the (R) EOC v Secretary of State for Employment [1995] 1 AC 1 (the EOC case, in particular at pages 25 and 28A-B), and

iv) the situation in the present case is not comparable to that in Autologic not only because the Claimant is not a taxpayer, but also because the companies there had already been assessed for tax and did not appeal to the First-tier Tribunal, though such an appeal was open to them. Rather they applied to the High Court for a declaration. In contrast, here the members of the Claimant have not yet been assessed.

The Claimant cannot seek to override the UK legislation because it has no directly effective EU law rights

102. In the First Judicial Review this issue was decided against the Revenue by Green J (see paragraphs 210 to 215 of his judgment).

103. Before me the Revenue relied on ICI v Colmer [1999] 1 WLR 2035. But in contrast to the position in that case (where by a private law claim a taxpayer sought to have legislation dis-applied so that it could obtain tax relief) the Claimant in this case does not seek the disapplication of the statute, but only a declaration that it is incompatible with Art. 56 TFEU.

104. Also the House of Lords have held that such relief may be obtained by a party who does not have directly effective EU law rights in the EOC case (see [1995] 1 AC at pages 3C/D and 31G to 32A) and I agree with the Claimant that:

i) the grant of such relief in that case did not depend on the EOC's statutory functions, and

ii) similar claims have been entertained in other cases in which the claimant was held to have sufficient interest notwithstanding the lack of a directly effective right (e.g. R (Age UK) v Secretary of State for Business, Innovation and Skills [2010] ICR 260).