IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 2203/2018

In the matter between:

SUNWEST INTERNATIONAL (PTY) LTD
T/A GRANDWEST CASINO AND ENTERTAINMENT WORLD

First Applicant

WORCESTER CASINO (PTY) LTD
T/A GOLDEN VALLEY CASINO AND LODGE

Second Applicant

and

THE WESTERN CAPE GAMBLING AND RACING BOARD

First Respondent

THE PROVINCIAL MINISTER OF FINANCE, WESTERN CAPE

Second Respondent

THE EASTERN CAPE GAMBLING BOARD

Amicus Curiae

Coram: Erasmus, Mabindla-Boqwana et Papier JJ

JUDGMENT HANDED DOWN ELECTRONICALLY ON 29 APRIL 2020

THE COURT

Introduction and Background

[1] The applicants sought a declaratory order that "Freeplay" credits, used to bet on slot machines at the applicants' casinos, do not constitute part of the "drop"[1] for purposes of the computation of adjusted gross revenue ("AGR"), in terms of section 64 of the Western Cape Gambling and Racing Act 4 of 1996 ("the Act"), read with Schedule III, and thus that such Freeplay credits do not form part of the taxable revenue. They consequently seek an order for the refund of the amounts overpaid by them, from the Provincial Revenue Fund; alternatively that the first respondent off-set the overpayments against the applicants' future liability to pay gambling tax in terms of section 64 of the Act read with Schedule III.

[2] The applicants are subsidiaries of Sun International (South Africa) Limited ("Sun International"), one of South Africa's largest operators of casinos. They are holders of casino operator licences, issued by the first respondent, and pay gambling taxes and levies to the first respondent, which is then paid into the Provincial Revenue Fund in terms of section 64 (3) of the Act. The gambling tax is calculated as a percentage of the applicants' taxable revenue and AGR. The issue before us concerns the treatment of Freeplay for the purposes of calculating taxable revenue and whether it forms part of the AGR.

[1] See para 13 below.

The Facts

[3] The facts are largely common cause. Freeplay is non-cashable credit that is allocated to a casino player's card, by the applicants, as a reward for loyalty. The credit is available for the player to use at slot machines at applicants' casinos. It is denominated in rand value. It is, however, not redeemable for cash. Players are able to appreciate the value proposition associated with Freeplay and entertain themselves without it impacting on their own financial resources.

[4] During 2014, Sun International introduced a system called "BALLY" in its casinos across the country. The system is able to differentiate between credits paid for by the player from his or her own funds, and Freeplay credits generated by the casino crediting its Most Valued Guests' player accounts as part of its loyalty programme. Subsequent to the introduction of this system, Sun International requested confirmation from various Casino Boards around the country that it could implement the method of calculating adjusted gross revenue by excluding the "non-cashable" play portion which is funded by Sun International and/or its subsidiaries (including the applicants).

[5] Various exchanges ensued between the applicants, their attorneys and officials of the first respondents. The views of the treasury of the Western Cape, on behalf of the second respondent, were solicited. The views of both respondents are that Freeplay falls within the definition of AGR and is accordingly taxable. A decision to this effect by the HOD: Compliance for the first respondent was conveyed to the applicants' attorneys, who

lodged an appeal with the first respondent's Board. The Board suggested that an application seeking declaratory relief should be brought.

[6] The applicant also litigated in the Northern Cape, where the full bench, in the unreported decision of *Teemane t/a Flamingo Casino v The Chairperson of the Northern Cape Gambling Board*[2], held that:

> *"It is clear from the common cause facts that Freeplay cannot form part of 'gross receipts' for the simple reason that the applicant does not receive anything when a Freeplay credit is used in its Casino. I believe Mr Cockrell is correct in his submission that the purpose of Regulation 2 is to impose a levy on the revenue that a licensee receives. It is common cause that no revenue results from the use of a Freeplay credit in the applicant's casino. Therefore, I find that the applicant is correct in its submissions on the plain-language interpretation of Regulation 2."*

[7] In the further, unreported, decision of *Sun International (South Africa) Limited v The Chairperson of the North West Gambling Review Tribunal and Others*[3], the North West High Court was also required to determine whether Freeplay was included in the

---

[2] *Teemane (Pty) Ltd T/A Flamingo Casino v The Chairperson of the Northern Cape Gambling Board*, Case No. 2023/2016, in the judgment of Lever AJ with Mamosebo J concurring, at para 22.

[3] *Sun International (South Africa) Limited v Chairperson of the North West Gambling Review Tribunal and Others* (M255/2017) [2018] ZANWHC 62 (25 May 2018), at para 30.

definition of "revenue" for purposes of calculating liability on the part of a casino. Gutta J, in her judgment, decided that:

> *"... Freeplay credits do not form part of gross gaming revenue as the purpose of Regulation 73(1) is to impose a levy on the revenue that a licensee receives and [the casino] receives no revenue from the use of Freeplay credits. Accordingly, on the plain language interpretation, and within the framework of the Constitution, I am of the view that the decision made by the Board and the Tribunal was materially influenced by an error of law ..."*

[8] While this court is not bound by any of these judgments, they are nevertheless persuasive, insofar as they may be relevant to the facts of the matter before us.

[9] The Eastern Cape Board was admitted as *amicus curiae*. The Eastern Cape Gambling and Betting Act 5 of 1997 ("the EC Act") has provisions almost identical to those of the Act which is the subject of these proceedings. Southern Sun has advanced similar views, as they have in this matter, to the EC Board. The EC Board has not made a final decision with regard to Freeplay, pending the outcome of this Court's decision on the matter. They believe, however, that Freeplay should be included in the definition of drop.

Legislative framework

[10] In terms of section 64 (1) of the Act, "... *there shall be paid to the Board [the first respondent] gambling and betting taxes and levies by the holders of licences as provided for in Schedules III and IV*." [Own emphasis.]

[11] Section 64 (3) requires the first respondent to pay such taxes into the Provincial Revenue Fund within the periods stipulated in Schedules III and IV, or as prescribed.

[12] In terms of Schedule III, Part B, the holder of a casino operator licence shall pay gambling tax on its "*taxable revenue*". "*Taxable revenue*" is defined in Schedule III, Part A as "*adjusted gross revenue less admissible deductions as determined under this Act*". The relevant portions of the definition of "*adjusted gross revenue*" are (d) and (e), which state the following:

> " (d) *in relation to slot machines, other than those contemplated in subparagraphs (e) and (f) below operated by a licence holder in the Province, the drop, less fills to the machine and winnings paid out; provided that the initial hopper load shall not constitute a fill and shall not affect the calculation of adjusted gross revenue;*
>
> *(e) in relation to slot machines operated by a licence holder in the Province which are linked via a wide-area progressive system, the drop, less fills to the machine, less any contributions made by the licence holder which are payable in consequence of such wide-area progressive system in respect of such slot machines during the tax period, and less any winnings paid out which are not recoverable from the central fund in terms of the wide-area progressive system; provided that the initial hopper load shall not constitute a fill and shall not affect the calculation of adjusted gross revenue; provided further that where any surplus amount is distributed from the central fund to*

a licence holder or where any licence holder withdraws from a wide-area progressive system and in consequence of such distribution or withdrawal recovers or recoups during any tax period any contribution previously deducted under this subparagraph, such contribution so recovered or recouped shall be included in the licence holder's adjusted gross revenue in the tax period in which the contribution is recovered or recouped, ..." [Own emphasis.]

[13] "*Drop*" means –

"*(a) in relation to table games, other than those referred to in subparagraph (b) of the definition of "adjusted gross revenue", the total amount of money, chips and tokens contained in the drop boxes, and*

(b) in relation to slot machines, the total amount of money and tokens removed from the drop box, or for cash-less slot machines, the amount deducted from players' slot accounts as a result of slot machine play." [Own emphasis.]

[14] The applicants have slot machines that accord with paragraphs (d) and (e) of the definition of AGR. Certain machines are linked to a wide-area progressive system (paragraph (e) of the definition), while others are stand-alone or are linked to the applicants' progressive systems.

[15] The issue in essence is whether Freeplay forms part of the "drop".

Interpretation of the Act

[16] The approach to be followed in interpreting a document (including legislation) is by now established. It is as summarised in the often-quoted case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4]: "*[C]onsideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*" [Footnotes omitted.]

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

[17] The statute must accordingly be given its grammatical meaning (except where it would lead to absurdity), and be properly contextualised. It must also be interpreted purposively and be construed consistently with the Constitution.[5]

[18] The Supreme Court of Appeal has reiterated the importance of the language of a document recently in *City of Tshwane Metropolitan v Blair Atholl Homeowners Association*[6]. It stated:

> *" This Court has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise."*

[19] The first respondent refers to the English case of *Cape Brandy Syndicate v Inland Revenue Commissioners*[7] where the Court said that "*[i]n a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied.*" Although the judgment was quoted with approval by cases thereafter, Botha JA, in *Glen Anil Development Corporation Ltd v SIR*[8], rejected the notion that fiscal legislation should be interpreted differently to other legislation. He stated (at 727 F-G) that the decisive and overriding principle to be used when interpreting fiscal legislation is no

---

[5] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.

[6] *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA) at para 63.

[7] *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1KB 64 at 71.

[8] *Glen Anil Development Corporation Ltd v SIR* 1975 (4) SA 715 (A).

different from that applicable in the interpretation of all legislation. In all cases of interpretation, the true intention of the Legislature is of paramount importance. It therefore remains open to the Legislature to attend to the Act to achieve their objectives.

[20] From the principles set down by our courts, applying the ordinary grammatical and literal meaning to words is the primary rule of interpretation. However, it may be deviated from if the ordinary grammatical language gives rise to a glaring absurdity. In such a case, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true "intention of the legislature"[9].

[21] If the words used are clear and unambiguous and in harmony with the intention of the Legislature, the objective and the scheme of the Act, then the ordinary and grammatical meaning of the words is used. If the words used are obscure or ambiguous, then the meaning that best accords with the intention of the Legislature, the object and the scheme of the Act, and one that the words are reasonably capable of bearing, is to be given to them.

[22] It is obvious that the word "Freeplay" is not expressed in the provisions dealing with gambling taxes that are mentioned above. The Act defines drop as... "*the amount deducted from players' slot accounts as a result of slot machine play*".

[9] *Venter v R* 1907 TS 910; *M v Commissioner Of Taxes(SR)* 21 SATC 16; *Farrar's Estate v CIR*, 1926 TPD 501).

[23] While the definition does not distinguish between the sources of the amount deducted, the question is what the word "amount" refers to or represents. The amount must represent revenue in the hands of the casino, because it is the "adjusted gross revenue" less admissible deductions that the operator of the casino is taxed on. Revenue is not defined in the Act. In simple terms *"revenue is the total amount of income generated by the sale of goods or services related to the company's primary operations."*[10]

[24] Whilst all parties may hold, from different perspectives, that the definition of "drop" is clear and unambiguous, the very fact that the definition can be given different meanings calls for more than a literal reading of the words. What is called for is an objective interpretation of the word "*amount*". The respondents contend that the principles of income tax, where a taxpayer pays tax on its income, should not be employed in this case because the principles are different. We are not sure how different those are as to the meaning of revenue. The purpose of paying the taxes might be different, but does the concept of revenue mean something other than income in the gambling statute? If it does, it must be demonstrated in the statute, not subjectively, but objectively so. If revenue has a meaning specific to the context of gambling, and which differs from that of taxation laws, then such meaning would be clearly stated in the gambling legislation, precisely to avoid confusion.

[10] https://www.investopedia.com/ask/answers/122214/what-difference-between-revenue-and-income.asp

[25] In the applicants' casinos, the player with Freeplay loaded on his or her card would insert it into the slot machine. He or she has a choice as to whether to download Freeplay credits onto the slot machine. If he or she chooses to do so, such credits are reflected on the slot machine as credits to place bets. When a player plays a game using Freeplay, the applicants do not receive any revenue from that game[11]. The applicants paint two possible outcomes to illustrate the point. The first being when a player bets and loses the game. In this regard, the applicants' revenue position does not improve, because the player lost a 'notional' credit that had been credited by the applicants with no *quid pro quo* given by the player. The player is in the same position as he or she was before he or she used Freeplay to bet. The second possible outcome is when a player wins. In this scenario, the applicants' have to pay cashable winnings to the player, despite the player having betted with a Freeplay credit. In this case, the applicants' revenue decreases. The winnings are paid out of their own financial resources. To drive the point, the applicants' counsel uses an example of an operator, Cape Wheel, being taxed on a ride (that costs R150), that it offered to a patron for free as if the patron had paid for the ride.

[26] In terms of section 39 (2) of the Constitution, "[*w*]*hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*." In the same injunction, judges must where possible read the statute, so far as is possible, in conformity with the

[11] This is on the understanding that the applicant does not write off the total value of the Freeplay scheme as a nontaxable expense when accounting to the South African Revenue Services.

Constitution. This means that an interpretation which falls within the constitutional bounds should be preferred.[12]

[27] The provincial legislature imposes tax as empowered by section 228 of the Constitution. Such imposition should rationally be connected to a legitimate governmental purpose.

[28] Imposition of tax should not be arbitrary. It has been held that "*deprivation of property is 'arbitrary' as meant by s 25* [of the Constitution] *when the 'law' referred to in s 25 (1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.*"[13] [Own emphasis.] The Court in [14] went on to set out factors that would establish such sufficient reason, which include the evaluation of the relationship between the means employed, and the ends sought to be achieved. The respondents are vague as to what purpose is sought to be achieved, other than contending that the literal grammatical language of section 64 and Schedule III should be applied. The second respondent suggests that the focus of the tax is on the gambling activities of a player, i.e. what actually happens in the slot machines, as the second respondent puts it, and that the source of what is inserted into the slot machine is irrelevant.

---

[12] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at paras 22 to 23.

[13] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 100.

[14] Id fn 13 at para 100.

[29] Although the focus may be on the gambling activities of a player, it seems logical to ask what the meaning is of "*amount deducted from players' slot accounts as a result of slot machine play*". Freeplay is a notional amount, although it has a rand value. Although the second respondent differs. It is notional because no cash is loaded for it. It is Freeplay and unredeemable. We do not see how it can be treated in the same manner as the amount of money that the player deposits into his account. Although the distinction between Freeplay and actual cash coming from the player is not expressed in the Act, the amount is taxed in the hands of the operator, who provided the Freeplay credit. The construction that the Freeplay credits do not improve the applicants' financial position, and accordingly should not be included in the "drop", does not impact the income tax position. This, in our view, is simply a question of rationality. Is it rational to construe Freeplay as an amount included in the drop? In our view, and in the absence of a logical explanation, it is not. We are persuaded by the argument therefore that it is irrational to require the operator of a licence to pay tax on a neutral position, which also amounts to the deprivation of property.

[30] We need not visit foreign jurisdictions to illustrate the point of irrationality. We agree with the second respondent and the amicus that different jurisdictions may treat the issue of Freeplay differently, depending on their policy positions on this issue. What some of the foreign cases cited by the applicants illuminate, however, is that the Freeplay concept is a complicated one. While that is so, the interpretation advanced by the applicants seems to find support in the judgments it has referred to, which are to the effect that

Freeplay is not revenue and should not be included in the calculation of gambling tax.[15] In one case it was held to be a notional value placed on tokens given to the player by a casino, as part of its promotional or marketing exercise which intrinsically has no value and is non-negotiable, or "*at best have an economic value to the player equivalent to their face value multiplied by the chances of winning*."[16]

[31] Finally, where the language is found to be ambiguous, based on the *contra fiscum* principle, the presumption should favour the taxpayer.[17]

[32] The reasoning that the amount cannot be "revenue" in the sense similar to income tax because gambling tax is comparable to sin taxes and the like, is unsound, because sin taxes excise duties levied on the actual goods. If the purpose of gambling tax is to discourage harmful behaviour, it is not clear how taxing Freeplay would achieve that purpose. In other words, a player does not get dissuaded from playing more.

[33] Conversely, Freeplay would attract more players into the casinos as an incentive to use their own financial resources, and in so doing, to ensure increased profitability for the casino. This should result in more gambling tax being collected. It would not make business sense to allow customers to only play using Freeplay credits. It is a reward for

---

[15] See *First Gold, Inc. Mineral Palace LP and Four Aces Gaming LLC v South Dakota Department of Revenue and Regulation 2014 S.D.91; Pueblo of Isleta v Michelle Lujan Grisham Civ. No. 17- 654 KG/KK.*

[16] See Revenue *and Customs Commissioners (HMRC) v London Clubs Management Ltd* [2018] EWCA Civ 2210 at para 30.

[17] *Estate Reynolds v CIR* 1937 AD 57 at p 70 and *Glen Anil Development Corporation Ltd v S IR* 1975 (4) SA 715 (A) at 727F.

loyalty. The Most Valued Guests are evidently those that spend more. If the programme was designed to have more players playing, mainly using Freeplay, with the applicants simply paying the winnings, without getting anything back, that would defeat the whole purpose of running their business. The applicants allege that since the inception of Freeplay in July 2014, until May 2017, for every R1 of Freeplay that was bet the customer's average spend from their own financial resources was R25. That is however not germane to the legal question of what "drop" means.

[34] It could also not be said that gambling tax is imposed because an operator must pay a licence to operate and therefore gambling tax is not taxed on income. An operator pays a licence fee in terms of other provisions of the Act, such as section 44. It seems to us that the reasoning put forward by the applicants, that the underlying general principle is that a person whose financial position has improved because of money coming in must share a portion of the increase with the *fiscus,* is sensible. As already mentioned, that reasoning is not to confuse the principles of gambling tax with that of income tax, it is logical. The respondents have not been able to support their interpretation of the statute other than to say, it must be read literally to mean everything that is deducted from the player's slot account. The word "amount" requires close scrutiny, as we have indicated, and it must be given a more sensible and business-like interpretation. It is not sensible for it to read to include Freeplay. In the final analysis, we are persuaded by the interpretation advanced by the applicants. In our view the meaning of "amount" should be sensibly interpreted to mean the "actual revenue".

As to whether the declaratory relief should be granted, there is no reason not to do so. The applicants clearly have an interest in the rights and obligations leading to the correct interpretation of the Act. It was important to have the dispute resolved so that the kind of tax that the applicants are liable to pay as per the statute is clearly defined.

Consequential Relief

[35] The claim of repayment is based on unjustified enrichment. It cannot be said that the overpayments were made in error after the BALLY system was introduced by the applicants. They knowingly paid, knowing that they held a different interpretation. However, they were instructed by the first respondent to calculate tax inclusive of Freeplay. It might possibly be said the payment, "*although deliberate...was nevertheless involuntary because it was effected under pressure and protest.*"[18] The first respondent controls all gambling activities in the province, as submitted by the applicant (Section 2 (4) of the Act). It also has the power to grant, amend, refuse and suspend casino licences and amend, suspend or revoke licence conditions (Sections 12 (3) and 12 (4)), it has the power to administer taxes and levies (Section 12 (13)) and impose penalties for any contravention or failure to comply with the Act (Section 12 (21)).

[18] *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 647C-D.

[36] There were issues of prescription raised. To the extent that claims have prescribed the applicants are not entitled to such amounts. It seems to us appropriate that the money be off-set against the applicants' future liability to pay gambling tax, rather than it be paid back. As we understand the submissions the parties were to recalculate the correct amount and the court does not have to direct that certain specific amounts be paid.

Costs

[37] As to costs, it was firstly by agreement that the application be brought, and it was to the benefit of all parties that the issue be determined. We would not consider it just in the circumstances of this case for a cost order to be awarded against the respondents.

Order

[38] Accordingly, we would make an order as follows:

1. It is declared that

    1.1 Freeplay used to bet on slot machines at the applicants' casinos do not constitute part of the "drop" for purposes of the computation of adjusted gross revenue in terms of section 64 of the Western Cape Gambling and Racing Act 4 of 1996 ("the Act") read with Schedule III;

1.2 Freeplay credits accordingly do not form part of taxable revenue in terms of section 64 of the Act read with Schedule III;

2. The first respondent is to off-set against the applicants' future liability to pay gambling tax in terms of section 64 of the Act read with Schedule III such amount as may be agreed between the parties or proved by the applicants.
3. Each party is to pay its own costs.

N C Erasmus
Judge of the High Court

N P Mabindla-Boqwana
Judge of the High Court

PP

T D Papier
Judge of the High Court

APPEARANCES

Counsel for Applicants	Adv A Cockrell SC
	Adv N Ferreira
Attorneys for Applicants	Cliffe Dekker Hofmeyr Inc
Counsel for First Respondent	Adv J A Newdigate SC
	Adv R Matsala
Attorneys for First Respondent	Marais Muller Hendricks Inc
Counsel for Second Respondent	Adv R T Williams SC
	Adv H Cassim
Attorneys for Second Respondent	State Attorney
Counsel for Amicus Curiae	Adv I Jamie SC
	Adv H J De Waal SC
Attorneys for Amicus Curiae	Abraham Le Roux Inc