Rank/Linneweber claims

HM Courts and Tribunals Service (HMCTS) are now asking all persons who have appealed against the decisions of HM Revenue & Customs (HMRC) to reject claims submitted for VAT considered by the appellants/claimants to be VAT overstated on income generated from gaming machines.

HMCTS set out there are 3 periods in which claims were made

1. 1st November 1998 to 5th December 2005 (referred to as Linneweber 1)
2. 6th December 2005 to 31st January 2013 (referred to as Linneweber 2) and
3. 1st February 2013 onwards.

We will discount commenting on the 3rd period as gaming machine income in this period is clearly not subject to VAT but correctly considered to be subject to Machine Gaming Duty (MGD) therefore any speculative claims for repayment of VAT overpaid would not be disputed by HMRC.

In order to ensure rejected claims for VAT were 'kept live' claimants were required to submit an appeal to the VAT and Duties Tribunal (more latterly known as the 1st Tier Tribunal (Tax Chamber), where appeals were stood over behind the lead case of Rank Group plc.

Litigation in the first Rank case (referred to as 'Slots') was found in favour of HMRC. HMCTS are now querying with appellants whether they wish to continue to sit behind Rank 'Slots', whether the appeal will stand behind the 2nd Rank appeal (FOBTS) or whether there is another case they wish to sit behind and why.

HMCTS have sent appellants a form, which sets out 3 sections which need to be considered which they require completion and return of. Having considered the form it seems that it does not adequately cover the answers that are required to the question asked by HMCTS.

Section 1 asks whether the appeal was stood behind the Rank 'Slots' case. If the appellant considers it was and is not standing behind another case the appellant must either note it withdraws its case, or if not withdrawing its appeal it must set out the reason why it does not consider it is bound by the decision of the Supreme Court in 'Rank 'Slots'.

Section 2 asks whether the appeal stands behind Rank FOBTs and asks the appellant to set out which periods the disputed decision relates to.

Section 3 asks whether the appeal falls into any of the categories set out and does not relate to the treatment of Slot machines or FOBTs – if it does HMCTS ask the appellant to set out particularised grounds of appeal and set out the periods to which this appeal relates.

Having considered the information available it seems to us that it would be difficult to successfully argue that any appeal stood behind Rank 'Slots' given the fact that Rank ultimately lost its appeal – therefore section 1 of the form provided by HMCTS can be ignored.

For claims made for the period pre 6 December 2005 the only current case that covers other VAT free gaming machines in that period is the Rank FOBTs case, however this case is not useful for the following period from 6 December 2005 through to 31st January 2013 as FOBTs were treated as being subject to VAT following the change in legislation effective from 6 December 2005.

So any Linneweber 1 claims/appeals must be stood behind the Rabnk FOBTs case. It is also my understanding that there may be further challenges to HMRC for this period with the challenges based upon other Vat free gaming machines, although as yet such a case has not been put forward.

For section 3 the VAT free gaming machine that is used as a 'comparator' machine is the B3A machine or electronic Lottery Vending Terminal – which the Tribunal determined was not subject to either VAT or Licence Duty. We understand that at 6 December 2005 there were no B3A machines in existence or usage but that the first B3A machines came into existence in mid-2006. It follows that if there were no VAT free gaming machines in existence there could be no breach of fiscal neutrality - but as soon as B3A machines came into existence there would be a breach of fiscal neutrality. HMCTS require fully particularised ground of appeal and confirmation of the periods to which the appeal relates.

Action required

Clubs need to understand what claims they made – and the periods which they cover, i.e. did they submit a Linneweber 1 claim, a Linneweber 2 claim (with a subsequent 'top up' to ensure no periods fell outside the 4 year cap) or both. They also need to understand what tribunal references they have and to which period this relates.

Completion of the form

Appeal number – the appellant (i.e. club) needs to enter the Tribunal reference/references here – these can be found on recent correspondence from HMCTS, or should be on papers previously received from the Tribunal, or held by the accountant or advisor that submitted the appeal.

Name of the Appellant – this is the clubs name and should also be on correspondence from HMCTS.

Name of Representative – unless the club has notified HMCTS that it has a representative using form BTC.DOT this should be left blank. However if the club is submitting the form with a completed form BTC.DOT notifying HMCTS of a representative this can be completed with the representatives details.

Section 1 – unless the club has decided that it does not want to pursue its appeal(s) any further it should enter 'not applicable (N/A) in both boxes.

Section 2 – If the club has a live Linneweber 1 appeal it needs to do the following

1. The club should tick the box that says 'I confirm that the grounds of appeal are that the treatment breaches Fiscal neutrality.
2. The club should tick he box that says 'A. 1st November 1998 to 5th December 2005'
3. The club should set out the VAT periods its claim covers in the box that says 'I list the periods of all the disputed decisions in this appeal'

If the club does not have a live Linneweber 1 appeal it should note all boxes not applicable (N/A).

There is a school of thought that says that by standing behind the Rank FOBT appeal appellants will preclude themselves from standing behind any other appropriate case.

To keep options open Clubs should note to HMCTS that whilst standing behind the Rank FOBT appeal the club is aware that other cases may be brought forward that would also be appropriate to stand behind – therefore the club wishes to keep this option open. This can be done in a covering letter which clubs can send to HMCTS when returning the form.

Section 3 – if the club has a live Linneweber 2 appeal it should tick the box which says ' I confirm that this appeal does not relate to the treatment of slot machines'. The club should then attach the following (a separate document for attachment to the covering letter is provided) ensuring that it sets out the dates for which the claim was made from and to;

This appeal relates to claims for VAT the appellant considers overstated for the period from *insert date* to *insert date* on income generated from the gaming machine(s) it operated. The appellant followed HMRC instructions to treat such income as standard rated but following the decision in Oasis technologies (UK) Limited v Revenue & Customs (LON/2008/0544) considers that it is disadvantaged as it considers fiscal neutrality is not being observed by the differing treatments applied to gaming machines it operated and declared VAT on and the B3A gaming machines operated by a host of operators across the UK whose income was treated as being exempt from VAT.

When considering whether there is a similarity or not between the machines operated by the appellant and the comparator B3A machines there are a number of factors that must be considered. Currently stakes and prizes are similar – a maximum stake of £2 with a maximum prize of £400 for a category B4 machine and £500 for a category B3A machine. Category B3 machines operated in adult gaming centres also have a £2 stake and a maximum £500 prize. Over the past years maximum prizes have altered as the government altered legislation but there has always been a broad similarity in stakes and prizes that would not allow a player to distinguish between categories B3, B3A and B4 machines.

In terms of appearance all of category B3, B3A and B4 machines appear very similar, a money slot to introduce the stake, a button or similar mechanism to start the game and spinning reels or the visual representation of spinning reels to indicate when the game is in play and whether the game has been won or lost. The casing of all these machines, the noises they make the visual display provided to encourage the player to participate in the game are all similar if not identical (indeed there are examples of certain manufacturers/distributors providing the same game in both category B3A and B4 machines). When considering HMRCs approach to the taxation (or not) of the B3A machine in the Dransfield Novelty Company Ltd case (MAN/08/0811) prior to its hearing HMRC officers considered the differences and similarities between traditional gaming machines (i.e. category B3 and B4 machines) and category B3A machines and noted;

"the machines (B3A machines that is – my inclusion) have all the characteristics and appearance of a gaming machine", and

"because of the general appearance of the machines and the experience presented to the player, the machines appear to compete with traditional gaming machines"

clearly indicating HMRCs acceptance of the similarity of machines operated by the Appellant with the category B3A machines accepted by HMRC as being exempt from VAT following the Oasis Technologies (UK) Limited decision.

It seems clear to us that HMRCs position is that the category B3 and B4 machines are sufficiently similar as for any difference to be unidentifiable and as such we conclude the differing tax treatment breaches the principle of fiscal neutrality.