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**LEGAL & INSURANCE DEPARTMENT
CONFIDENTIAL AND LEGALLY PRIVILEGED MEMORANDUM**

To: Peter Herring

Copy: Neil Spencer

From: Debra Tegoni

Date: 28 March 2012

Subject: **PROPOSAL CLASSIFYING GAMING MACHINES F&B PROMOTIONAL PROGRAM TO BE PART OF BONUS JACKPOT**

Peter,

I refer to previous discussion we have had regarding the proposed reclassification of Gaming Machines Food Program to be part of the Bonus Jackpot and allow for the promotional cost to be Gaming Machine Tax deduction.

I note that part of our discussions involved the agreed need for a review of the information provided to the Regulator (ultimately for Treasury) incorporating our gaming tax reporting and an assessment (based on that information) on the likely impacts to that information resulting from the above reclassification. I note that you have separate advice from Finance and Revenue Audit on these matters.

Specifically regarding the legal assessment of the above, I advise as follows:

Relevant Definitions

- 1) With respect to gaming tax, the calculation of "Gross Gaming Revenue" for the casino is contained in the Consolidated Management Agreement and the *Casino Management Agreement Act 1993*.
- 2) The definition of "Gross Gaming Revenue" means "the total of all sums, including cheques and other negotiable instruments whether collected or not, received in any period by the Company, **from the conduct or playing of games** within the temporary Casino or the Melbourne Casino (as the case maybe) less the total of **all sums paid out as winnings** during that period **in respect of such conduct or playing of games** but excluding any Commission Based Player's Gaming Revenue (which is defined in a similar way for commission based players)" (*my emphasis in bold*)
- 3) There is no definition of "winnings" in any of the casino agreements or relevant legislation other than I note a useful reference (not a definition) in section 78B in the *Casino Control Act*, - Forfeiture of winnings. This part refers to "winnings" comprising and including a non-monetary prize and so this clearly envisages that winnings can comprise cash and non-cash prizes. In these circumstances "winnings" is given its ordinary meaning and would, in my view, incorporate non cash prizes.

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"Winnings" in its ordinary meaning is defined as resulting in or relating to victory in a contest or competition and includes receiving prizes or rewards for performance amongst other things.

- 4) The definition of "Jackpot" in section 8 of the *Casino Control Act* means "the combination of letters, numbers, symbols or representations required to be displayed on the reels or video screen of a gaming machine so that the winnings in accordance with the prize payout scale displayed on the machine are payable from money which accumulates as contributions are made to a special prize pool". I note that Jackpots are fixed or variable and have configurations that include a start-out value and an increment value (turnover) which is reflected in the revenue classification reports submitted to the Regulator. By way of contrast, "bonus" and "bonus jackpot" appear as a separate category on these revenue reports (as effective deductions). I understand that we have utilised this category now and in the past as not having an increment value and have configuration areas for the two classifications in separate locations within the GM management system.

Reporting of Gross Gaming Revenue

- 5) I am advised that we report Gross Gaming Revenue as a summary of gaming machine revenue for certain periods and this essentially incorporates turnover, less game wins, less jackpot start outs, less variable prize jackpot increments, less fixed price jackpot increments, less **bonus jackpots** which equals DACOM revenue, which equals final Gross Gaming Revenue subject to tax. Accordingly there is no classification/column that exists to specifically record bonuses; credits, rewards or prizes other than those referable to jackpots; hence the use of the term "bonus jackpots".
- 6) There is no definition anywhere in relevant agreements or legislation that defines a "bonus jackpot" or a "bonus" on its own. It is not a term that has an obvious or apparent ordinary meaning.

Course of conduct/background of activity to date

- 7) Over time, I am advised that gaming machines have included deductions from Gross Gaming Revenue amounts under the category of bonus jackpots in the deduction line. Current examples of these deductions are:
- a) The "welcome back" offer (I understand this was initially incorporated as a deduction many years ago and in relation to which there was an "approval" or at least a Regulator stamped document on the configuration worksheet effectively allowing a change to DACOMs required to provide the offer and including that the BMM would test the system change etc.).

As I understand it, the welcome back offer allows a patron to be awarded as a "bonus" a dollar credit at their next visit based on the number of points earned by playing on a gaming machine on their previous visit.

- b) As well as the welcome back offer there are other additions to the bonus jackpots deductions, namely, mailed credits (as an offer to customers who have not visited in a while who are given free credits to play on a machine once and if they return) and, as part of the Signature program set up, where points are earned via Signature on play on a gaming machine they can be redeemed for credits on a gaming machine. The

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later initiative does not require configuration workstation settings and so has not been submitted in any way to the Regulator.

- 8) The above all demonstrate a prior course of conduct whereby rewards, prizes or bonuses of sorts are provided to a patron by virtue of their play on a gaming machine.
- 9) Given that there is no definition of bonus jackpot or a bonus, including these rewards as a permitted deduction as part of "bonus jackpots" was and remains a matter of judgment and justification.
- 10) However, given part of the term "bonus jackpot" includes the term "jackpot", there may be an argument that the deduction should only apply to a type of jackpot as defined. What has been done to date under this category and what is proposed now as an extension cannot be properly categorised as a "jackpot" as it is defined; i.e. the prize or reward is not payable by virtue of a combination of letters, symbols, representations etc. displayed on a gaming machine.
- 11) The question is can these things be determined as something different as a "bonus jackpot" and does it matter when looking at how to calculate Gross Gaming revenue anyway?

Potential Arguments

- 12) As there is no definition of "bonus jackpots" one can argue that these types of rewards are a "bonus" – an unexpected reward in the ordinary meaning of that word and in any event is correctly described as a "winning" to justify a deduction from Gross Gaming Revenue; being a prize or a non-cash winning (which is permitted) arising from the conduct or playing of games within the casino under the definition of Gross Gaming Revenue.
- 13) An alternate argument on this point may be that the reward or bonus is not a **"sum paid out as winnings....in respect of such conduct or playing of games"** to be properly calculated as a deduction. The bonus/reward or prize may be accrued through the conduct of playing a game, the actual prize does not arise in respect of the playing of games – i.e. it has no reference to the outcome of the game. While this may be an argument that may be used at some point against us I am of the view that the better argument is on a broader definition of winnings incorporating prizes that are provided and paid in respect of the playing off games in a general and ordinary meaning.

Opinion and Risks

In addition, we would also rely on a course conduct that such deductions have been allowed in the past and now for quite some time. This is not a strong argument for us especially as the Regulator has not provided any specific approval to the bonus jackpots along the way.

Overall I am of the view that including the food and beverage promotional program as part of bonus jackpots is aligned with what we have done in the past and so puts us in no worse a situation, other than if any dispute were to arise, the potential for claw back quantum obviously increases. I would argue that there is nothing in the definition of Gross Gaming Revenue that prohibits us from doing as is proposed as the F&B rewards can be described as a "winning" in a generic sense for valid deduction, irrespective of a category (being bonus jackpots) contained in a reporting document that is not defined in any legislation or relevant agreement.

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The risks are that that given there is no effective "statute of limitations" on clawing back gaming tax paid or unpaid if the Regulator were to query the inclusion of the F&B promotional program, it may lead them to unravelling the prior offers of welcome back and the offers as all wrongly classified deductions. I maintain the better argument is, irrespective of the categorisation in the form in which gaming machine revenue is provided, "winnings" is able to be interpreted more broadly. Genuine rewards (such as what is proposed) are provided directly referable from the conduct or playing of games within the casino in relation to gaming machine play.

The more difficult issue may be why are we changing classification of F&B rewards now and we will need to be prepared to answer that question and the answer may be we got it wrong initially but we did not think it reasonable to go back and reclaim the tax overpaid. Ultimately, it will be a matter of argument, judgment and interpretation as the answer is not entirely clear. This is of course only relevant if the change is picked up; hence Finance and Revenue Audit's view on how likely it is that the change will be obvious and assessing this risk in making this decision is critical

Provided extending the reclassification of the gaming machine's food program does not alert anyone's interest and so a review in tax payable, the risk appears fairly low and if required a reasonable argument can be put to justify our position. The risk may increase as and when more deductions are included over time but this should be assessed at that time (if relevant).

Please call me if you have any questions.

Regards

Debra Tegoni
EGM – Legal and Regulatory Services