

IN THE MATTER OF THE *CASINO (MANAGEMENT AGREEMENT) ACT 1993*
AND THE TREATMENT OF PREMIUM PLAYER COMMISSIONS FOR THE
PURPOSES OF CASINO TAX

JOINT MEMORANDUM OF ADVICE

A. Introduction

1. We are asked to advise Crown Melbourne Ltd (**Crown**) about whether Premium Player Commissions are “winnings” for the purposes of “casino tax”.
2. In our opinion, for the reasons that follow, Premium Player Commissions are properly characterised as “sums paid out as winnings”.

B. Casino Tax

3. Crown operates the casino in accordance with the provisions of the *Casino (Management Agreement) Act 1993* (the **Management Act**). That Act ratifies the Management Agreement for Crown Casino. The effect of ss 6-6J is that the Management Agreement, and the Deeds of Variation thereto, take effect as if they had been enacted by the Management Act. Section 7 of the Management Act provides that if a provision of the Management Agreement is inconsistent with the *Casino Control Act 1991*, the provision of the Management Agreement prevails and the application of the *Casino Control Act 1991*, in relation to the Crown Casino, is modified accordingly.
4. Sections 112A, 113 and 114 of the *Casino Control Act 1991* impose various taxes, charges and levies upon Crown as the operator of Crown Casino. However, these provisions are effectively supplanted by section 11 of the Management Act. Section 11(1) provides that the payments to the State for which provision is made by Part 4 of the Management Agreement are taxes, fees, charges and other payments payable by Crown in lieu of taxes and levies payable under sections 112A, 113 and 114 of the *Casino Control Act 1991*.
5. Clause 22A of the Management Agreement (as varied) provides that while the casino licence remains in force, Crown must pay, among other things, “casino tax” to the State each month. The amount of the casino tax is calculated as a specified

percentage of the Commission Based Players' Gaming Revenue for the month in question.

6. Commission Based Players' Gaming Revenue is defined in the Management Agreement (as varied) as follows (emphasis added):

***Commission Based Players' Gaming Revenue** means the total of all sums, including cheques and other negotiable instruments whether collected or not, received in any period after 31 December 1995 by the Company from the conduct or playing of games within the Temporary Casino or the Melbourne Casino (as the case may be) by Commission Based Players less the total of all sums paid out as winnings during that period to Commission Based Players in respect of such conduct or playing of games.*

7. Relevantly, a Commission Based Player (as defined in the Management Agreement) is a person who participates in a premium player arrangement.

8. "Premium player arrangement" is defined in s 3 of the *Casino Control Act*:

***premium player arrangement** means an arrangement whereby a casino operator agrees to pay a patron of the casino a commission based on the patron's turnover of play in the casino or otherwise calculated by reference to such play.*

C. Commissions

9. We begin by setting out facts about the Premium Player Commission.

- (a) Premium Player Commissions are paid by Crown under a Premium Player Program Agreement made between Crown and the player.
- (b) The commission paid by Crown may be calculated as a percentage of the player's turnover within the casino (on specified games and provided a minimum turnover is reached), or as a percentage of the player's losses at the casino (on specified games and provided a minimum turnover is reached) or otherwise.
- (c) A player may request a partial settlement of amounts at any time. At the conclusion of the gaming program, a full settlement of amounts will be made and the player will be paid the commission.
- (d) Non-negotiable chips are used at the casino by Premium Players to place bets and are the mechanism by which the commission is calculated. If a Premium Player wins using a non-negotiable chip, he or she will be paid in Commission chips, with the non-negotiable chip remaining as the original wager. Commission chips may be exchanged for non-negotiable chips. At

settlement, the Premium Player's total turnover is based on the total non-negotiable chips purchased, less any non-negotiable chips returned.

- (e) At settlement, a Premium Player may elect to have expenses incurred at the casino deducted from commissions payable. In those cases, the expenses are paid for by the Premium Player using commissions earned.
- (f) Commissions may also be applied by a Premium Player to the repayment of any credit amounts owed to the casino.
- (g) At settlement at the conclusion of the program, any commission payable after deduction of expenses and credit repayments is paid in cash or telegraphic transfer.

D. "Winnings"

- 10. The statutory question is whether Premium Player Commissions are "sums paid out as winnings ... to Commission Based Players in respect of such conduct or playing of games."
- 11. Four points may be made about the construction of that statutory phrase.
- 12. First, "winnings" is not defined in the Management Agreement, the Management Act or the *Casino Control Act*. The ordinary meanings of "winning" and "winnings", identified in the *Oxford English Dictionary*, are as follows (emphasis added):

3. concr. That which is won; a thing or amount obtained or gained; gain, profit (as acquired); ...

4. pl.: usually concr., as pl. of 3, Things or sums gained, gains, profits; earnings; in mod. Use chiefly applied to money won by gaming or betting

That is a broad definition. Nothing about it requires a "winning" to be in respect of a wager that was won.

- 13. Secondly, the sum must be paid "to" the Commission Based Player. As a matter of construction, there might be a question whether that includes only sums paid *directly* to the player, or may include payments made *indirectly* to the player, but on the facts as we understand them, the commission is paid directly to the player and so the issue of construction does not arise.
- 14. Thirdly, the winning must have been "in respect of" such conduct or playing of games. The words "in respect of" take their meaning from their context and

ordinarily require there to be some connection or relation between the two subject-matters, though the connection need not be close or direct.¹

15. Fourthly, that the winnings must have been in respect of the “conduct or playing of games” shows that the winnings are not limited to wagers won on games, but may include any sums gained that have a connection or relation with the playing of a game and, more broadly, the conduct of games. This allows for a broader range of things or sums gained to fall within the phrase than would fall within the phrase “on the outcome of gambling events” in s 126-10(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

E. Premium Player Commissions are “winnings”

16. We are of the view that payments made by Crown to players as Premium Player Commissions are sums paid out as “winnings” for the purposes of “casino tax”. That is so whether they are paid out as cash, or applied by the player against expenses incurred or to amounts owed by the player to Crown. In both of the latter cases, the player elects to apply some or all of the commission to satisfy another obligation. That this is done without a physical transfer of money from the casino to the player (before it is transferred back again) does not, in our opinion, change the character of the commission itself as a sum paid by Crown to the player. A “sum” may be “paid” in various ways and need not involve a direct cash transfer.
17. In our opinion, the character of the payment that is made is that it is a gain to the player and the gain is in respect of the conduct or playing of games. That conclusion can be supported in two ways.
18. First, the gain is in respect of the playing of games. The commission is calculated by reference to either turnover, or losses, of playing games. The commission may thus be characterised as part of the return to the player from playing games. In substance, the final return to the player from the playing of games is affected by the amount of the commission. The commission will either reduce net losses from wagers or increase net winnings. This conclusion is not affected by the fact that commission is based on accumulated turnover or losses, rather than individual amounts wagered or lost. Instead of the return being determined on that individual

¹ See, eg, *CJR Ltd Chief Commissioner of State Revenue* (2006) 68 NSWLR 440 at [30].

basis, it is determined on an accumulated basis. For Premium Players, then, returns are both individual wagers won and commissions paid.

19. Secondly, the commission might be seen as a gain paid for taking part in games; that is, in respect of the *conduct* of games. As s 64(1)(j) of the *Casino Control Act* demonstrates, taking part in a game is seen by the statute as part of the conduct of gaming. The commission is payable to the player for taking part in a sufficient number of games to generate the minimum turnover or losses.
20. That the payment bears one or both of those characters stamps it as a “sum paid out as winnings.”

Dated: 9 February 2016



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