

141219 Commissions Advice (003).pdf

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Date: Fri, 23 Mar 2018 12:02:07 +1100
Attachments: 141219 Commissions Advice (003).pdf (288.08 kB)

Morning Glen,

See attached as discussed. Apologies for the delay in forwarding it through to you.

If possible can you please consider it and let me know when the earliest possible time might be to discuss it with you.

Cheers
Josh

Joshua Preston
Chief Legal Officer – Australian Resorts



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IN THE MATTER OF THE *CASINO (MANAGEMENT AGREEMENT) ACT 1993* AND THE TREATMENT OF 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:
 - (a) Premium Player Commissions; and
 - (b) Junket Program Commissionsare “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”, but Junket Program Commissions are not.

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. A Commission Based Player is a person who participates in a premium player arrangement or a junket.
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.

9. “Junket” is defined in s 3 of the *Casino Control Act*:

junket means an arrangement whereby a person or a group of people is introduced to a casino operator by a junket organiser or promoter who receives a commission based on the turnover of play in the casino attributable to the persons introduced by the organiser or promoter or otherwise calculated by reference to such play.

C. Commissions

10. For the purposes of this advice, we are asked to consider two types of commissions.
11. The first type of commission is called a 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).

- (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) In addition to commission, Complimentary Allowances are also provided, calculated on the player's total turnover. Complimentary Allowances cover in-house room, food and beverage costs and airfare costs incurred by a player. Complimentary Allowances cannot be redeemed for cash.
 - (e) 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.
 - (f) 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.
 - (g) Commissions may also be applied by a Premium Player to the repayment of any credit amounts owed to the casino.
 - (h) Any commission payable after deduction of expenses and credit repayments is paid in cash or telegraphic transfer.
12. The second type of commission is called a Junket Program Commission.
- (a) Junket Program Commissions are paid by Crown under agreements made by Crown and various junket operators.
 - (b) The agreements do not oblige junket operators to arrange junkets, but to the extent an operator does so, and certain conditions are met, Crown pays the operator a commission. The commission is calculated as a percentage of the net turnover. Under the agreements, a portion of the commission must be forwarded by the operator to the players. The amount forwarded to the players is determined by the operator. Crown's expectation and experience is that junket operators forward between 80% and 100% of the commission on to players.

- (c) Commissions are paid in foreign currency to a nominated bank account of the operator.
- (d) The percentage of the commission that is payable to the operator is calculated by reference to matters including the type of junket program, the amount of Front Money provided, the number of players and the complimentary services that are to be provided by the casino.
- (e) The operators are not agents, employees or representatives of Crown.

D. “Winnings”

- 13. The statutory question is whether either or both types of commissions are “sums paid out as winnings ... to Commission Based Players in respect of such conduct or playing of games.”
- 14. Four points may be made about the construction of that statutory phrase.
- 15. 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.

- 16. Secondly, the sum must be paid “to” the Commission Based Player. A question arises whether that includes only sums paid *directly* to the player, or may include payments made *indirectly* to the player. We return to this issue below.
- 17. 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
- 18. 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

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

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”

19. 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.
20. 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.
21. 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 basis, it is determined on an accumulated basis. For Premium Players, then, returns are both individual wagers won and commissions paid.
22. 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.

23. That the payment bears one or both of those characters stamps it as a “sum paid out as winnings.”

F. Complimentary Allowances are not “winnings”

24. In our opinion, Complimentary Allowances are not “winnings”. Such allowances do not bear the character of a “sum paid out as winnings” but are in the nature of gifts or gratuities, albeit Crown calculates the value of the gift or gratuity based on a player’s turnover. Allowances may only be applied to accommodation, food and beverage and airfare costs, and may not be redeemed for cash. We accept that a “winning” may be a non-monetary prize,² but we do not see that a gift whose size is calculated by reference to turnover or losses is capable of being a “prize”. Complimentary Allowances are not awarded to the winner of a game.

G. Junket Program Commissions are not “winnings”

25. In our opinion, Junket Program Commissions paid by Crown to junket operators are not properly characterised as “sums paid out as winnings ... to Commission Based Players.” That is for two inter-related reasons.

26. First, the sum is not paid to the player, but to the operator. The definition of “Commission Based Players’ Gaming Revenue” specifically includes that the payment be made “to Commission Based Players”. Clearly enough, if that is limited to *direct* payments to players, the definition is not satisfied for Junket Program Commissions. But even if the definition does extend to *indirect* payments, in our opinion, these commissions still do not satisfy that definition. In our opinion, to be a payment *to* the player, the indirect payment must be held by the intermediary for the player as owner of the payment and the sum paid must be subject to the direction and control of the player.³ But under present arrangements, in the hands of the operator, it is the operator (and not Crown or the player) that determines whether to pay any part of the commission it receives to players and, if so, how much to pay. That means that it cannot be said that any part of what Crown pays to the operator as commission is, at the time of payment, capable of being characterised as an indirect payment to a player.

² See *Casino Control Act*, s 78B(3).

³ Compare *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 396.

27. Secondly, it seems to us that the character of the payment to the operator is not a “sum paid out as winnings”. It is a payment made to the organiser for the organiser having introduced players to the casino. That is seen in the factors that are taken into account in calculating the amount of the percentage. It also reflected in the different definitions of “junket” and “Premium Player Arrangement” in the *Casino Control Act* to which we have referred above. The definition of “junket” envisages the operator receiving a commission. The definition does not suggest the operator receives the commission (or any part of it) for or on behalf of players. There are no doubt sound commercial reasons why Crown would seek to have part of the commission returned to players. But that is done in a separate transaction, controlled by the operator.
28. This conclusion is not affected by the obligation on the operator to pay some amount over to players. As we have said, that seems to us to be a separate transaction and one that is controlled by the operator.
29. Nor is it affected by the contention that the purpose of the payment is to encourage gaming at the casino. That may be so, but that alone does not stamp the payment with the character of a “winning”.
30. This conclusion does not mean that payments made to operators can never be “winnings” for the purposes of casino tax. It seems to us to be possible for the payments to be structured in a way that ensures they are payments “to” players as “winnings”. One method would be to separate the amount of any commission payable to the operator from the commission payable to players. Another would be to structure the payments so that they are wholly payments to players that are held by the operator and there would be separate arrangements whereby the player authorised the operator to deduct an operator’s commission from the amount paid over to the player. There will likely be further alternatives.

H. Recovery of overpaid amounts

31. In our advice of 23 December 2013, we advised about how proceedings for recovery of any amounts paid that were attributable to the mistaken inclusion of sums as “sums ... received” in Gross Gaming Revenue might be brought. Those same principles apply to Commission Based Players’ Gaming Revenue. They also apply to the recovery of any amounts paid that are attributable to the mistaken failure to include sums as “sums paid out as winnings”.

32. It appears that Crown does have a possible claim for recovery based on mistake. In order to be sure an operative mistake was made, it would be necessary to review Crown's policies and procedures about the calculation of casino tax for any references to the treatment of Premium Player Commissions and to confirm whether advice (internal or external) has previously been given about this topic. It would also be relevant to know the extent to which Crown has adverted to the issue in making prior payments. A claim might be able to be made if the evidence showed that Crown made the payments in ignorance of the true position and without making any conscious decision to make the payments regardless of the legal obligation.⁴
33. In our advice of 23 December 2013, we also identified potential limitations on recovery in the *Limitation of Actions Act 1958*. We reiterate our view that there is a sound argument to be made for Crown that the 1-year limitation in s 20A of that Act does not apply because that part of the payment of "casino tax" that is attributable to the mistaken failure to include Premium Player Commissions as "winnings" was not paid by way of tax or purported tax. That argument is, however, untested. If s 20A of the *Limitation of Actions Act* does not apply, then we reiterate our view that a 6-year limitation is likely to apply from the date of payment.
34. We will revisit the matters canvassed in this advice upon receipt of further instructions about the matters identified in paragraph 31 above.

Dated: 19 December 2014

NEIL YOUNG
Nispan Sathyan Chambers

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⁴ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 369; *Hookway v Victoria Racing Ltd* (2005) 13 VR 444 at [41].