Case No: AC-2008-LON-005741

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 8th July 2025
Neutral citation: [2025] EWHC 1660 (Admin)

Before :

MRS JUSTICE EADY DBE

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Between :

THE KING on the application of
(1) THOMAS HOLDINGS LIMITED
(2) THOMAS ESTATES LIMITED
(3) MECHANISED PROJECT MANAGEMENT
(4) MPM INVESTMENTS
(5) WM NOBLE (AUTOMATICS) LIMITED
(6) SUMMIT LEISURE (CLAYTON) LIMITED
(7) BJ'S LEISURE LIMITED
(8) SUMMIT LEISURE (NORTHUMBERLAND) LIMITED

Claimants

- and -

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS **Defendants**

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- -

KIERON BEAL KC, RHYS JONES (instructed by **PricewaterhouseCoopers LLP**) for the **Claimants**
ELENI MITROPHANOUS KC, JOANNA VICARY, JAMES ABERNETHY (instructed by **the General Counsel and Solicitor to His Majesty's Revenue and Customs**) for the **Defendant**

Hearing dates: 10-12 June 2025

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Approved Judgment

This judgment was handed down remotely at 11am on [Tuesday 8th July 2025] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE EADY

Mrs Justice Eady DBE:

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Introduction

1. This is my judgment on the claimants' claims for judicial review of decisions of the Commissioners for His Majesty's Revenue and Customs ("HMRC") to refuse to apply extra-statutory concessions in respect of assessments of Amusement Machine Licence Duty ("AMLD") relating to a category of machines ("*the disputed machines*") operated by the claimants in amusement arcades and bingo halls. It is not in dispute that the assessments were correct, because the disputed machines were properly to be treated as "*gaming machines*" as defined by section 25(1A) of the Betting and Gaming Duties Act 1981, where "*the outcome of the game is inherent in the action of the machine*". It is the claimants' case, however, that, in relation to each assessment, an extra-statutory concession ("*ESC*"), in the form of the misdirection ESC or the misunderstanding ESC (both in force at the relevant time), ought to have been applied such that the AMLD liabilities in question would not be enforced.
2. The claimants fall into two groups: the first and second claimants are companies formerly owned by the Thomas family (they were sold to Riva Gaming Limited on 12 August 2006); the third to eighth claimants are part of what is known as the Noble group of businesses. Both groups of claimants have operated bingo halls and amusement centres in the United Kingdom since the 1960s; they are also involved in the development and provision of gaming equipment. Where necessary to distinguish between the two groups of claimants in this judgment, I refer to them as the "*Thomas claimants*" or the "*Noble claimants*".
3. The relevant period of assessment for the first and second claimants was from December 2004 to July 2006; that for the remaining claimants, from January 2005 to July 2006. Until 18 April 2005, the relevant defendants would have been the Commissioners of HM Customs and Excise; for ease of reference, however, throughout this judgment I have simply used the title "HMRC".
4. For the hearing, a large amount of documentation was introduced through statements from the following witnesses: (1) for the claimants: (a) Mr James Simon Thomas, formerly managing director of the Thomas claimants between 1989 and August 2006, and a member of the national council of the trade association, the British Amusement and Catering Trades Association ("BACTA"); (b) Mr David Harmon Biesterfield, group legal and development director for the Noble claimants, where he has largely worked since February 1986; (c) Mr Nicholas Harding, chief executive officer of various (non-claimant) companies operating amusement and/or bingo premises in the UK; (d) Mr Stephen Whitelaw, co-founder and managing director of a business providing hardware, software and game design for various sections of the machine-gaming industry worldwide; (e) Mr Leslie MacLeod-Miller, solicitor and formerly BACTA's general counsel (2004-2007) and chief executive (2007-2014); (f) Mr Anthony Dennis Boulton, part of a business involved in the design and manufacture of amusement machines in the UK at the relevant time; (g) Mr Andrew Glennon, group chief financial officer in a group of companies involved in the amusement/leisure industry (now including certain of the Noble claimant companies); and (h) Mr Victor Mark Cramer, director and solicitor at PwC, with the management and day-to-day conduct of these proceedings for the claimants; and (2) for HMRC: (a) Mr Philip John Levy, HMRC anti-avoidance; (b) Ms Emma Cox, HMRC anti-avoidance; (c) Mr Brian O'Kane, HMRC gambling duties policy team; and (d) Ms Louise Burt, HMRC compliance (large business section).

The background

Relevant statutory provisions

5. For the periods to which these proceedings relate, the relevant regulatory framework (at times referred to as the "*social law*") was provided by the Gaming Act 1968 ("GA") and the Lotteries and Amusements Act 1976 ("LAA"). By virtue of GA section 21 and LAA section 16, for regulatory purposes, a distinction was drawn between gaming by means of a machine to which Part III GA applied (referred to in these proceedings as "*gaming machines*") and other forms of gaming. Part III GA applied to machines constructed or adapted for playing a game of chance where (relevantly): *"... the element of chance in the game is provided by means of the machine*" (GA section 26(2)).
6. For VAT purposes, in Group 4 of Schedule 9 to the Value Added Tax Act 1994 ("VATA"), "*games of chance*" were exempted from VAT. That exemption, however, excluded (so, rendered taxable) machines that were "*gaming machines*", similarly defined (relevantly) as machines in which: *"(c) the element of chance in the game is provided by means of the machine*".
7. Separately, under section 21 of the Betting and Gaming Duties Act 1981 ("BGDA") it was required that amusement machines were to be subject to the grant of a licence, and, by section 22, liable to "*amusement machine licence duty*" ("*AMLD*"). Further related provisions made clear that category A AMLD machines were those that were not "*gaming machines*", whereas (relevantly) category E AMLD machines were those that were gaming machines. A "*gaming machine*" for these purposes was defined as a machine where (relevantly): *"(c) the outcome of the game is determined by the chances inherent in the action of the machine, ...*" (BGDA section 25(1A)). In HMRC's reference notice 454 (June 2002) guidance was provided as to the applicability of AMLD, advising that "*the definition of a gaming machine in this notice is based upon the [BGDA] ... [which] differs from the social law definition ...*". For those unsure as to whether a particular machine would be exempt from AMLD, the notice advised that they should consult the Greenock Accounting Centre before making the machine available for play.

Whether the disputed machines were "gaming machines" – the decision in Rank

8. To understand the current claims, it is necessary to appreciate how the disputed machines operated. This has been addressed in detail in related litigation, and a useful summary is provided in the judgment of the Supreme Court in *Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc* [2015] UKSC 48, as follows:

> "3. The disputed machines were all slot machines used for gaming. Traditionally such machines are coin-operated, with three or more mechanical or video reels which spin when a button is pressed or, in the case of older machines, when a handle is pulled. The machine typically pays out according to the patterns or symbols on the machine when it stops. The basic form of the machines is sufficiently described in the agreed statement of facts, ...:
>
> > "… the hardware of a slot machine consists of a cabinet containing the electronic control board, power supply coin insert and pay-out mechanisms, reels and/or video screens and cashboxes. The electronic control board is an embedded microprocessor control system that generates the winning and losing games and displays the results to the player via the reels, lamp displays or video screens. The machine's software is a list of instructions that the processor executes in order to generate the winning or losing games. Such software is controlled either by embedded software that is controlled or random or by a remote 'random number generator'. 'RNG' (for 'random number generator') is used to describe the system for producing numbers for the machine's software, whether the system is embedded in that software or provided by means of another device."
>
> As is apparent from that description, and was explained in evidence, modern machines are entirely computerised:

> "In modern slot machines, the reels and lever are present for historical and entertainment reasons only. The positions the reels will come to rest on are chosen by an embedded RNG contained within the machine's software.
> The RNG is constantly generating random numbers, at a rate of hundreds or maybe thousands per second. As soon as the lever is pulled or the 'Play' button is pressed, the most recent random number is used to determine the result. This means that the result varies depending on exactly when the game is played. A fraction of a second earlier or later, and the result would be different ...""

9. The issue at the heart of the *Rank* case related to the question whether (prior to a change in the law from 6 December 2005) the disputed machines were gaming machines and thus subject to VAT.

10. To the extent that the element of chance was provided by an electronic or mechanical component within, and forming an integral part of, the body of the terminal, there was no dispute: that was a gaming machine. The issue in the *Rank* litigation related to machines that used a random number generator ("RNG"), which might be capable of being used only by a single terminal or by multiple terminals, but which (in either case) was not an electronic or mechanical component within, and forming an integral part of, the machine. For Rank, it was argued that machines using RNGs that were not thus integrated into the mechanics or software of the terminal were akin to the older style bingo game, where winning numbers would be produced by the random selection of a ball (whether taken manually from a bag or by means of an electronic ball shuffler), entirely separate from the player's card or screen - the contrast being between an element of chance provided by machinery within the device being used by the player and one provided by an outside agency of some kind.

11. At first instance, it was held that terminals constructed with dedicated, albeit non-embedded, RNGs were gaming machines (allowing that the position might have been different if the RNG had an independent power source and was supplied separately from the terminal). The Court of Appeal considered, however, that there was no distinction between single-terminal and multi-terminal RNGs, and the RNG was, in either case, to be treated as part of the machine; as the chance was thus created by something that was part of the machine, it was properly to be defined as a gaming machine. The Supreme Court affirmed the decision of the Court of Appeal but on the basis that the element of chance was in fact produced "*by means of*" the player's interaction with the machine – pressing the button or pulling the lever – which would interrupt the sequence of numbers produced by the RNG; although the RNG was a necessary part of the process, the element of chance was provided by means of the machine, which was, therefore, a gaming machine.

12. Given the outcome of the *Rank* litigation, it is common ground that the disputed machines in the present proceedings (which are of the same type as those in issue in *Rank*) were gaming machines. That meant they could not fall within category A for AMLD purposes. The claimants say, however, that they should be afforded the benefit of the misunderstanding or misdirection ESCs because, at the relevant time, there was a shared understanding that the disputed machines were not to be treated as gaming machines, and HMRC had so directed or ruled.

The evolution of the disputed machines

13. The evolution of the disputed machines is described in the witness evidence before me, in particular in the statements of Mr Thomas and Mr Biesterfield, and others working in the industry at the relevant time. Thus, Mr Thomas describes his involvement in the development of a game called "*Jackpot Bingo*", which he says was the first type of fully automated bingo game with a separate RNG into which one or more terminals could be plugged. *Jackpot Bingo* was released on to the market in 2003 and was deliberately intended to take advantage of a reading of the relevant provisions of the LAA and GA so as to be treated as a non-gaming

machine (a "*section 16/21*" machine), thus avoiding certain regulatory restrictions, as well as being exempt from VAT.

14. Similarly, Mr Biesterfield describes the interest that the Noble claimants had in the development of machines where the element of chance was provided by a RNG external to the terminal; this, he explains, did not simply mean removing that part of the terminal software (referred to by some witnesses as the "*master processor unit*") that would traditionally act as a RNG (or equivalent), but required new machines to be designed (or older machines to be re-designed), so the RNG would be a separate processor, contained within a box, connected to the terminal by a cable but otherwise independent from it. For Mr Biesterfield, a key distinction related to the "*compensators*" that would otherwise be provided by traditional machines, such that the computer programme would *"produce a controlled version of randomness, where the previous payouts of the machine can influence future results*"; in order to fall outside the definition of a "*gaming machine*", the RNG could not interact with the machine so as to ensure the same compensation. Mr Biesterfield explains that the early versions of these new machines would tend to operate with one RNG, usually located at the cash desk, linked to a number of terminals. Given, however, that WiFi technology was unreliable at that time, this required the use of long cables and, for reasons of practicality (as well as the desirability of greater portability), during the course of 2004, single terminal:single RNG configurations began to be developed.

15. I pause to note that Mr Biesterfield's description of how amusement arcades and bingo halls were locating the separate RNG at this time accords with recollections of HMRC officials. In a memorandum written in January 2008, one of the relevant officers, Mr Blyth, recalls visiting premises on 25 March 2004, where the RNG was situated in a back office, adjacent to the room in which the three terminals using it were sited.

16. Returning to the narrative, as those involved in the industry have explained in their statements, the attraction of the new machines at this time was in part due to increases that had recently been allowed in cash and prize limits for non-gaming machines. There was also, however, a particular interest (and concern) about the development and growth in use of Fixed Odds Betting Terminals ("FOBTs") in bookmaker's, which were perceived to be contributing towards a fall in the turnover of amusement arcades and bingo halls and which were being treated as non-gaming machines for VAT purposes. FOBTs looked like traditional gaming machines and could be played for cash, allowing a variety of simulated games (such as roulette, or virtual horse or dog racing) to be played. The regulatory regime applicable to betting shops meant, however, that they had to be "*betting machines*", where the player places bets on a simulated event, and to ensure that FOBTs could not be construed as gaming machines – which would not be allowed in a betting shop - the RNGs for FOBTs were required to be off-site. Thus, a central feature of how FOBTs operated was that the terminal – which contained the visualisation software and was located in the bookmakers - was connected to a remote server, which contained the RNG creating the chance element of the games: when a bet was placed, the RNG would generate the result, which was relayed to the FOBT by modem.

17. In contrast, the regulatory regime applicable for amusement arcades and bingo halls required the RNG (along with any terminal/s) to be sited on licensed premises; locating the RNG off-site would thus not be an option for those operating in that sector. The design similarity between FOBTs and gaming machines (at least from the player's perspective) was, however, perceived to have boosted the business of bookmakers at the expense of others in the sector, which had led to an interest in similarly configured machines – separating out the RNG from the terminal software - from operators of amusement arcades and bingo halls.

18. This was something about which the relevant officials within HMRC started to become aware during the course of 2004; with the observation in an internal memorandum of 3 March 2004 that "*FOBTs may be finding their way out of the bookmakers shop and into the amusement arcade environment*". At the same time, consideration started to be given to how the use of these new machines in amusement arcades and bingo halls should be treated for VAT and AMLD purposes. A decision had earlier been made to treat FOBTs as exempt from VAT (albeit this was subject to further review), and the question was whether similar machines, albeit

operating in a different regulatory environment, should be treated in the same way – a question of some importance given the principle of fiscal neutrality required in relation to VAT liabilities. Going into May 2004, however, it is apparent that there remained uncertainty within HMRC as to how these new machines operated; with an internal email of 20 May 2004 noting that a "*clear explanation*" was still required as to "*how the FOBTs [in amusement arcades/bingo halls] work*".

19. At this early stage, the evidence makes clear that the focus for those seeking to use the disputed machines in arcades and bingo halls was on the regulatory requirements. Certainly both the Thomas and Noble claimants had been seeking to obtain guidance from the relevant regulatory body – the Gaming Board for Great Britain - and, in late March/early April 2004, the Board notified the Thomas companies that it was content for: "*these systems to be installed and played as a game under section 21 [GA] ...*", although expressing the caveat that: "*This is, of course, subject to the system operating to the limits set out in section 21 and in other respects meeting the requirements of the legislation*", recording that it was agreed that: *"... this endorsement applies only to the existing version of the games and that you would consult with the Board before making any changes, or introducing other versions ... [and] ... any systems in use would be modified if necessary to conform to the final version of the draft guidelines ....*".

20. At around the same time, the Noble claimants were similarly seeking regulatory guidance regarding these machines, with Mr Biesterfield writing to the Gaming Board in mid-April relating to "*a prospective machine*" operating along similar lines to *Jackpot Bingo*. Attaching a diagram to show how the machine would be configured, it was explained: *"... the server producing the random numbers will be connected to the terminal by a connection lead, but will be located away from it. ...*". In responding, by letter of 7 July 2004, the Gaming Board observed that it was in discussions with BACTA regarding the development of a Code of Practice "*in respect of section 16 and 21 machines*", but, while content "*to give a view on new concepts in machine gaming"* it *"does not and never has "approved" individual types of machine*." I pause to observe that there is evidence before me (from Mr Whitelaw) to suggest that the position has changed since the introduction of the Gambling Act 2005, as there are now "*testing houses*" which the industry uses to verify that machines are properly classified.

21. In any event, subsequently, after a visit from a Gaming Board official to Noble premises, by email of 5 August 2004 it was confirmed that: *"... the Board has no issues with regards the outline of your proposed S16 [LAA] gaming terminal ...*", although: "*... we cannot give a definitive answer as we have not had the chance to view the final product. However provided your system complies with the appropriate legislation and BACTA/Gaming Board guidelines ... we see no issues arising*."

HMRC's interactions with BACTA and the letters of 18 August and 3 September 2004

22. Meanwhile, returning to the position in late May 2004, it is apparent that HMRC were seeking to learn more about the use of the new machines, writing to the trade association, BACTA, on 27 May 2004, expressing concerns as to how these were being treated for tax purposes. Although the machines were seen as akin to FOBTs, while FOBTs were liable to general betting duty there was no common understanding as to the appropriate tax treatment for these new machines in arcades and bingo halls. Working on the assumption that BACTA members would wish to consider the tax implications before investing in the new machines - although it was noted that HMRC had no record of any enquiries being made - it was explained:

> "... we want to ensure that everyone accounts for the proper tax and that no one is unfairly disadvantaged because of misunderstanding or misinformation. To that end, we would like to meet with industry representatives to clarify how these machines work, what different 'games' they provide, how many of these machines are in use and the anticipated size of the market for these machines with a view to determining their proper tax liabilities."

23. Within HMRC, although there appears to have been some consideration whether the machines should be treated differently depending on location (that is, whether an FOBT in a bookmaker's,

or one of the new machines operating in an amusement arcade or bingo hall), it was recognised that this would not be possible given the principle of fiscal neutrality, which precludes treating similar, competing supplies of services differently for VAT purposes (the issue in Case C-453/02 *Finanzamt Gladbeck v Linneweber* ([2008] STC 1069), which was then being litigated before the Court of Justice of the European Union). At that stage, internal advice highlighted the difficulties arising from the decision to treat FOBTs in bookmakers as not being gaming machines (the approach that had been adopted for VAT purposes), arguing that "*so called fixed odds betting terminals are actually gaming machines, and so should be treated accordingly*" (email from Robert Bartlett (a solicitor) of 1 June 2004), albeit others observed that "*an argument can be made the other way*" (email from Phil Sears (HMRC VAT reliefs policy team) of 7 June 2004). For some officials within HMRC policy, it was clear that an RNG separate to the terminal meant that "*the element of chance must be provided outside the machine*" (email from Ian Moules (HMRC excise betting and gaming policy development team) of 7 June 2004); although others considered it significant that the relevant statutory definition made "*no distinction dependent on the physical location of the RNG*" (email from Mr Sears of 8 June 2004); while some considered the important point to be the fact that, absent a dedicated RNG, a machine would not have all the necessary attributes to constitute a gaming machine (email from Brian O'Kane of 8 June 2004). In any event, given the spread of the new machines, it was recognised that "*Unless we can identify a difference other than location ... excise and VAT need to work together to agree the future treatment*." (email from Mr O'Kane dated 8 June 2004).

24. On 14 July 2004, officials from HMRC met with BACTA representatives (including Mr Thomas) to discuss these new machines. Mr Thomas explained that, while he was involved in a company that manufactured and supplied the machines, he only had "*one or two installed in his arcades*"; although he did not consider many were being used ("*in the low hundreds*"), due to considerations of cost and questions as to the longevity of use, he confirmed these were "*an accepted part in the economics of arcades/bingo halls*". It was further explained that BACTA members were paying a bingo tax when operating these machines in bingo halls, treating them as a form of mechanised cash bingo, a course that was not at that stage disapproved by those attending from HMRC.

25. Within HMRC policy, however, a debate continued as to how the new machines were to be treated for tax purposes. Internal emails in August 2004 reflected a view that FOBTs and "*FOBT-type*" machines should be afforded "*equity of treatment*" pending the introduction of new legislation (specifically, in anticipation of what was to become the Gambling Act 2005) or further review (email from Mr Sears of 12 August 2004); on that basis, it was considered that such machines – being seen as "*video machines providing games of chance*" (email from Mr Moules of 12 August 2004) - would be liable to category A AMLD at £250 per machine per annum, but would not be liable to any other tax. As for what should be communicated to those using the machines, given it was known that users were paying bingo duty on the machines, it was considered (*per* the email from Mr Moules of 12 August 2004) that it would be wrong to:

> "... give misleading information when we are directly asked such a question. While from a fairness perspective we both agree it is good that we receive tax on the winnings for s21 machines as it restricts distortion, legally it is Parliament who decides what is or is not taxed, even if that decision is based on ignorance or outdated knowledge – as is the case here."

It was therefore felt that HMRC should write to BACTA, explaining the view reached.

26. In internal consultation regarding the letter to BACTA, concern was raised that the proposed position (the only liability being category A AMLD) would make the machines very attractive, and that this "*ruling may destablise the market*" (email from John Alderman (national business manager, HMRC large business team) of 17 August 2004). It was, however, considered that the cost of the machines, together with the knowledge that they were to be re-categorised as gaming machines in the near future, meant the risk was limited. Against that background, Mr

O'Kane wrote to BACTA on 18 August 2004, referring to the meeting on 14 July 2004 and to HMRC's further reflections, which had:

> "... led us to the conclusion that the games provided by these terminals do not constitute bingo and should not therefore fall within the scope of bingo duty."

Then continuing:

> "While these terminals undoubtedly provide gaming opportunities they cannot be classed as gaming machines so long as they rely on a random number generator that is not an integral part of the terminal, i.e. a random number generator that is remote from the terminals. Instead, it is our view that for tax purposes these terminals (if they rely on a remote RNG to determine the outcome of their 'virtual games') will be required to hold a Category A Licence (£250 per 12 months) under s23(3) of the Betting and Gaming Duties Act (BGDA) 1981 – "any machine which is not a gaming machine".
>
> Although these are not gaming machines, they do provide gaming opportunities as described in the 68 and 76 Acts. As such, they would appear to continue to enjoy VAT exemption under Group 4 of Schedule 9 to the VAT Act.
>
> ...
>
> While your members may have been content to include income from these machines in their duty calculations for bingo or gaming duty I am sure you will agree that it is important that the proper duty is accounted for and it would be inappropriate for Customs to take payment of a duty that is not due in law."

And further advising:

> "I would appreciate it if you could publicise this decision among your membership. I will advise colleagues that AMLD is appropriate for machines that provide virtual games and that rely on a remote random number generator. Any claims that your members make to recover duty payments that were not properly due to Customs and Excise should be directed to our Greenock Accounting Centre and must be supported by documentary evidence for the amount of duty being reclaimed, the period covered by the claim, and how that amount is calculated. Where a claim for repayment is made, a retrospective licence will also be required for Amusement Machine Licence Duty."

27. Also on 18 August 2004, Mr Alderman wrote out to various large businesses in the sector under the heading *"The tax treatment of Section 21 Gaming Act 68 and Section 16 Lotteries and Amusement Act 76"*, referring to the *"decision"* that had been taken, as confirmed to BACTA that day, that the machines in issue *"if they rely on a remote random number generator to determine the outcome of their 'virtual games'"* would be exempt from VAT and only required to hold a category A licence for AMLD purposes.

28. To the same effect, a draft HMRC Business Brief for September 2004 addressed "*Duty liability for "section 16 and section 21 Gaming Terminals'*"", explaining that these:

> "... look like traditional gaming machines and are similar to bookmakers' fixed-odds betting terminals. They offer games of chance, usually roulette-based games, and are driven by a remotely sited, random number generator. ..."

and stating that such machines were liable to category A AMLD.

29. After further consultation with BACTA, a re-drafted version of Mr O'Kane's letter of 18 August 2004 was provided, dated 3 September 2004. This was substantively the same as the original, although the paragraph asking BACTA to publicise the decision to its members was omitted, and a warning added that:

> "DCMS have clearly stated their intention to use their Gambling Bill to reclassify these as gaming machines. In the meantime we will continue to regard such gaming terminals as being liable to AMLD under Category A but, as with all other taxes, this will be subject to review in the annual Budget cycle."

The BACTA Code of Practice and Factsheet October 2004

30. In early October 2004, BACTA drew up a Code of Practice for "*S16 machines ... Games played under Section 16 of the Lotteries and Amusement Act 1976*" (I understand a similar Code was drawn up for "*section 21 machines*"), making clear:

> "1.5 Section 16 games may only be sited within premises in respect of which the relevant authority has issued an appropriate permit ... granted in respect of the whole premises (not in respect of specific machines). Both the terminal and RNG must be sited within the premises where the gaming is taking place. (NB the RNG can be in the gaming or office area, but the terminals must be in the adult only gaming area)"

31. Addressing "*Manufacturers/Suppliers*", the Code stated (relevantly):

> "2.1 Section 16 games cannot be gaming by means of Part III (1968 Gaming Act).
> 2.2 The Random Number Generator (RNG) must be independent and physically separate from the player terminals, other than connecting wires etc.
> 2.3 When the game commences, the terminal must use the next randomly generated number/s available to it (which could be the last number/s received but not used, in order to avoid unnecessary delay). The terminal must not modify either the random number/s or the outcome normally expected from that result, otherwise the terminal will be considered to be providing an element of chance (and thus would be caught by Part III of the Act in contravention of 2.1 above)."

32. A BACTA Factsheet was drawn up at the same time, albeit this was headed with the caveat: "*This factsheet is not intended to provide legal advice and individual legal advice should be sought before taking any action*." In setting out the conditions for "*section 16/21*" games, it was stated (so far as relevant for present purposes) that:

> "There must be a remote random number generator. Else the game would fall under Section 34"

As for the position regarding VAT and AMLD, the factsheet (relevantly) stated:

> "HM Customs & Excise has confirmed the following as at 3 September 2004:
> . S16 machines are 'gaming terminals' and not gaming machines
> . Bingo clubs have been including the income from Section 16 machines in their calculations for bingo duty, however the games provided by these terminals do not constitute bingo and should not therefore fall within the scope of bingo duty
> . These terminals cannot be classed as gaming machines so long as they have a random number generator that is remote from the terminals
> . For tax purposes these terminals will be required to hold a Category A Licence. ...
> . Although these are not gaming machines, they do provide gaming opportunities as described in the 68 and 76 Acts. As such they would appear to continue to enjoy VAT exemption under Group 4 of Schedule 9 to the VAT Act."

The Noble claimants and HMRC's letter of 26 October 2004

33. Returning to the particular position of the Noble claimants, on 7 October 2004, on a visit from a representative of the Gaming Board, one of the new machines that it was intended would be installed was shown in operation. Mr Biesterfield followed this up with an email, attaching a photograph of the machine in question with confirmation as to how it was intended to operate, explaining:

> "The terminal relies on a remote random number generator which will be located on the site in question. The version that we showed you today relies on "Blue Tooth" technology so that there is no connection by wire between the RNG and the terminal. We may, however, operate the machine with the RNG connected by wire, as was the case with the terminal we showed you on the 5th August. The RNG produces a stream of random numbers and is read by the terminal. Accordingly, the RNG produces the element of chance, the number randomly generated being "snatched" by the terminal in each determination of winners. All signals and messages therefore flow from the RNG to the terminal and not vice versa.
>
> We presently intend that each terminal will be served by an individual RNG. However, as we discussed, we may choose to have one RNG serving multiple terminals in the particular venue. ...
>
> In passing, and as we discussed, I note that Customs have now indicated that Section 16 terminals of this sort are regarded as Category A machines under the Betting and Gaming Duties Act 1981."

34. The Gaming Board responded the following day, advising:

> "I can confirm that the machine titled "Nudge and Win" shown to me during my visit on the 7th October 2004 would appear to be compliant with respect to the current Bacta/Gaming Board guidelines. With regards taxation I would advise that you seek clarification from Customs and Excise, though I understand you[r] view to be correct at this time.
>
> In the event that you modify or produce any new titles I suggest that a visit by ourselves will only be necessary if there are any contentious or potentially non-compliant features incorporated into your design."

I understand the reference to "*Bacta/Gaming Board guidelines*" to be to the BACTA Code of Practice and Factsheet; this, however, suggests that these documents were developed in consultation with the Gaming Board.

35. On 21 October 2004, Mr Alderman, and colleagues from HMRC's large business team, visited the Noble claimants' premises in Gateshead. It is unclear what, if any, machines were seen on this visit but these would not have included any disputed machines as these were not installed for use by the Noble claimants until December 2004 (the timing that has informed HMRC's decisions in this matter). In Mr Alderman's subsequent letter of 26 October 2004, it was made clear that the primary purpose of the visit was to introduce the members of the large business team, explaining that, as national business manager, he (with his colleagues) would now have responsibility for businesses within the betting and gaming sector. Noting there had been a discussion regarding "*Section 16 and section 21 Machines*", Mr Alderman recorded:

> "I stated that I would confirm their tax treatment. It is our view that for tax purposes these terminals (if they rely on a remote random number generator to determine the outcome of their "virtual games") will be required to hold a Category A licence ... under s23(3) of the ... BGDA ... – "any machine which is not a gaming machine"."

The letter further advised that, to the extent that there were any queries "*relating to this matter*", these should be taken up directly with Mr Alderman's team.

The Thomas claimants and HMRC's letter of 13 May 2005

36. As for the Thomas claimants, notwithstanding Mr O'Kane's letters of 18 August/3 September 2004, or the content of the BACTA factsheet, they had initially continued to treat the disputed machines as subject to bingo duty, only obtaining category A AMLD licences as from 28 February 2005. This change was notified to HMRC's Greenock accounting centre on 7 April 2005, with a corresponding claim made for repayment of bingo duty as against each of the relevant machines (identified as "*section 16/21*" machines, with the name of the game then provided in an attached schedule). The customer liaison officer dealing with this repayment claim, Mrs Way, consulted Mr O'Kane, in particular as to the way in which the machines should have been dealt with prior to 28 February 2005. Responding, Mr O'Kane advised as follows:

> "On the s16/21 issue. Up until 09/04 there was a lot of confusion in this area. These new s16/s21 'machines' were developed to exploit a loophole in the Gaming Act '68 and the Lotteries and Amusements Act '76. These sections were intended to cover mechanised betting but because they were so loosely worded and because these machines were built so they weren't caught by the definition of a gaming machine the trade thought bingo duty was the correct liability.
>
> . These machines are clearly not providing bingo, so we can't apply bingo duty.
>
> . They fall outside our definition of a gaming machine – it's not the working of the machine itself that determines the outcome of the game. Instead, it's the numbers that are produced by a remotely sited Random Number Generator that determines the outcome – so we can't tax them as gaming machines (Cat B, C, D, or E).
>
> . They fall within the definition of a video machine that is not a gaming machine so we can only licence them as Cat A.
>
> We advised the trade that from that date forward they must not account for bingo duty on these machines, instead they should obtain CAT A licences. In reality no other tax was ever properly due on these machines and they should have been taking Cat A licences all the time.
>
> The trade association (BACTA) advised us that there were very few of these machines around so we agreed that anyone who had been paying the wrong tax could either:
>
> . submit a written claim (showing full details of what they had paid in error) to recover that tax and, at the same time, make a payment for the arrears of cat A AMLD and continue to pay AMLD in future; or
>
> . simply make a 'fresh start' – stop paying e.g. bingo duty and apply for Cat A licences.
>
> Thomas Estates seem to have gone for the first option ..."

37. It is apparent that Mrs Way also spoke to the finance/operation director for Thomas Estates Ltd, before responding by letter of 13 May 2005, confirming she had consulted with HMRC policy and "*we have researched this at length*", before concluding:

> "From September 2004 Section 16/21 machines were liable for Gaming Machine Duty and traders had to obtain Category A Gaming Machine Licences to operate them.
>
> Prior to this date the duty should have been included in your bingo returns. Consequently you had been accounting for this in the correct manner.
>
> After September 2004 the machines should have been licensed as Category A, and we will now need to issue retrospective licenses for these machines.
>
> Attached is a breakdown of the outstanding Licence Duty, ...
>
> ...

> Whilst we appreciate this may not have been the outcome expected, I must remind you that the onus remains with the trader to ensure that machines are correctly licensed."

HMRC's position going into 2005

38. More generally, it seems that as HMRC's position became better known within the industry, and with no immediate threat of legislative change, there was a significant increase in the numbers of the disputed machines in amusement arcades and bingo halls, effectively doubling during the period December 2004 to May 2005. Meanwhile, discussions continued, in particular between HMRC and the Treasury, as to how legislative changes might be made so as to address the tax issues arising from the treatment of FOBTs and the disputed machines.

39. Continuing to see these machines (described as "*Section 16 and 21 terminals*") as "*similar*" to FOBTs, HMRC's internal guidance manual of January 2005 explained:

> "Section 16 and Section 21 terminals ... offer games of chance ... and again are driven by a remotely sited, random number generator.
> ...
> Because the element of chance is not provided by the terminals themselves, but by a RNG, which is outside the machine ... Section 16 and Section 21 terminals cannot be treated as gaming machines. Consequently, if the terminals offer the facilities for ... playing any games of chance, they will be exempt from VAT ...".

40. Within HMRC, there were, however, concerns that there had been an increase in what were perceived to be tax avoidance schemes, seeking to take advantage of the approach that had been taken. In an email to Mr MacLeod-Miller (BACTA) of 7 July 2005, Mr O'Kane recorded that, whilst "*VAT colleagues*" had confirmed that if the machines were constructed so as to fall outside the definition of a gaming machine ("*eg they are reliant on a remotely-sited RNG*") they would be exempt from VAT, it had been brought to his attention that: "*... there are machines that purport to be s16 machines but are driven by a random number generator that is a fixed part of the machine (bolted to the base of the cabinet*)", which he considered: "*... will be sufficient to place these machines within the scope of Part III of the 68 Act and also to attract AMLD as gaming machines* ...". Similarly, by email to Mr MacLeod-Miller of 29 July 2005, Mr O'Kane referred to premises in Glasgow where the RNG was "*incorporated within the cabinet*"; in such circumstances, Mr O'Kane advised: "*... I would argue that this puts the machine outside the scope of s16 and will cause it to be licensed as a gaming machine. ...*". More generally, by internal email of 31 August 2005, Mr O'Kane expressed his view as follows:

> "... The entitlement to a licence as a Category A machine is predicated on the random number generator being remote from the playing terminal (this requirement is also reflected in the Gaming Board's code of practice for so-called s16 machines). When the random number generator is fitted inside the player terminal or simply affixed to the housing (e.g. bolted to the back or to the base) we believe that is sufficient to bring the machine within the definition of a gaming machine."

I understand the reference to "*the Gaming Board's code of practice*" should in fact be understood to refer to the Code and Factsheet issued by BACTA (the reference to the need for the RNG to be "*remote*" coming from the BACTA Factsheet produced in October 2004).

41. Mr O'Kane also prepared a draft letter to BACTA, recording similar concerns although this was never sent out (apparently on the advice of HMRC anti-avoidance).

BACTA's revised guidance, October 2005

42. At around this time, the Gaming Board had similarly raised concerns regarding the siting of the RNG for this type of machine, emailing Mr Thomas on 15 September 2005 about a machine

his company had manufactured, being used by another entity, where the Board's inspector had found the RNG attached to the plinth (the cabinet on which the player terminal sat). In raising this with Mr Thomas, it was observed: "*I know you are aware this makes the machine a Part III Gaming machine*."

43. In responding, Mr Thomas referred to the location of the RNG being "*a moving feast with conflicting messages being spread by some manufacturers*", and explaining that he had asked BACTA to "*issue chapter and verse*" to clarify the position. In stating his own view on the issue, Mr Thomas continued:

> "As far as I am aware, the RNG has to be physically separate to the machine, e.g. hanging on the wall behind the machine ...
> This is what we have done for all our machines. ...When 8 liner [the name of the machine referenced by the Board] was made, the position was not clear and the RNG was designed to be loose but internal, fixed for travelling purposes only. We have done a letter to all customers we know of ... saying that the RNG has to be separate from the machine ..."

44. Mr Thomas then sought to agree a form of words with the Gaming Board that could be used by BACTA to advise its members; on this, the Board made clear its view that: "*the RNG should be independent and physically separate from the playing terminal*", observing: "*your suggested method of siting does seem to be one of several possible methods that would meet this requirement*", leading Mr Thomas to provide draft advice for BACTA as follows:

> "For the avoidance of doubt, the Gaming Boards advice for S16 and S21 machines is that
> Random Number Generators (RNG) in S16/21 machines have to be independent and physically separate from the machine, eg hanging on the wall behind the machine or hanging on an adjacent machine.
> Otherwise the machine would be a Part III gaming machine, and subject to the S34/31 stake and prize limits, taxation and AMLD"

45. At the start of October 2005, BACTA duly provided a "*clarification note*", which was published in the relevant trade press, stating:

> "Random Number Generators (RNGs) in S16/21 machines must be independent and physically separate from the machine, e.g. the RNG may be attached to the wall behind, above (including from or inside) the ceiling, beside the machine, or contained in independent separators between machines.
> RNGs will not be considered 'independent and physically separate' if they appear to be an integral part of the machine, eg if the machine, and anything physically attached to it is moved and the RNG moves at the same time. Therefore, if the RNG hangs or sits inside any part of the machine or is attached to or hangs or sits inside the plinth, it will not be deemed to be separate for these purposes."

On 7 October 2005, BACTA issued revised guidance substantially in the same terms.

The configuration of disputed machines operated by the claimants

46. At around this time, between 4 to 6 October 2005, HMRC officers visited sites run by the Noble claimants, recording that they had "*over 1,000*" of the disputed machines, where:

> "... the RNG has been removed from the inside of the machine and attached to the machine by a hook or in some instances attached to the wall behind the machine."

Although it was noted that:

> "It is the intention of the company to install freestanding purpose built separators, in the middle of banks of machines and attach the RNGs currently attached to the machines by hooks, to that separator. This will in their view, make them comply with the guidelines issued by BACTA on information from the Gaming Board, with the condition to allow the machines to be exempt from VAT and AMLR, under section 16/21 regulations."

The note of the visit further recorded:

> "It has been conveyed to the company that BACTA guidelines are only guidelines and that HMRC are currently reviewing the matter regarding the correct licensing requirements, Vat and Duty treatment of these machines and that they will be informed of the decision as soon as it is made."

47. Part of the note from the visit records:

> "The Divisional Accountant for the resorts division, Peter Henderson was present and provided a copy of advice received direct from Bacta regarding the location of the Random Number Generator. He fully believed that the company were working within specified guidelines when removing the RNG from inside the machine and fixing it to the wall or specially constructed wooden plinth behind the machine. The machines where MPM have removed the RNG themselves are known as ICE BOXES [in fact, this was the name given to the boxes containing the RNGs], but they also operate a number of genuine section 16 machines on these sites. ..."

And, in relation to another site:

> "Brian Hall provided a detailed breakdown of the machines on site and was very open about describing the practice of removing the RNGs and siting them outside the machines ... Paul Hyman was also happy to discuss this practice as the company had issued instructions, after receiving guidance from Bacta, to the local managers to adapt the machines to comply with the legislation to operate without the need for a licence, or to account for Vat on the takings. ..."

48. Although not present for these visits, Mr Biesterfield takes issue with this record, stating that the Noble claimants had not themselves removed the RNG from any of the machines as the note suggests, and Messrs Henderson, Hall and Hyman would not have suggested otherwise. It seems to me that it is possible that the reference was in fact to the design of the disputed machines used by the Noble claimants: the creation of a machine where the RNG was outside the terminal circuitry could be described as "*removing*" the RNG. Alternatively, the reference might have been to the removal of the RNG from where it had been stored within the cabinet of the machine for transportation purposes. Either way, I accept that the construction of the disputed machines required something more than simply the on-site removal of the RNG from the master processor unit of the machine (the disputed machines had been specifically designed to operate with a separate RNG) and I do not consider that anyone from Noble, who understood how the machines operated, would have suggested otherwise. What I consider these notes reveal, however, is the limited understanding of the design of the disputed machines on the part of the HMRC officers concerned.

49. In any event, on a subsequent visit to sites operated by the Noble claimants, on 23 February 2006, Mr Hall made clear that no-one on-site would have "*taken anything outside the machine*". By that stage, the RNGs used for the disputed machines (whether on a single, or multi-terminal basis) were attached to a board behind those machines, with wires leading from the RNGs into a hole in the back of each unit.

50. As for the siting of the RNGs for the disputed machines operated by the Thomas claimants, on a site visit on 23 August 2006, HMRC recorded that, when the machines were delivered for use, the RNG box would be bolted to the back of the main casing and would then be removed

and either attached to the wall behind the machine or, if two machines were back to back, the RNGs would be swapped over and each bolted to the other machine. HMRC's understanding of the position in this regard was subsequently confirmed to the Thomas claimants by letter of 15 September 2006. In responding on 27 October 2006, those acting for the Thomas claimants emphasised that bolting the RNG to the back of the machine was "... *merely a convenience for carriage*", explaining: "*They go out with clear instructions that the RNG has to be detached and kept remote from the machine and this requirement is known and understood by all in the industry*."

Linneweber and legislative changes – HMRC's position in late 2005

51. Returning to the chronology, in mid-October 2005, the Thomas and the Noble claimants (along with many others) made requests to HMRC for repayments of VAT on gaming machines, arguing that (as had been made clear by the CJEU in *Linneweber*), the principle of fiscal neutrality meant that, for VAT purposes, it had been wrong to distinguish between different types of machine used for gambling on the basis that the element of chance was (or was not) provided by means of the machine. It is apparent that these claims – and the questions they raised as to the VAT treatment of gaming machines for the future – gave rise to concerns within HMRC and the Treasury, and a change to the definition of a "*gaming machine*" was recommended so as to bring all machines used for gambling within scope for VAT purposes, while also legislating to ensure that all machines were paying appropriate AMLD. In presenting the case for change, reference was made to what was described as "*evidence of avoidance or manipulation*", where machines were being "*reconfigured/reconstructed (by removing the RNG from the machine housing) in an attempt to fall outside the social law definition of a gaming machine*".

52. On 5 December 2005, in its Business Brief 23/05, HMRC announced the legislative changes that would render both FOBTs and the disputed machines liable to VAT and align the definition of a gaming machine for AMLD with the amended definition for VAT. For AMLD, the amended definition was contained within the Finance Act 2006, taking effect from 1 August 2006. In advance of that change, the amendment to the definition for VAT purposes was to be introduced the following day, 6 December 2005 (that change being introduced by means of article 2 of the Value Added Tax (Betting, Gaming and Lotteries) Order 2005). Addressing the amended definition, the Business Brief stated that this would create certainty: "...*by confirming that where the element of chance in the game is provided is not relevant*". In respect of AMLD, it was confirmed that, when the change was made pursuant to section 25 of the BGDA: *"... bookmakers' FOBTs and section 16/21 machines will become gaming machines for the purposes of AMLD*", albeit: "*Those section 16/21 machines that qualify as non-gaming machines and currently pay Category A AMLD should continue to do so until Budget 2006*."

53. In the Explanatory Memorandum to the 2005 Order, it was further explained:

> "7.2 The definitions of a gaming machine in VAT and excise law have traditionally followed those in the social law applicable to the different forms of gambling. The social law definition has been updated by the Gambling Act to reflect new technology. A new definition for VAT purposes that uses section 235 of the Gambling Act as a template is accordingly desirable.
>
> ...
>
> 7.4 Bringing forward the adoption of the new definition of gaming machine will also clarify the VAT liability of machines whose random number generator is not located within the outer casing of the machine, in light of recent attempts at avoidance through reconfiguring machines, by putting it beyond doubt that the location of the random number generator is irrelevant. At present one of the features that must be present for a machine to be a gaming machine is that "the element of chance in the game is provided by means of the machine" (Note (3)(c) to Group 4).
>
> 7.5 We do not accept that the avoidance is successful, or that there has been any breach of fiscal neutrality, but this change in definition will ensure that

> there is little room for doubt that all machines used for gambling are within the scope of VAT. ..."

2006 and the Vale report

54. During the course of 2006, it is apparent that the past treatment of the disputed machines was the subject of more detailed consideration by HMRC anti-avoidance. In particular, the claimants rely on an internal report written by Ms Alex Vale, dated 23 August 2006, ("the Vale report") which (relevantly) sought to address the following questions:

> "1. Do the so-called s16/21 machines really qualify to be treated as s16/21 gaming?
> 2. What should the VAT liability of a so-called s16/21 machine with an externally located random number generator be prior to 6th December 2005?
> 3. What should the AMLD liability of a so-called s16/21 machine with an externally located random number generator be prior to 1 August 2006?"

55. The Vale report acknowledged the risk of adverse publicity, given that the industry had been relying on the BACTA guidance and, while arguably not endorsing that guidance, HMRC had: "*... not yet publicly notified the industry what we consider the correct VAT and AMLD position to be prior to 6th December 2005 for VAT and 1 August 2006 for AMLD*." Having considered what might constitute a "*gaming machine*" for VAT, AMLD, and social law purposes under the unamended legislation, the Vale report recommended it should be confirmed: "*... that the so-called s16/21 machines should always have been subject to VAT and AMLD in the same way as all other gaming machines*."

56. In reaching this conclusion, consideration was given to whether it might be argued that there had been an earlier misdirection. Acknowledging there might be individual circumstances where a taxpayer had relied on a verbal or written statement from an HMRC officer, the view was taken that any challenge for misdirection would have to be considered on a case-by-case basis. As for whether it might be said that there had been a general misdirection, in particular as a result of Mr O'Kane's letter to BACTA of 3 September 2004 ("*this at first glance does not look particularly helpful*"), emphasis was placed on the statement that: "*(a machine) cannot be classed as a gaming machine so long as they rely on a random number generator that is not an integral part of the terminal ie a random number generator that is remote from the terminal*." As to what was meant by "*remote*", reference was made to dictionary definitions, which suggested something that was distant or far away, concluding: *"... it is clear that for a machine to qualify as s16/21 gaming, the RNG would not be situated near the machine*."

57. Following the Vale report, a draft of a new Business Brief was circulated within HMRC and to relevant officials in HM Treasury, explaining this was:

> "... seeking to alter, rather than confirm, the implied message given in earlier published material that DIY adaptations are distinguishable from specially designed so-called s16/21 machines, the latter now being lumped together with FOBTs. We now take the view that some so-called s16/21 machines are not necessarily distinguishable from DIY adaptations (and certainly are not distinguishable if they too have their own dedicated RNG in close proximity to and on the same power source as the rest of the machine)... ."

58. On 27 September 2006, HMRC Business Brief 15/06 thus stated:

> "In Business Brief 23/05 ... we advised that the change to the definition of a gaming machine for VAT purposes created certainty by confirming that where the element of chance in the game is provided is not relevant. This followed attempts to avoid VAT by reconfiguring and developing machines so that the random number generator (RNG), which determined the outcome of the game, was sited outside the machine. HMRC consider that the majority of these machines were in fact gaming machines, even before the change in the

> definition in December 2005, despite having their RNGs fitted outside the main body of the machine. As such, VAT should have been accounted for, and the machines licensed as gaming machines. ..."

59. Some concern regarding this guidance was expressed by Mr Alderman in an internal email of 29 September 2006, advising that there could be claims of an earlier misdirection. The response of HMRC's anti-avoidance team, by email of 7 November 2006, explained, however, that: *"... our main priority is to safeguard HMRC's defence against Linneweber claims, and if possible improve it*"; and, with that in mind: "*We all now agree that 'game of chance' machines with RNG's [sic] located anywhere on the same premises were gaming machines – as opposed to FOBTs that were operated in betting shops far remote from the source of generation of the element of chance*." As for possible claims of misdirection or misunderstanding, it was considered that no assumptions could be made: "*... even if the same information had been given out to all, factors such as disclosure, reliance and detriment can vary from trader to trader*."

60. Attempts were made to obtain further information from HMRC officials who had worked with businesses regarding the disputed machines during 2004 and 2005, and a discussion paper, drawing on those responses as well as his own understanding of the position, was authored by Mr Alderman on 12 January 2007. Mr Alderman noted that:

> "31. There is no excise guidance on terminals that handle section 16 and section 21 gaming. The only references to such terminals are contained in the policy letter to BACTA dated 3rd September 2004. BACTA have used this letter to inform their advice to the gaming machine operators."

Observing:

> "39. The letters dated August and September 2004 from Excise (both materially the same) ... were written in the context of "terminals" used in bingo premises and some arcades. These terminals resembled FOBTs, and they had a remote RNG on the premises, and one RNG could serve more than one machine. The ruling given was a policy decision, taken in conjunction with VAT, and the Excise Policy team ... There was no contextual element with the letter allowing the reader to develop machines in the belief that they were VAT-exempt and carried a nil or category A licence."

Considering HMRC's level of understanding at the relevant time, Mr Alderman continued:

> "40. The department was largely unsighted on developments within the gaming machine market; a previously dormant and stable environment that had changed radically. Tax law had previously enjoyed a close linkage with social law and in 2004 there was little evidence that this should change.
>
> ...
>
> 42. ... The location of the RNG was key to whether the department recognised the machines as gaming machines, this understanding was reflected in the ... excise policy letter.
>
> ...
>
> 48. I believe there is a high likelihood that there was misunderstanding in the department. While policy units may have had a clear understanding of the liability and nuances of gaming products this was not reflected in internal guidance, instruction or communication. General ignorance of the various gaming products and the subtleties of the tax liability caused a general misperception of the appropriate tax position. ..."

Noting that the relevant regulatory body (then the Gaming Board) had never provided guidelines, Mr Alderman observed:

> "51. ... They consider that machines were never envisaged under the relevant legislation. They were in the process of drafting a new act under which these

> types of machines would be catered for, and did not want to be drawn into ruling on these machines. BACTA provided guidance which [the Board] did not approve ... but did not object to. ...
> 52. Whether a machine is a gaming machine principally relates to the "determinator" of the event. The [Board] maintains that were the determinator is separate from the machine, that machine is not covered by part III of the act – and not a gaming machine.
> ...
> 55. Using the [Board's] criteria it is possible to see how some operators believed that they were fulfilling the "remote" criteria.
> 56. While the taxpayer should not rely on social law criteria with little information in the public domain they made assumptions.
> 57. This is not a clear cut case of misunderstanding. I believe that on balance the department placed insufficient, clear information to the public to allow them to be aware of the liability issues, this allowed room for other legislation to take precedence. No action was taken to correct this view until the issue of business brief 15/06. ..."

Retrospective licences and VAT assessments

61. On 15 October 2007, a submission was made to HMRC on behalf of BACTA relating to the earlier, pre-December 2005, tax treatment of the disputed machines and any suggestion that retrospective VAT/AMLD assessments should be imposed. BACTA's primary submission was that the disputed machines had correctly been treated as exempt from VAT and subject to category A AMLD; in the alternative, it contended that there would be "*an overwhelming case*" for the misdirection and/or misunderstanding extra-statutory concessions to be applied, in particular placing reliance on Mr O'Kane's letter of 3 September 2004, and HMRC's apparent knowledge of the industry and the machines in issue. In responding to that submission on 20 December 2007, HMRC stated that any claims for misdirection or misunderstanding would be considered on an individual basis.

62. On 5 February 2008, HMRC wrote to the Noble claimants, retrospectively imposing category E AMLD licences on their disputed machines for the period 22 January 2005 to 31 July 2006 (assessing excise duty due in the sum of £2,138,535). On 11 February 2008, HMRC similarly wrote to the Thomas claimants retrospectively imposing category E AMLD licences on their disputed machines for the period 7 December 2004 to 31 July 2006 (assessing excise duty due in the sum of £845,355). VAT assessments were also raised against the claimants (dated 19 December 2007 in respect of the Thomas claimants; 25 January 2008 for the Noble claimants) but these were subsequently withdrawn following the decision of the Upper Tribunal in *Rank Group plc v HMRC* [2020] UKUT 0117 (TCC), which ruled in favour of the taxpayers' case that VAT charged on gaming machines had breached the principle of fiscal neutrality given the different treatment of FOBTs.

The extra-statutory concessions and the decisions under challenge

The extra-statutory concessions

63. The claimants seek judicial review of decisions made by HMRC as to the applicability of two extra-statutory concessions ("ESCs"):
ESC 3.4 ("the misunderstanding ESC"), which provided:

> **3.4 VAT: Misunderstanding by a VAT trader**
> VAT undercharged by a registered trader on account of a bona fide misunderstanding may be remitted provided all the following conditions are fulfilled: (a) There is no reason to believe that the tax has been knowingly evaded; (b) There is no evidence of negligence; (c) The misunderstanding does not concern an aspect of the tax clearly covered in the guidance published by

> Customs and Excise or in specific instructions to the trader concerned; and (d) The tax due was not charged, could not now reasonably be expected to be charged to customers, and will not be charged.

ESC 3.5 ("the misdirection ESC"), which provided:

> **3.5 VAT: Misdirection**
> If a Customs and Excise officer, with the full facts before him, has given a clear and unequivocal ruling on VAT in writing or, knowing the full facts, has misled a registered person to his detriment, any assessment of VAT due will be based on the correct ruling from the date the error was brought to the registered person's attention.

Both ESCs were in force at the relevant time under Public Notice 48; each has since been withdrawn.

64. Before addressing the specific decisions under challenge, I note that, although the misdirection and misunderstanding ESCs expressly applied to VAT liabilities, in respect of both groups of claimants, HMRC have accepted that the ESCs should equally be treated as potentially applying to AMLD in these circumstances.

The Thomas claimants

65. For the Thomas claimants, submissions were made by letter of 16 January 2008 for reconsideration of the VAT assessment of 19 December 2007 relying on the misdirection and/or misunderstanding ESCs, and asking that any liability for AMLD be treated in the same way. Referring to the points already made on behalf of BACTA, reliance was further placed on what was described as the 13 May 2005 ruling, as provided by Mrs Way.

66. Those submissions were refused by HMRC for reasons provided by letter of 11 March 2008: (1) contrary to any suggestion made in the BACTA submission, it was not accepted that the misdirection ESC applied on a "global" basis; (2) in any event, to the extent reliance was placed on Mr O'Kane's letter of 3 September 2004, that related to specific circumstances discussed at the meeting with BACTA on 14 July 2004; (3) the letter of 13 May 2005 did not amount to a validation of the categories of licences applied for, and, taking the view that the disputed machines were in fact "*gaming machines*", HMRC were not guilty of misdirection in granting licenses based wholly on information provided by the applicant.

67. By letter of 26 March 2008, those acting for the Thomas claimants requested an explanation for the rejection of the case made under the misunderstanding ESC, in particular given the observations made by Mr Alderman in his 12 January 2007 report.

68. HMRC responded to that request on 21 April 2008, addressing the four criteria identified in the misunderstanding ESC. Accepting there was no evidence of evasion, any suggestion that HMRC guidance had amounted to a misdirection or caused misunderstanding was rejected. It was further considered arguable that the Thomas claimants had not acted reasonably in neglecting to seek clarification (which could amount to evidence of negligence), and it was not accepted that Mr Alderman's internal discussion paper took matters further. As for whether the tax due had been charged, or could now reasonably be charged, to customers, no clear conclusion seems to have been reached, the decision-taker observing that it would be: "*interesting to know, where a business has modified machines to remove an RNG and then elected not to account for VAT on income from it, whether the price per play was reduced accordingly*."

69. Subsequently, by letter of 3 July 2008, the misunderstanding decision in the Thomas claimants' case was stated to be withdrawn pending determination of the *Rank* case (ultimately determined by the Supreme Court in *Rank v HMRC* [2015] UKSC 48). That decision has not, however, been re-made and the parties have proceeded on the basis that the decision should be treated as confirmed.

The Noble claimants

70. As for the Noble claimants, their initial submissions were made under cover of a letter of 21 February 2008. In addition to relying on the BACTA submission, it was contended that there was a specific misdirection provided to the Noble claimants on 21 October 2004, as formally confirmed by letter of 26 October 2004. Taken together with the factual context, in particular the approval provided by the Gaming Board of machines developed by the Noble claimants, it was submitted that HMRC had provided a clear and unequivocal direction; alternatively, the interpretation given to that direction was wholly reasonable so as to entitle the Noble claimants to the benefit of the misunderstanding ESC. Subsequently, by letter of 26 November 2008, additional representations were made as to the applicability of the misunderstanding ESC.

71. Having convened a panel to consider the Noble claimants' claims, by letter of 16 February 2009, these were refused. On misdirection, it was held that Mr Alderman's letter of 26 October 2004 could not be seen as a clear and unequivocal ruling, and there was no evidence that he had been provided with the "*full facts*", in the sense of having seen the machines in issue. As for the misunderstanding ESC, the panel was unable to identify anything specific that had been misunderstood; rather, "*there was a difference of opinion about what the law meant*". Otherwise, while accepting there was no reason to believe tax was knowingly evaded and that the issue raised did not concern an aspect of tax clearly covered in general guidance, the panel expressed "*slight concerns*" as to whether the Noble claimants were negligent in not enquiring into the tax effect of specific configurations of the disputed machines (as recommended by the Gaming Board). Having found no misunderstanding, the panel did not enquire further into the final condition (that the tax had not been charged, and could not reasonably be charged, to customers), although broadly considered this criterion met.

72. The Noble claimants made further submissions on 18 May 2009 and a meeting took place on 22 September 2009, when it was agreed that the misdirection claim would be put on hold. As for the claimed misunderstanding, it was clarified that this related to the emphasis being placed on the proximity of the RNG to the disputed machine, the relevance of which had not been referred to in guidance (general or specific) received by the Noble claimants.

73. Considering the clarified claim under the misunderstanding ESC, by further letter of 14 October 2009, this was again rejected, the panel saying it was unable to understand how the claimed misunderstanding could have arisen, as:

> "in every place where guidance was available there was a reference to the word remote. We also note that some of the turns of phrase specifically emphasise, in our opinion, the distance by using the phrasing 'remote from the terminals'. That would seem to us to add to the linguistic interpretation that the RNG would be a long way away from the terminals not on the wall just behind it. ..."

Moreover, given that the machine the Gaming Board had "*approved*" was a prototype that was never used, and the Board had suggested obtaining advice from HMRC, the panel questioned why specific advice was not sought when the first machines were brought into use. In the circumstances, the panel did not find a *bona fide* misunderstanding had been established.

74. Subsequently, following the Upper Tribunal's decision relating to VAT liabilities ([2020] UKUT 0117), on 13 October 2021 HMRC wrote to the Noble claimants, acknowledging that, in the light of the Supreme Court's decision ([2015] UKSC 48), statements made in 2004 regarding the tax treatment of the disputed machines were incorrect as a matter of law. Reserving HMRC's position on questions of relevant qualification and knowledge, it was made clear that it would, in any event, be necessary to demonstrate that enforcement would be profoundly unfair or an abuse of power; the Noble claimants were invited to confirm their position in this regard.

75. On 7 January 2022, the Noble claimants duly made further submissions on the misdirection ESC.

76. By letter of 12 August 2022, that claim was rejected. In explaining that decision, it was stated that HMRC remained of the view that there had been no misdirection for these purposes: (1) Mr Alderman's letter of 26 October 2004 did not amount to a clear and unequivocal ruling

regarding the tax treatment of the disputed machines, but simply repeated general points made by Mr O'Kane in his letter to BACTA of 3 September 2004; and (2) other HMRC guidance was clear that the tax treatment would be influenced by the configuration of the disputed machines and the siting of the RNG. HMRC also considered the question of detriment; weighing the question of fairness against the strong public interest in the imposition of tax in accordance with the law, HMRC did not accept evidence of real and significant detriment had been shown.

The legal framework and my approach

77. To a large extent, the legal principles relevant to these claims are not in dispute. In identifying the framework principles applicable to claims made in reliance upon extra-statutory concessions, I have drawn on the helpful summary provided by the Court of Appeal in *Murphy and anor v Revenue and Customs Commissioners* [2023] EWCA Civ 497 [2023] STC 944 (see the judgment of Newey LJ at [28]-[32]), albeit I have unpacked parts of that summary, so as to more fully reflect the particular issues arising in the claims before me.

78. In approaching the question of reliance upon the extra-statutory concessions in issue in these proceedings, I have kept in mind the following principles:

(1) The role of HMRC is that of a tax-collecting agency, not a tax-imposing authority; the tax-payer's only legitimate expectation is, *prima facie*, to be taxed according to statute, not concession or a wrong view of the law: *R v IRC, ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 *per* Bingham LJ at 1569 B-C.

(2) Consistent, however, with their responsibility for managing the tax system, provided any concessions are made with a view to obtaining, overall, the highest net practicable return for the exchequer (HMRC's primary duty being to collect taxes which are properly payable), it will be lawful for HMRC to make concessions in relation to individual cases, or types of cases, which may result in the non-collection of tax otherwise lawfully due: *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 *per* Lord Diplock at 636-637; *R (oao Wilkinson) v IRC* [2005] UKHL 30 *per* Lord Hoffmann at [21]; *R (oao Davies) v Revenue and Customers Commissioners* [2011] UKSC 47 *per* Lord Wilson at [26]; *Murphy* at [28].

(3) Given the (limited) discretion thus afforded to HMRC, a formal public statement by HMRC may be binding, subject to its terms, in any case falling clearly within them: *MFK* at 1569C-D. And, if a concession is published to all who might benefit from it, those to whom it is addressed will be entitled to arrange their affairs in reliance upon it, provided they remain clearly within the terms of the concession: *R (oao Greenwich Property Ltd) v Customs and Excise Commissioners* [2001] EWHC Admin 230 *per* Collins J at [13]; *Murphy* at [29].

(4) To the extent, however, it is said that HMRC have represented that they will forgo tax otherwise payable, the taxpayer must demonstrate: (i) they gave full details of the transaction in issue, making clear that a fully considered ruling was sought and the use it was intended would be made of it; and (ii) that the ruling or statement relied on was clear, unambiguous and devoid of relevant qualification: *MFK* at 1569 D-G; *Greenwich Property* at [23].

(5) The proper interpretation of a concession is for the court: *R (oao Accenture Services Ltd) v Revenue and Customs Commissioners and ors* [2009] EWHC 857 (Admin) *per* Sales J at [33] and [36]; *Murphy* at [30]. It is not to be construed as if it were a statute: *Greenwich Property* at [13]; *Murphy* at [32].

(6) Moreover, given that such a concession will involve a derogation from statute, it is to be given a relatively narrow construction, and not afforded a more liberal scope than the words used can, on a fair reading, reasonably bear: *R (oao ELS Group Ltd) v Revenue and Customs Commissioners* [2016] EWCA Civ 663 *per* Patten LJ at [37].

(7) As for the standard by which any assessment of the extent or meaning of a concession is to be tested, the clarity of the representation in issue is to be judged by a holistic appraisal of all relevant statements, as would have been understood by the ordinarily sophisticated taxpayer (irrespective of whether they are in receipt of professional advice): *Paponette v*

AG Trinidad and Tobago [2010] UKPC 32, [2012] 1 AC 1 *per* Sir John Dyson SCJ at [30]; *Davies* at [29]; *R (oao First Alternative Medical Staffing Ltd and anor) v Revenue and Customs* [2022] EWCA Civ 249 *per* Zacaroli J at [34]; *Murphy* at [31].

(8) Given HMRC's primary duty to collect tax, to the extent there is any doubt - either as to the clarity and unambiguous nature of the concession, or as to a taxpayer's compliance with its terms - that must be resolved in favour of the tax being payable according to the statutory requirement; if there is doubt or ambiguity, it is for the taxpayer to enquire of HMRC as to whether what they intend falls within the concession: *Greenwich Property* at [23].

(9) Where determination of compliance with an extra-statutory concession requires an evaluative assessment, that will be a matter of judgement for HMRC, subject only to challenge by judicial review on grounds of rationality, having regard to the evidential material available to the relevant decision-taker at the time: *R (oao Teleos plc and ors) v The Commissioners of HM Customs and Excise* [2004] EWHC 1036 (Admin) *per* Moses J at [154]; *Accenture* at [35] and [36]; *ELS Group* at [37].

79. A claim of entitlement to an extra-statutory concession is in the nature of a claim to benefit from an enforceable substantive legitimate expectation (*Accenture* at [8]). It is for the claimant to prove the legitimacy of the expectation claimed and, where reliance is placed upon a promise or assurance, to establish not only that it was made or given, but that it was clear, unambiguous, and devoid of relevant qualification: *MFK* at 1569H-1570B; *Paponette* at [37]. Moreover, to the extent the claimant contends they relied on the promise or assurance to their detriment, they must prove that too: *Paponette* at [37], albeit, in cases involving a liability for tax, detriment may be established if a taxpayer is disadvantaged by being unable to budget for the sums in issue: *R (oao Medical Protection Society Ltd) v Revenue and Customs Commissioners* [2009] EWHC 2780 (Admin) *per* Sales J at [11].

80. Should the claimant discharge this initial burden, it will be for the public authority to justify the frustration of the legitimate expectation thus established. In so doing, it will be for the authority to identify any overriding interest relied on to justify the frustration of the expectation; the task for the court will be to weigh the requirements of fairness against that interest and to determine whether the necessary element of unfairness or abuse of power has been established: *Paponette* at [37]; *R (oao Corkteck Ltd) v Revenue and Customs Commissioners* [2009] EWHC 785 *per* Sales J at [26]; *Accenture* at [32]. Fairness in this context imports the notion of fair and open dealing on both sides - HMRC's discretion is limited and fairness requires its exercise should be on the basis of full disclosure: *MFK* at 1569H-1570B. That said, the principle that good administration requires public authorities to be held to their promises would be undermined if the law did not require that a failure or refusal to comply was objectively justified as a proportionate measure: *Nadarajah v SoS Home Department* [2005] EWCA Civ 1363 at [68]; *Paponette* at [38]. Where, however, there is good reason to change a particular policy, or to depart from an earlier erroneous decision, the court may find there is no inherent unfairness: *R (oao Hely Hutchinson) v Revenue and Customs Commissioners* [2017] EWCA Civ 1075 *per* Arden LJ at [48], and [62]-[63], it being recognised that the duty of conformity is subject to a "*good reason*" exception: *R (oao ZLL) v Secretary of State for Housing, Communities and Local Government* [2022] EWHC 85 (Admin), *per* Fordham J at [7].

81. The principles applicable to claims of legitimate expectation thus inform the approach I take to the claims in this case. To the extent that the claims are put on the basis of a positive misdirection, the ESC will only apply where a clear and unequivocal ruling has been given by an HMRC officer who is in possession of the full facts: *Medical Protection Society* at [12]; *MFK* at 1569D-E. As for a case of misdirection by omission (a possibility acknowledged in HMRC's internal guidance, cited in *Medical Protection Society* at [11]), the same clarity would be required - it will only be in an exceptional case that such a clear ruling could be implied from an omission: *Medical Protection Society* at [36]. The misdirection ESC also requires that the ruling or direction in issue has misled the taxpayer to their detriment. Analogous to the balancing exercise in a claim of legitimate expectation, this is a point going to fairness, relevant to the question whether it would be unjust for the authority to frustrate the expectation in issue, albeit bearing in mind the significant public interest in the collection of taxes properly due and

having regard to the nature of the representation and the degree of reliance: *R (oao Aozora GMAC Investment Ltd) v Revenue and Customs Commissioners* [2019] EWCA Civ 1643 per Rose LJ at [44] and [53]-[60].

82. There is little guidance in the case-law as to the approach I should adopt to the misunderstanding ESC. Applying the framework principles, however, I consider I am bound to construe the terms of the concession narrowly, in accordance with how the language used would be understood by the ordinarily sophisticated taxpayer, but giving due deference to the evaluative assessments reached by HMRC as to the applicability of the conditions of eligibility in the particular circumstances of the case.

83. More generally, a dispute has arisen between the parties as to whether the court's task in determining these claims is properly limited to reviewing the decisions in issue on rationality grounds, or whether I am required to make findings of fact as to the claimants' eligibility under the ESCs relied on. For the claimants, Mr Beal KC accepts that, to the extent that an evaluative judgement as to the applicability of an ESC is required, that must be for HMRC; he nevertheless contends that an appraisal of the evidence is necessary to assess the rationality of the conclusions reached. In opposition, Ms Mitrophanous KC says that the evaluation of the evidence must be for HMRC, although she also contends that any assessment of that evidence would lead to the conclusion that the right decisions had been reached.

The claim and the parties' submissions

The claimants' case

84. The grounds of claim identified at the permission stage can be summarised shortly: it is the claimants' claim that HMRC failed to properly construe and apply: 1. the misunderstanding ESC, and 2. the misdirection ESC. As the matters relied on in respect of 2. form part of the case in relation to 1., it is convenient to address the grounds in reverse order.

85. On the misdirection ESC, it is argued that, in possession of the full facts, HMRC misled the claimants into believing the disputed machines were properly subject to category A AMLD, alternatively failed to inform them that they should account for AMLD at a higher rate, and thus misdirected them; and, as the higher rate of AMLD could not be built into the claimants' commercial decisions, they had suffered detriment. More specifically, in the case of the Thomas claimants, the misdirection decision of 11 March 2008 failed to engage with HMRC's contemporaneous evaluation of the correct AMLD treatment of the disputed machines (communicated to the Thomas claimants in Mrs Way's letter of 13 May 2005). For the Noble claimants, objection is taken to the finding (communicated in the decision of 12 August 2022) that Mr Alderman's letter of 26 October 2004 did not constitute a clear, unequivocal ruling. Taken together with the BACTA Code of Practice and Factsheet (both of October 2004, and informed by the O'Kane letters of 18 August/3 September 2004), the claimants say these rulings – which reflected HMRC's position at the time - could not have been clearer. It is also contended that it was wrong to find the Noble claimants had suffered no detriment.

86. On the misunderstanding ESC, it is submitted that, consistent with industry views, the approval of the Gaming Board, and in line with guidance issued by BACTA (in accordance with the O'Kane letters of 18 August/3 September 2004), and the specific rulings of 26 October 2004 (to the Noble claimants) and 13 May 2005 (to the Thomas claimants), the claimants held a *bona fide* belief that the disputed machines they operated were properly to be classified as subject to category A AMLD. At the time, that understanding was shared within HMRC – a point the misunderstanding decisions failed to engage with. There had, however, been a change in HMRC's position, which was reflected in the emphasis on the condition of remoteness, and which (in the case of the Noble claimants) had been interpreted by reference to dictionary definitions when there was no evidence that was the meaning intended. More specifically, the Noble claimants say this point was acknowledged by an HMRC official (Ms Bloxham) at a meeting in November 2007, when she accepted there was no distinction between the disputed machines that had been exclusively developed for the Noble companies and others (acknowledging that, while the RNG had to be remote from the machine, precise distance did

not matter). Additionally, for the Thomas claimants, reliance is placed on a ruling from HMRC of 26 June 2006 refusing an input tax claim on disputed machines on the basis that the machines had been exempt at the relevant time.

87. As for whether the claimants had been negligent, the misunderstanding decisions failed to engage with evidence of steps taken to ascertain the correct treatment of the disputed machines, including with HMRC. The absence of clear general guidance from HMRC reflected internal confusion; to the extent there were concerns as to how disputed machines were classified by operators, this was addressed by BACTA guidance (with which the claimants complied). As for whether the tax had been charged, or could now be charged, to customers, to the extent this was in issue, it was apparent the claimants were no longer in a position to build this additional cost into their charging structure.

88. The claimants place reliance on the fact that HMRC have allowed other claims under the misdirection and/or misunderstanding ESCs. To the extent it is necessary to consider their claims on an individual basis, however, the claimants say the court must first determine the facts on which they rely: if those facts show the claimants came within the terms of the ESCs, the decisions would inevitably be irrational/perverse.

HMRC's position

89. In respect of the misdirection ESC, it is denied that, in relation to the claimants' disputed machines at any relevant time, HMRC had the full facts. HMRC's knowledge of the disputed machines was developing at that time (as were the machines); it was not until late 2005 that it became aware of the nature and extent of abuse/avoidance measures. As for the letters relied on by the claimants: the Thomas claimants' letter of 7 April 2005 did not impart relevant knowledge to HMRC, but made a self-assessed assertion as to the applicable licences; the response from Mrs Way (13 May 2005) merely confirmed the general position regarding properly categorised section 16/21 machines without expressing a view as to whether the Thomas machines so qualified; the Noble claimants did not install the disputed machines until December 2004 and so no discussion could have been held regarding these in October 2004 (and no clear advice given in the letter of 26 October 2004). There was thus no unequivocal ruling on disputed machines operated by the claimants, and the letters to BACTA did not change this, amounting only to a general representation without knowledge of the facts relevant to any particular taxpayer.

90. Addressing the claims founded on the misunderstanding ESC, HMRC argue that this will not extend to misunderstandings formed on the basis of legal or professional advice. As for the contention that any misunderstanding arose as a result of HMRC's letters of 18 August/3 September 2004, 26 October 2004 (for the Noble claimants), or 13 May 2005 (for the Thomas claimants), that does not withstand scrutiny for the reasons identified in respect of the misdirection ESC; moreover, the failure to seek clarification or specific advice regarding the claimants' disputed machines could rationally and reasonably be seen as evidence of negligence.

91. As for the decision of 26 June 2006, that was not a point put before the decision-takers but was, in any event, only shortly before the end of the relevant period, and resulted from no actual assessment of the disputed machines in question.

Analysis and conclusions

Preliminary observations

92. Before addressing the particular issues I am required to determine, I should first make some preliminary observations about the evidence and my approach.

93. Permission in these claims was granted by Mr Alan Bates (sitting as a Deputy Judge of the High Court) at a hearing on 14 December 2023, when directions were given for the future case management of the proceedings, including disclosure and service of witness statements (with Mr Bates making some observations as to what would be relevant evidence in this matter).

HMRC's statements were served on 28 March 2024, and included statements from Mr Levy and Mr O'Kane. On 16 January 2025, the claimants filed an application relating to disclosure and seeking that Messrs Levy and O'Kane be available to be cross-examined. Unfortunately that application was not processed by the court office and had not been addressed by the commencement of the hearing. At that stage, Mr Beal stated that he did not intend to take up hearing time pursuing the application, but would seek to point out how, had it been allowed, this might have assisted the court; in later submissions, he suggested that adverse inferences might properly be drawn from the unavailability of Messrs Levy and O'Kane.

94. As no application relating to disclosure or cross-examination was pursued before me, I make no ruling in this regard. What is, however, clear to me, is that the best evidence is that provided by the contemporaneous documents, as compared to statements prepared nearly twenty years after the events in issue (and after parts of this history have also been the subject of other court proceedings). I do not draw adverse inferences in respect of any of the witnesses (or as against any party to these proceedings) as a result of discrepancies between the contemporaneous documents and their recall of the position, as explained in their statements. I do, however, consider the most helpful evidence to be that presented by the documents, and, save as stated otherwise, this has been the principal source of the factual narrative contained within the background section to this judgment.

95. Although my task is to review the decisions under challenge, given that it is the claimants' case that the irrationality of the reasoning is demonstrated by an appreciation of the factual context in which they were operating, in particular given directions provided by HMRC at that time, the dispute between the parties as to the role of the court in this respect is essentially academic. In the circumstances, I have, as the claimants urged, made findings as to the nature of the particular communications made by HMRC officials on which reliance has been placed.

HMRC's position – introductory observations

96. Considering the contemporaneous documents, I would agree with the claimants' general argument that a change took place in HMRC's position in 2006, subsequent to the Vale report in August that year. The focus of the decisions under challenge had to be, however, on the period preceding that: December 2004/January 2005 to July 2006. And, having regard to that earlier history, I consider the position to be more nuanced than the claimants' case would suggest.

97. In part (as the Vale report and internal emails from HMRC anti-avoidance make clear), the 2006 change in position was informed by concerns regarding the claims that were being made subsequent to the ruling in *Linneweber*. Those concerns were, however, reflective of earlier misgivings about the treatment of FOBTs: accepting the need to treat like machines in a like manner (the fiscal neutrality point) did not mean there had been no unease about the implications thus arising from the VAT exemption afforded to FOBTs (see, for example, the internal HMRC emails from early June 2004). Moreover, in addition to the *Linneweber* issue, it is also apparent that, during the latter part of 2005, HMRC officers were becoming increasingly concerned by what they perceived to be deliberate VAT and AMLD avoidance, arising from what was seen to be crude or tokenistic attempts to avoid a machine falling within the "gaming machine" definition when, in truth, that would have been its correct categorisation. This, I find, was a genuine concern, albeit reflective of the limitations in HMRC's understanding of how the disputed machines actually operated.

98. At this stage, I should note that there is a conceptual difficulty in addressing HMRC's views about "avoidance" as those developed in late 2005 and going into 2006. Since the decisions of the Court of Appeal and the Supreme Court in *Rank*, it is clear that the disputed machines were always properly to be defined as "gaming machines" and ought to have been treated as such. Whether the RNG was integrated into the terminal software, or, if it was not, its precise location, ought thus to have been irrelevant when determining what was a "gaming machine" for VAT and AMLD purposes. That was, however, not the point that was initially being made within HMRC when concerns were raised about "avoidance", and what is revealing about the issues that were being identified is how, even considering the position without the clarification

provided by the appellate courts in *Rank*, this demonstrated a lack of real understanding about the operation of the disputed machines.

99. The limitations in HMRC's understanding stand in clear contrast to the position of the claimants at the relevant time. Although the view they had adopted (with the benefit of expert legal advice) as to what constituted a "gaming machine" was ultimately held to be wrong, the claimants were clear as to what that view meant in terms of the way in which the disputed machines had to be configured. If physically separating out the RNG meant that the "machine" (understanding that to be the terminal being played) did not create the element of chance, then that was all that was required to fall outside the definition of "gaming machine". On that view, the location of the RNG – provided it was not an integral part of the terminal software – was irrelevant: separating out the RNG from the terminal's master processing unit would be sufficient to ensure that the element of chance was not provided by means of the machine (a point that was further underlined by the removal of the "*compensation*" – the "*controlled version of randomness*" - that was a feature of traditional machines, as Mr Biesterfield has explained). I do not find that there was any attempt to obfuscate this position on the part of the claimants (or anyone else in the industry) when dealing with HMRC, but there is an obvious danger for those who are deeply knowledgeable about something to assume that others possess a similar level of understanding. It is important, therefore, to be clear about what was in fact understood by HMRC at the relevant time.

100. This is a point that has significance when considering the use of the word "remote", which continually featured in HMRC communications. Adopting the logic of the claimants' view, provided the RNG was separate from the processing unit within the terminal, its distance – or remoteness – from the terminal was not relevant. If, however, the disputed machines were to be seen as similar to FOBTs (the starting point for HMRC officials, which informed their view as to how the disputed machines should be treated for VAT purposes), the degree of separation between RNG and player terminal could be seen as a relevant descriptor. For those with a more sophisticated understanding of the operation of the disputed machines, that might seem to be a red herring (the location of the RNG for FOBTs was simply a product of the particular regulatory environment in which they operated), but the documents do not suggest this was a point of distinction that was a focus within HMRC. Indeed, the limitations in HMRC's understanding in this regard are revealed at various points in the evidence (see my earlier observations regarding the visit to the Noble premises in October 2005), and were acknowledged in Mr Alderman's discussion paper of January 2007; this provides relevant context to the issues I am required to address.

HMRC statements made in the O'Kane letters of 18 August and 3 September 2004

101. The first statement made on behalf of HMRC which is relied on by the claimants is that contained within Mr O'Kane's letters to BACTA of 18 August and 3 September 2004. The substance relied on is repeated in both letters, in which Mr O'Kane stated HMRC's view in general terms that the disputed machines were not "gaming machines" (and would thus only be liable for category A AMLD) provided: "*they rely on a random number generator that is not an integral part of the terminal, i.e. a random number generator that is remote from the terminals*".

102. Although I cannot be certain that either letter was circulated more widely, I do accept that: (1) one or both letters would most probably have been seen by Mr Thomas, given his then role within BACTA; (2) the substance of the letters was, in any event, communicated by BACTA to its members via its Factsheet of October 2004, in which it was stated that HMRC had confirmed that machines would not be classed as "gaming machines" "*so long as they have a random number generator that is remote from the terminals*"; and (3) HMRC intended that this view should be communicated to BACTA's members (having expressly asked that this be done in the original letter of 18 August 2004).

103. The claimants rely on Mr O'Kane's request for BACTA to publicise his letter to its membership as bringing this statement within the ruling in *Greenwich Property*. That is a somewhat strained analogy: *Greenwich Property* concerned a detailed concordat identifying concessions made by

HMRC, with approved guidelines setting out the law concerning VAT within the higher education context; it is difficult to see Mr O'Kane's generalised statement (most likely as communicated through the BACTA Factsheet) as analogous. Allowing, however, that the statement was thereby knowingly published to all BACTA members who might benefit from it, I accept that this communicated a general confirmation that HMRC would not treat machines as "gaming machines" if they used a RNG that was "*remote from the terminals*".

104. I would further accept that those reading this statement within the BACTA Factsheet might reasonably have been expected to have considered this alongside the Code of Practice BACTA issued at the same time. This provided guidance from a regulatory perspective, and made clear that both the terminal and the RNG had to be sited within licensed premises, although the RNG could be in the office or the gaming area; the word "remote" was not used. The Code of Practice did not, however, purport to set out HMRC's view in this regard and said nothing about the treatment of the disputed machines for VAT and AMLD purposes. I appreciate that many in the industry may have focused on the references to "*section 16/21*", and the regulatory requirements relevant to those provisions, but that cannot avoid the specific language used in setting out HMRC's position. I am thus satisfied that confirmation of HMRC's general approach, as provided by Mr O'Kane's letters of 18 August and 3 September 2004 and communicated to BACTA members, could only reasonably have given rise to an expectation that HMRC would not treat machines as "gaming machines" if they used a RNG that was "*remote from the terminals*".

HMRC's position to July 2006

105. From my review of the contemporaneous documentation (see, for example, the internal guidance of January 2005, the communications to BACTA in July 2005, and Mr O'Kane's internal email of 31 August 2005), I am further satisfied that the position confirmed in the letters of 18 August and 3 September 2004 continued to be reflective of HMRC's position throughout the relevant periods for these claims (that is, up to July 2006). To the extent that HMRC started to take a more sceptical view, from late 2005, that was because officials were increasingly seeing disputed machines – purporting to be "*section 16/section 21 machines*" – where the RNG was very plainly not "*remote*" from the terminal, being "*bolted to the base of*"/"*incorporated within*" the cabinet of the machine (see Mr O'Kane's emails to Mr MacLeod-Miller of BACTA in July 2005). It may well be that HMRC's concerns were in part informed by the significant increase in the disputed machines during 2005, but these descriptions clearly contrasted with the early experience described by Mr Blyth of seeing a separate RNG, serving multiple terminals, sited in a back office away from the gaming floor.

106. For the claimants, it is contended that an emphasis on the remoteness of the RNG from the terminal (where that is understood to require distance, as opposed to mere physical separation) is not something that can rationally be said to be reflective of HMRC's view prior to the change in position heralded by the Vale report or, at least, as publicly communicated in 2004 and going into 2005. This, however, suggests an element of motivated thinking and a failure to engage with the words used. The claimants undoubtedly had their own view as to the relevant distinctions in configuration between traditional and disputed machines, and this may well have informed their reading of the word "remote" as synonymous with physical separation (see Mr Thomas' response to the Gaming Board's email of 15 September 2005, and his input into the drafting of BACTA's revised guidance of 7 October 2005), but that cannot be said to be the only (still less the obvious) interpretation of that term. Appreciating that the claimants (and, no doubt, others in the industry) would see a condition of remoteness (in the sense of distance) to be an unnecessary gloss on the regulatory requirements, HMRC's use of the term could not simply be ignored. Even if the ordinarily sophisticated taxpayer in this context might approach the word "remote" in the light of the relevant regulatory context provided by section 16 LAA and section 21 GA, an obvious question would still arise as to what it meant. Certainly, the confirmation thus provided as to HMRC's position relevant to the disputed machines cannot be said to have been clear, unambiguous and devoid of relevant qualification.

107. On the facts, in thus rejecting any suggestion that the misdirection ESC could apply on a global basis, I consider that HMRC reached an entirely permissible decision. The fact that other claims might have been allowed does not assist the claimants; HMRC properly approached the claims made under the concession on a case-by-case basis, that did not amount to a breach of the duty of conformity.

The Thomas claimants – HMRC's letter 13 May 2005

108. For the Thomas claimants, in respect of both ESCs, reliance is placed on the letter from Mrs Way of 13 May 2005; this, it is said, provided a ruling or direction on which the Thomas claimants were entitled to rely as to the correct classification of the machines in issue for AMLD purposes. Mrs Way was responding to the Thomas claimants' letter of 7 April 2005 which notified HMRC that relevant licences (category A) had been taken out for "*our Section 16 and Section 21 Machines*", and sought repayment of bingo duty; the machines in question were then listed, identified by name (*Jackpot Bingo* etc).

109. As the claimants contend, the reply from Mrs Way represented a considered response from HMRC, provided after consultation with Mr O'Kane. Mrs Way did not dispute the classification of the listed machines as "*Section 16/21 machines*" liable for category A AMLD, but equally she had not been provided with information that would cause her to do so. As is apparent from the advice she received from Mr O'Kane, Mrs Way's response assumed that these were machines where the outcome of the game would be determined by "*a remotely sited Random Number Generator*"; this had been the condition identified by the clarification of HMRC's position on 3 September 2004 (identified as the relevant date in the response of 13 May 2005), and there was nothing in the Thomas claimants' correspondence that would have put Mrs Way on notice that further verification was required. In fact, the report from the site visit of 23 August 2006 recorded that the RNGs were either attached to a wall, or to another machine, immediately behind the machine they operated; that is, physically separate but not remote in the sense of being distant from the machine. This is, however, not something that Mrs Way could have known when responding on 13 May 2005.

110. On the facts, therefore, I do not agree that it was irrational/*Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) for HMRC to reject the suggestion that the letter of 13 May 2005 amounted to a validation of the categories of licence applied for the machines in question.

The Thomas claimants – HMRC's 26 June 2006 refusal of input tax claim

111. I can take this point more shortly. This is not a matter that was put before the relevant decision-makers and a failure to address this ruling cannot be said to be irrational. In any event, the same point arises as for the letter of 13 May 2005: HMRC's decision (communicated by letter of 26 June 2006) assumed the facts to be as claimed; it does not amount to a considered validation of the classification of the machines in issue.

The Noble claimants – HMRC's letter of 26 October 2004

112. For the Noble claimants, reliance is placed on the letter from Mr Alderman of 26 October 2004, which followed a site visit on 21 October 2004. Although the primary purpose of the visit was to introduce the team allocated to manage the relationship with the Noble group of companies, it is apparent that a specific request was made at the meeting for confirmation of the tax treatment of what were described as "*Section 16 and section 21 Machines*".

113. This request has to be seen in context: on 7 October 2004, Mr Biesterfield had hosted a visit from a representative of the Gaming Board as part of an on-going desire to obtain the Board's confirmation that a proposed machine (shown in operation on this visit) would be treated as falling within section 21 GA/section 16 LAA for regulatory purposes. In emailing the Gaming Board after the visit, Mr Biesterfield had referred to his understanding of HMRC's classification of such machines for AMLD purposes. While not disagreeing with that view, the Board had advised Mr Biesterfield to seek clarification from HMRC. It would seem the

opportunity to obtain this clarification was thus sought on the occasion of the visit on 21 October 2004.

114. Addressing the tax issue in his letter, Mr Alderman confirmed that HMRC would treat machines as category A for AMLD purposes "*if they rely on a remote random generator to determine the outcome of their 'virtual games'*". Mr Alderman and his team did not, however, meet Mr Biesterfield on their visit (they were hosted by the then group financial director) and there is no indication that they were shown the type of machine proposed. Although the claimants have placed some reliance on a site visit carried out at an unrelated company's premises by Mr Alderman's team at around the same time (19 October 2004), when the note of the visit records that the team looked at various machines in operation, there is no evidence that Mr Alderman or his colleagues saw any disputed machine/s on their visit to the Noble claimants' premises.

115. In any event, the disputed machines were not being operated by the Noble claimants until December 2004 and did not then include the earlier prototype. On subsequent visits to the Noble claimants' premises, when disputed machines were seen in operation, the RNGs were either (1) attached to the machine by a hook or to the wall behind (October 2005), or (2) attached to a board behind the machines to which they related (23 February 2006). There is no basis for thinking that the letter of 26 October 2004 was written with either type of configuration in mind and, on the evidence available, I cannot say that it was irrational/*Wednesbury* unreasonable for HMRC to conclude that the letter did not amount to a clear an unequivocal ruling regarding the tax treatment of the disputed machines operated by the Noble claimants.

Ground 1: the misdirection ESC

116. Given my findings, as set out in the preceding paragraphs, I now turn to answer the (slightly re-ordered) questions identified by the claimants as relevant to the first ground of claim: whether HMRC erred in law in construing or applying the misdirection ESC?

117. *Question (1): did HMRC have the full facts concerning the disputed machines operated by the claimants*? No. HMRC had stated that the RNG had to be "remote" for disputed machines to be treated as falling within category A for AMLD purposes. Prior to the visits in October 2005 and February 2006 (Noble claimants), and August 2006 (Thomas claimants), HMRC did not have the full facts relating to the position of the RNGs in respect of the disputed machines operated by the claimants.

118. *Question (2): did HMRC mislead and/or misdirect the claimants as regards the proper AMLD treatment of the disputed machines*? No. Accepting that, throughout the relevant period, HMRC was operating on a mistaken understanding of the law (as subsequently made clear by the appellate courts in *Rank*), the only direction was that disputed machines would be treated as falling within category A for AMLD purposes if they used a "remote" RNG. Although the claimants contend this did not necessarily mean "distant", the highest it can be put is that the direction thus lacked clarity and was ambiguous as to its meaning; it was not, therefore, a clear and unequivocal ruling such as would be required for the application of the misdirection ESC.

119. *Question (3) Did HMRC misdirect the claimants by omission, whether by failing to take action and/or providing clear guidance on the proper AMLD treatment of the disputed machines*? No. To the extent that the general direction provided by HMRC was ambiguous or lacked clarity, it would have been open to BACTA, or to individual operators of the disputed machines, to ask for clarification as to what the reference to "remoteness" entailed. The requests of 21 October 2004 (Noble claimants) and 7 April 2005 (Thomas claimants) did not identify that a specific ruling was sought as to whether the particular configuration of their disputed machines would meet that requirement; in the circumstances, there could not have been a clear, reasonable expectation that HMRC would take action to validate the particular classification of the claimants' machines for AMLD purposes or provide further guidance to clarify the requirement of remoteness in these cases.

120. *Question (4): Did the claimants suffer detriment as a result of being misled and/or misdirected?* Given my finding that the claimants were not misled or misdirected, this question does not arise. If, however, my assessments on questions (1)-(3) were incorrect: (a) in the case of the Thomas claimants, I am unable to see that any submission was made, or evidence provided,

relating to this question, such that it cannot be said to have been irrational/unreasonable for HMRC not to make a finding of detriment; (b) in the case of the Noble claimants, given the need to assess the alleged unfairness/abuse in the light of the nature of the representation, and the reliance found to have been placed on it, my tentative view would be that this would be a matter requiring fresh evaluation.

121. For the reasons provided, I dismiss the claims of both the Thomas claimants and of the Noble claimants on ground 1.

The misunderstanding ESC – general observations

122. There are difficulties in seeking to apply the misunderstanding ESC to the present cases, given that the concession relates to the undercharging of VAT, which is not the same as an obligation to pay AMLD. HMRC have, however, expressly allowed that this ESC should apply to the claimants' claims relating to the retrospective assessments of liability for AMLD purposes and it is therefore necessary to seek to construe the misunderstanding ESC to apply to that particular form of tax. In both cases, however, the decisions under challenge pre-date the 2020 decision of the Upper Tribunal relating to VAT liabilities and, inevitably, the focus of the reasoning provided is on VAT rather than AMLD.

123. In approaching the construction of the misunderstanding ESC, it seems to me that the question whether underpaid AMLD should be remitted because of a "*bona fide* misunderstanding" is intended to be answered by the application of the four conditions for eligibility. The first three seek to ensure that the concession is limited to cases where the taxpayer cannot be said to be at fault, thus there must be: (i) no reason to believe the tax has been knowingly evaded; (ii) no evidence of negligence; and (iii) the misunderstanding must not relate to an aspect of tax clearly covered by HMRC guidance or specific instructions given to the taxpayer. The fourth condition is more specific to VAT liabilities but can be understood as requiring a similar assessment of fairness as when determining the question of detriment to a claim under the misdirection ESC.

124. The reasons provided in relation to the decisions taken under the misunderstanding ESC are presented differently in respect to the two groups of claimants and I have, therefore, addressed each case separately under this second ground of claim.

Ground 2 – the misunderstanding ESC – Thomas claimants

125. In respect of the Thomas claimants, having accepted there was no evidence of knowing evasion, the focus of the reasoning was on questions (ii) and (iii): whether there was evidence of negligence, as considered in the light of the available HMRC guidance. Accepting there had been no specific rulings or instructions to the Thomas claimants, to the extent that HMRC had provided general guidance, it was considered that made clear it was only machines operating with remote RNGs that would be treated as "*true s 16/21 machines*" for tax purposes. Finding that the available guidance was thus incapable of leading the Thomas claimants to the decision they had made regarding their machines, to the extent that there was any doubt, it was considered arguable that they had failed to act reasonably in neglecting to seek clarification.

126. Although the phrasing of the decision might be criticised, the substance is clear, and accords with my own assessment of the evidence. As I have found, HMRC's general approach, as communicated to BACTA's membership, had stated only that HMRC would not treat machines as "gaming machines" if they used a RNG that was "*remote from the terminals*". To the extent that guidance was ambiguous or otherwise lacked clarity (whether in general terms or in its application to a specific case), it was for the taxpayer to make the necessary enquiries of HMRC. In the case of the Thomas claimants, as I have already found, the letter of 7 April 2005 did not seek a fully considered ruling and did not amount to such an enquiry.

127. In argument, Mr Beal suggested that, given the use of a term that sets a legal standard, it should be for the court to evaluate whether there was evidence of "negligence" for these purposes. I am not sure that is correct; it seems to me that HMRC might well be said to be best placed to assess the standard of care that might reasonably be expected of a reasonable taxpayer in the particular circumstances of the case in question. In any event, however, given the knowledge and understanding of the Thomas claimants, and the nature of the tax in issue, I would agree

that, in these circumstances, a failure to obtain specific clarification of HMRC's position – as to what was meant by "remote" and/or as to the particular configuration of the machines in question – amounted to evidence of negligence.

128. For the reasons provided, in the case of the Thomas claimants, I find there was no error in HMRC's construction and/or application of the misunderstanding ESC, and duly dismiss ground 2.

129. If I was wrong in that conclusion, however, I would have to accept that there was merit in the challenge relating to question (iv) under the misunderstanding ESC. To the extent that a decision was made on this point (which is unclear), it relates only to VAT, and appears to proceed on a mistaken understanding of the configuration of the machines in issue.

Ground 2 – the misunderstanding ESC – Noble claimants

130. In respect of the Noble claimants, the focus of the reasoning was on the general question whether there had been a *bona fide* misunderstanding, the panel's conclusion being that there had been a difference of opinion as to what the law meant rather than a misunderstanding. In reaching its decision, the panel accepted there was no evidence of knowing evasion, and that this was not a case concerning an aspect of tax "*clearly covered in general guidance*". Although, given its overall conclusion, the panel did not fully address the question whether there was evidence of negligence, it expressed concerns in this regard given that, notwithstanding advice from the Gaming Board, on 8 October 2004, to seek HMRC clarification, the Noble claimants had not enquired as to the tax effect of specific configurations of the machines they intended to operate. Subsequently addressing further submissions on this point – focusing on the emphasis given to the remoteness of the RNGs to the machines in issue – the panel again questioned why specific advice had not been sought from HMRC, before finding there was no evidence of a *bona fide* misunderstanding in this regard.

131. Although adopting a different structure to the reasoning provided in relation to the Thomas claimants, the substance of the decision is again clear. Accepting that the Noble claimants were entitled to say that there had been no clear guidance for the purposes of question (iii), the panel did not accept that reasonable steps had been taken to obtain the necessary clarity, in particular in its application to the specific configuration of the machines the Noble claimants intended to install. This, the panel considered, was not due to any *bona fide* misunderstanding but arose from the particular view that had been taken as to the correct legal test: a difference of opinion not being the same as a misunderstanding.

132. Given my earlier findings, I do not consider that was an irrational conclusion. Notwithstanding the careful measures taken by the Noble claimants to seek approval from the Gaming Board for the machines they intended to operate, they did not take similar steps to secure a clear ruling from HMRC. For the reasons I have already explained, I do not accept that it was open to the Noble claimants to simply ignore the language used by HMRC in setting out its position – either in its general communication (via the BACTA Factsheet of early October 2004) or in the advice provided by Mr Alderman in his letter of 26 October 2004 – which (in either case) could only reasonably have given rise to an expectation that HMRC would not treat machines as "gaming machines" if they used a RNG that was "*remote from the terminals*". Moreover, although Gaming Board representatives had been shown (on at least two occasions) the prototype for the machine the Noble claimants had intended to use, with detailed explanations being provided as to how it might be configured, at no stage was there any attempt at a similar level of engagement with HMRC. Even when the Gaming Board official had advised that clarification of the tax position should be sought, this was only done in a broad-brush way, without seeking clarification of what was meant by "remote" (either in general terms or as applied to the specific configuration intended).

133. In the circumstances, the conclusion reached – that this was not a case of *bona fide* misunderstanding but evinced a difference of view as to what was required as a matter of law – was one that was rationally open to HMRC. To the extent that reflected a finding that there was evidence of negligence, that was also a permissible conclusion on the facts of this case.

134. For completeness, I am unable to see that the reference to a statement said to have been made by Ms Bloxham in November 2007 (the suggestion being that she indicated there would have been no material difference between the disputed machines installed by the Noble claimants and those in use more generally) takes matters any further. Although it is correct that this was not referenced in the reasons provided for the decision, it would be of peripheral relevance to the issues the panel had to determine and a failure to expressly deal with this point does not render the decision irrational or Wednesbury unreasonable.

135. For the reasons thus provided, in the case of the Noble claimants, I also find there was no error in HMRC's construction and/or application of the misunderstanding ESC, and duly dismiss ground 2.

Disposal

136. For all the reasons provided in this judgment, these claims are dismissed. The parties are directed to seek to agree a draft minute of order, to be filed no less than 48 hours before the proposed date for the handing down of judgment. To the extent that there is any disagreement and/or the parties seek to make any consequential applications, concise written submissions should be made addressing these issues (limited to two sides of A4), which should also be served no less than 48 hours before the handing down of judgment.