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1) Introduction

My instructors act for Crown Resorts Limited (**"Crown Resorts"**). Crown Resorts owns Crown Melbourne Limited (**"Crown"**).

Crown has been carrying on a casino business since 1994 in Victoria and has been liable for Victorian casino or gaming taxes pursuant to a Management Agreement to be taken, by the *Casino (Management Agreement) Act* 1993 (Vic.), "as if it had been enacted in [that Act]". Crown has also been relevantly subject to assessment to Commonwealth Goods and Services Tax (**"GST"**).

This matter concerns electronic gaming machines (**"EGMs"** or **"pokies"**) and whether Crown's gaming tax treatments for eight different categories of EGM jackpot and bonus programs (**"Programs"**) has been appropriate over the period FY 2013 to date (**"the Period"**).

A Victorian Royal Commission has been established to examine the affairs of Crown. In the week commencing Monday 7 June 2021, in proceedings before the Royal Commissioner, the Honourable Mr R Finkelstein QC, the suggestion was made that Crown had, in the Period, "avoided" around $200 million of State casino taxes by deducting certain "Jackpot" items in the calculation of the amounts upon which State tax is levied ("Gross Gaming Revenue") that it was not entitled to deduct.

Since that time my instructors have been gathering information from Crown on these matters and my brief has been supplemented as and when new information comes to

hand. Arnold Bloch Liebler, who represents the board of Crown, is undertaking the process of having this information fully sourced and verified. Presently, my instructors identify the approximate total amount in question during the Period as between approximately $271.8 million and $272.6 million (the $800,000 variance requires further investigation).

"Gross Gaming Revenue" is relevantly defined in clause 2 of the Management Agreement to mean:

> "the total of all sums, including cheques and other negotiable instruments whether collected or not, received in any period by the Company from the conduct or playing of games within the Temporary Casino or the Melbourne Casino (as the case may be) less the total of all sums paid out as winnings during that period in respect of such conduct or playing of games."

Six of the eight Jackpot Bonus programs concern "Pokie Credits" and treat them as being within the calculation of Gross Gaming Revenue. Crown's systems relevantly deal with "Pokie Credits" within this calculation as follows:

1. Rewards Member gets Pokie Credit credited to Reward Member card
2. Rewards Member uses card at EGM, whereupon Pokie Credit face value is displayed on bonus credit meter on the EGM screen to be used solely as a bet
3. Pokie credit is bet by member
4. System automatically adds the Reward Member's Pokie Credit bet to gaming turnover
5. System debits, in relation to that Reward Member's EGM play:
    - Game wins;
    - Jackpot start outs;
    - Variable prize jackpot increments;
    - Fixed price jackpot increments; and

- Bonus Jackpots (as later ascertained as described below for Category 8).

Categories 7 and 8 are also dealt with as above, with the differences noted below.

In the case of Category 7: "Pokie Credit Tickets", steps are as follows:

1. Patron (member or non-member) receives a physical Pokie Credit Ticket for no consideration (commonly upon filling out paperwork at the Casino to join the Crown Rewards Program).

2. Patron (member or non-member) inserts Pokie Credit Ticket into the EGM and

3. The Value of the credits is displayed on the bonus credit meter on the EGM screen

4. Steps 3 to 5 per above.

Dining, Accommodation and Parking Bonus Jackpots in Category 8 are treated differently and do not involve Pokie Credits credited as turnover. They are processed in the following manner:

1. Bonus Jackpot is system-generated at the EGM based on the Rewards Member's level of play but held dormant until redeemed by the Rewards Member

2. Rewards Member redeems the Bonus Jackpot at the corresponding outlet for Dining, Accommodation and Parking.

3. The redemption amount is then automatically deducted in the EGM system as a Bonus Jackpot.

The ultimate figure resulting from the above process is the "DACOM revenue". This is treated by Crown in relation to these eight Categories as its Gross Gaming Revenue under clause 22 of the Management Agreement.

I have been asked to provide my opinion on the following questions:

The First Question

Does each Jackpot in fact fall within the reach of the definition of "Gross Gaming Revenue" at all?

The Second Question

If the Jackpot falls within the reach of "Gross Gaming Revenue", does it reduce or increase the amount thereof?

I am also asked to comment on any other matter I consider to be relevant to these Questions.

My instructions include ten appendices A to J. I have been provided with:

- The current "Crown Rewards Rules", being the overall terms and conditions governing the Programs;

- The eight (8) jackpot and bonus categories at issue (the "Categories"):

- A brief description of each Category (as provided by Crown)

- The gaming tax amounts at issue for each Category over the Period:

- The Terms and Conditions for each Category: and

- Associated regulatory approvals / examples supplied by Crown regarding each Category

- "Technical Requirements for Gaming Machines and Electronic Monitoring Systems in the Melbourne Casino" – A Victorian Casino and Gaming Authority document – which includes various requirements for EGMs in respect of bonus jackpots.

- "The Technical Requirements Document for Melbourne Casino" – A Victorian Commission for Gambling and Liquor Regulation document – which includes segments on jackpots, bonus jackpots and player promotion / bonusing systems.

- A Bonus Jackpot (BJ) Master File updated as at 16 June 2021, which sets out:
    - The 8 Categories (Column A)
    - Gaming tax at issue for the Period for each Category (Column C). Column C is colour coded to enable cross-referencing to the source information for the colour coded amount on the second Tab of the spreadsheet (labelled 'Summary (2021-6-16)" Tab). (My instructions are that confirmation of amounts set out in BJ Master File is the subject of a separate engagement between Crown and KPMG. Verification of the amounts in the BJ Master File is wholly outside the scope of this

Opinion. I am here concerning myself only with the Questions posed above.)

- Description and Examples (Column D) for each Category as provided by Crown
- Associated Approval/s – examples for each Category as provided by Crown (Column E). This column contains references (e.g. 05-002). These references are document file names. I have been provided the documents referred to therein in a further file.
- Terms and Conditions / Collateral for each Category (Column F).

The information provided in the documents and other facts provided is being verified by Arnold Bloch Liebler, who are obtaining sworn testimonies from relevant parties.

On Friday 18 June 2021, I was informed that I may be receiving instructions on further relevant matters presently with Arnold Bloch Liebler and asked to consider those matters and provide a further Opinion. In this regard, Appendix J contains opinions from other Counsel that are also relevant to the correct calculation of Crown's casino tax liability in the Period.

2) Summary

a) How the correct casino tax is identified

The Victorian casino taxes are calculated and payable in accordance with the terms of the *Casino (Management Agreement) Act* 1993 (Vic.), which ratifies a Management Agreement, with a number of variations, between Crown and the Victorian executive government. The casino taxes are contractually agreed under Part 4 of the Management Agreement, with the Management Agreement taking effect as if it had been enacted by the *Casino (Management Agreement) Act* 1993. This regime supplants the taxation regime otherwise imposed by the *Casino Control Act* 1991 (Vic.) (see s 11).

When GST was introduced by the *A New Tax System (Goods and Services Tax) Act* 1999 (**"the GST Act"**), the Management Agreement was varied (the Sixth Deed of Variation) to take into account Crown's liability to GST and the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations executed in June 1999.

From 1 July 2000, following the sixth deed of variation dated 3 April 2000 to the Management Agreement, the Victorian casino taxes have been calculated under clause 22C.2 of the Management Agreement in accordance with a formula that contains two integrated components: (i) a primary tax calculation on two separate items referred to in clause 22 as "Gross Gaming Revenue" and in clause 22C as Commission Based Players' Gaming Revenue reduced by (ii) the "State Tax Credit", being the Global GST amount under Division 126 GST Act as *declared by Crown* to the Commissioner of Taxation.

That is, the correct amount of casino tax for each month in the Period is identified by clause 22C.2 of the Management Agreement:

> The total amount of casino tax as described in and calculated under clauses 22 and 22A shall be reduced by the State Tax Credit calculated with respect to gambling supplies to which those clauses apply. The State Tax Credit will be allowed as a reduction in the total amount of casino tax payable under clauses 22 and 22A when calculated on the seventh day after the end of the relevant month.

Clause 2 of the Management Agreement defines the "State Tax Credit" to mean:

> an amount equivalent to the amount determined under Division 126 of the GST Act, declared by the Company to the Commissioner as the Global GST Amount with respect to gambling supplies to which clauses 22 and clause 22A apply

The application of the formula in clause 22C.2 each month gives rise to the one debt payable by Crown to the State.

Under clause 22C.5 adjustments are then made in the following month for the actual Global GST amount assessed by the Commissioner for the previous month. An amended assessment is an assessment for all purposes (s155-80 in schedule 1 of the *Taxation Administration Act* 1953 (Cth) (**"TAA"**)). Accordingly, it may take many years, including litigation under Part IVC TAA, before the correct assessment of a taxpayer is finalised for a particular tax period.

This opinion deals solely with Crown's treatment of the eight Categories insofar as it affected its calculation of Gross Gaming Revenue under clause 22 and the State Tax Credit.

Accordingly, in relation each Category, I have examined:

(i) whether it should affect the calculation of Gross Gaming Revenue as either a credit or a debit, or both)

(ii) how Crown declared it to be treated within the definition of Global GST amount under Division 126 of the GST Act, which gives rise to the State Tax Credit, and

(iii) how, if at all, the Commissioner of Taxation might reassess Crown in the tax periods within the Period, which gives rise to an adjustment to the State Tax Credit in the following month under clause 23C.5 of the Management Agreement.

For example, if in the Period a relevant item had been wrongly deducted by Crown in the calculation of Gross Gaming Revenue and Crown had made a declaration of its Global GST amount which was subsequently subject to a correcting assessment by the Commissioner of Taxation for that month, then over the (whole) Period (i) the primary casino tax would be higher than reported but (ii) the reducing State Tax Credit would also be subject to adjustment.

I note that Crown's actual casino tax liability under clause 22C.2, however, also depends on clause 22A (Commission Based Players' Gaming Revenue) and its reducing State Tax Credit. These are separate integers currently the subject of potential adjustment in the Period by reason of the recent decision of Davies J in *Crown Melbourne Limited v Commissioner of Taxation* [2021] FCA. I explain this in more detail herein.)

b) Overall conclusion and conclusions for each of the Eight Categories

I consider that there has been an under-reporting of actual casino tax liability in relation to the eight Categories of approximately 2.6% of the $272.6 million suggested to be under-reported in the Period. This relates only to two subcategories within Category 8 – free accommodation and free parking. Crown (i) under-reported Gross Gaming Revenue and (ii) declared an incorrect Global GST amount (i.e.the State Tax Credit), for the purposes of clause 22C.2 of the Management Agreement.

As a matter of precision, there is *presently* an under-payment of State casino taxes of approximately 3% of the total amount said to be under-paid for the Categories [$8,075,418, comprising accommodation ($4,419,933) and car-parking ($3,655,486)]. Crown, however, has also made the same errors for accommodation and parking in what it declared to be its Global GST amount in relation to gambling supplies under s 126-10 of the GST Act. Although it underpaid GST for that subcategory in the amount of approximately $917,661, its declaration (whether in fact right or wrong) was its State Tax Credit under clause 22C.2 of the Management Agreement for that category. Nevertheless, the casino tax is subject to adjustment under clause 22C.5 if and when the Commissioner of Taxation amends the GST assessments to increase the Global GST amounts.

A reconciliation must be undertaken and Crown ought consider requesting amendments to its GST assessments, having regard to the four-year amendment period, in order to identify the correct Global GST amounts. When it does this, its casino tax-reducing State Tax Credit for those four years in the Period will be adjusted upwards by approximately $917,661 under clause 22C.5 of the Management Agreement.

In summary, Crown's correct State taxes liability in relation to the 8 Categories is (after amendment of Crown's GST assessments for the past four years) $7,157,757 more than reported in the Period ($8,075,418 less $917,661), not $272.6 million more (as has been suggested).

In my opinion, Crown also under-reported its consideration for or in connection with its taxable supplies of food and beverages within Category 8 under Division 9 of Chapter 2 GST Act. It ought to have included as consideration received for those taxable supplies the amount of the Dining Rewards redeemed as part payment of those taxation supplies. The estimated GST payable is $2,820,818. This error does not affect Crown's casino tax liability under clause 22C of the Management Agreement.

I set out my conclusions on the Questions, and summary of reasons, for each Category below.

c) Categories 1 to 6 – Pokie Credits

These six categories are:

- Pokie Credit Rewards (Welcome Back / Free Credits / Seniors promotion)
- Mail Outs
- Pokie Credits (Matchplay)
- Random Riches (Carded Lucky Rewards)
- Jackpot Payments

- Pokie Credit Tickets

The First Question admits of an immediate answer in the Negative for all non-cash redeemable Pokie Credits, both when awarded as credits on the EGMs/pokies being played by the patrons and when used by the patrons as bets. These six categories account for approximately 88% of the total amount in question.

The reason is that Crown did not receive any cash or cash equivalent sums from, or pay any such sums to, the patrons as required for inclusion in the clause 22 definition of "Gross Gaming Revenue". The Pokie Credits merely were, as Crown made clear to the patrons in their promotional material, free bets when using the pokies. Viz. in working out its "Gross Gaming Revenue"

- Crown's system credited its "turnover" by the amounts of the non-redeemable Pokie Credits when bet by the patrons using the EGMs and subsequently incorrectly included that turnover amount as it if had received sums of money from the patrons as bets.

- Conversely, Crown's system debited those same non-redeemable Pokie Credits when credited in favour of the patrons using the EGMs and subsequently incorrectly deducted its debits as if it had paid actual sums of money to the patrons as winnings.

In short, Crown's system/accounting process incorrectly include an amount as sums of money received and incorrectly include an amount as sums of money paid – yielding a correct net position on "Gross Gaming Revenue". Crown's system/accounting process

for Pokie Rewards recorded nothing other than the fact that Crown conferred a right to a free bet and that bet was made.

It is trite that a mere self-generated accounting entry is neither a receipt of a sum of money from another party, nor a payment of a sum of money to another party. In *Brookton Co-operative Society Ltd v Federal Commissioner of Taxation* [1981] HCA 28; (1981) 147 CLR 441, at 455 the High Court said:

> Payment of a dividend may occur in a variety of ways not involving payment in cash or by bill of exchange, as, for example, by an agreed set-off, account stated or an agreement which acknowledges that the amount of the dividend is to be lent by the shareholder to the company and is to be repaid to the shareholder in accordance with the terms of that agreement. It is, however, well settled that the making of a mere entry in the books of a company without the assent of the shareholder does not establish a payment to the shareholder (*Manzi v. Smith* [1975] HCA 35; (1975) 132 CLR 671, at p 674)

The words of Jacobs J in *Manzi v Smith* [1975] HCA 35; (1975) 132 CLR 671 are wholly apposite:

> "the entries made through the journal and the books of the company did nothing except alter the manner in which the internal accounts of the company were expressed".

Accordingly, for the six categories of jackpots and bonuses involving "free" bets as represented by non-redeemable Pokie Credits, Crown's EGM and accounting systems have, by including the free bet of a Pokie Credit as both actual turnover received by Crown and winnings paid by Crown, created a wholly illusory issue. Those non-redeemable Pokie Credits were neither sums of money received by Crown nor sums of money paid by Crown within the definition of Gross Gaming Revenue; Crown's *net* calculation of Gross Gaming Revenue was, to that extent, correct and there was no underpaid casino tax relating to Pokie Credits. Accordingly, for these six categories, the Second Question does not arise.

d) Category 7 - Consolation prizes

A seventh category - Consolation prizes – can also be dealt with immediately. This category accounts for approximately 0.35% of the total amount in question. Here Crown actually doubled the cash-redeemable credit prizes payable to the patron over a short period of EGM/pokie gaming time. So what would be an actual EGM payout for $100 of winnings becomes an actual EGM payout of $200 of winnings. The additional $100 would have been deductible in the calculation of Gross Gaming Revenue as the payment of a sum of money as winnings in respect of gaming.

e) Category 8 – Bonus Jackpots

The remaining category is "Bonus Jackpots" for Reward Members. This category accounts for approximately 12% of the total amount in question. The dollar amount is $32,898,625, sub-categorised as follows:

- Dining Rewards $24,823,207 (9%)
- Accommodation $4,419,933 (1.7%)
- Car Parking $3,655,486 (1.3%)

This category, unlike the six Pokie Credit categories, did not involve Crown incorrectly crediting an amount as if it were EGM turnover received by it in cash from the patron and simultaneously debiting that same amount as cash winnings paid to the patron.

Crown recorded Bonus Jackpots only when redeemed. It recorded the patrons' redemptions in exchange for Crown's provision of accommodation, car-parking and food and beverage as (i) additional **non-gaming revenue** earned by it from the patrons as a result of providing those other goods and services to the patrons and (ii) a deduction from Gross Gaming Revenue by treating the redeemed Bonus Jackpots as sums paid out as winnings which the patrons used to "pay" Crown for those other goods and services.

In short, Crown characterised the patrons' redemptions of Bonus Jackpots as increasing its non-gaming revenue not subject to State casino taxes and reducing its Gross Gaming Revenue under clause 22 of the Management Agreement subject to State casino taxes.

This category must, it appears to me, be broken down into sub-categories for (i) accommodation and car parking benefits and (ii) Dining Rewards. Both sub-categories must be analysed very carefully to determine not only the correct Gross Gaming Revenue calculation, but also Crown's actual Victorian gaming tax liability under clause 22C.2 of the Management Agreement, which also depends on the correct GST treatment of those sub-categories to give and adjust the State Tax Credit.

My conclusions in respect of each subcategory are as follows:

i) ***Hotel accommodation and car parking benefits subcategory***

Crown incorrectly included as its non-gaming revenue what it recorded as the "payments" by the patrons of the notional value of hotel accommodation and car parking in fact provided for free. The patrons paid nothing to Crown, in fact or in law.

Conversely, Crown incorrectly claimed what it recorded as offsetting payments by it of Bonus Rewards when redeemed by the patrons in discharge of what Crown recorded to be their notional payment obligations to Crown for free hotel accommodation and free car parking as a deduction in the calculation of its Gross Gaming Revenue. Crown paid nothing to the patrons, in fact or in law.

In short, Crown's accounting entries recording debits and credits for Bonus Rewards were not receipts and payments of sums and did not record an underlying agreement between Crown and the patrons for the mutual offsetting of monetary obligations between them.

For GST purposes Crown correctly excluded from accommodation and car parking revenue the amounts referable to Bonus Rewards.

However, Crown Resort's declaration of its Global GST amount each month in relation to free accommodation and car parking was incorrect. It incorrectly included the notional value of those perquisites as amounts it was liable to pay as monetary prizes in the Global GST amount formula. That is, Crown under-reported its Global GST amount under s 126-10 and consequently its net amount under s126-5 GST Act each month.

Crown ought consider requesting amendments to its GST assessments. The Commissioner's power to amend is limited to four years from the date that Crown Resorts lodged its GST return for the relevant period (s155-35 in schedule 1 TAA). If the Commissioner amends Crown's GST assessments by altering the particular "Global

GST amount", then clause 22C.5 of the Management Agreement will be triggered to increase Crown's State Tax Credit for each month in the Period.

In summary, in relation to this sub-category:

(a) during the Period Crown's casino taxes, by reason of incorrectly deducting Bonus Rewards redeemed in the calculation of Gross Gaming Revenue under clause 22 of the Management Agreement, should have been higher than reported by, on the figures set out above, $4,419,933 for Accommodation and $3,655,486 for Car Parking

(b) for the past four years Crown's GST assessments are subject to reassessment by the Commissioner of Taxation. Crown would, as a result, have a higher Global GST amount than declared and its casino taxes would be reduced in the same amount by a State Tax Credit adjustment under clause 22C.5 of the Management Agreement. My instructors have estimated this reduction to be $917,661.

ii) ***Dining Rewards subcategory***

(1) Gross Gaming Revenue

Crown correctly claimed the amounts of Dining Awards earned on the pokies when redeemed as a deduction of sums paid out as winnings in the calculation of its Gross Gaming Revenue under clause 22 of the Management Agreement.

The reason for the difference in my conclusions between these sub-categories is that in the case of free accommodation and free car-parking, the patron is truly receiving a mere perquisite in respect of gambling. A perquisite may be characterised as a Reward Member's winning in respect of gaming on the pokies, for it is just as much a part of the consideration he or she agrees to receive for risking his or her money in gambling transactions with Crown. But, critically, it is not a sum paid out by Crown and cannot be treated as the equivalent of a sum paid out as winnings within the definition of Gross Gaming Revenue.

In contrast, under the Dining Awards redemption arrangement, a patron has won, by conducting gaming on EGMs, a contractual right, albeit contingent and limited in recourse, against Crown to have certain of his or her monetary debts (for food and beverage) discharged. The patron is not receiving as a perquisite the right to a "free" meal. Rather, the patron must incur a genuine monetary obligation to Crown for food and beverage services as offered in Crown's restaurants at fixed prices. He or she might, or might not, choose to use Dining Rewards on that or any other dining occasion in full or partial discharge of that separate obligation to pay for food and beverage. That is not an illusory option, which might be said of a mere percentage discount voucher given solely to encourage the purchase of goods, not as one of the agreed rewards from playing the pokies.

This mutual offset arrangement falls within the "Spargo's case" principle as discussed by the High Court on many occasions (for example, *J C Williamson's Tivoli Vaudeville Pty Ltd v Federal Commissioner of Taxation* [1929] HCA 33; (1929) 42 CLR 452) and in the cases referred to in my instructions.

Moreover, I consider that despite the temporal delay in offsetting being made by Crown to the patrons until the Dining Rewards are redeemed (i.e. when the debt to Crown is incurred), Crown's payments (by way of offset) are to be characterised as winnings paid out "in respect of" the patrons' EGM play. They form part of the terms and conditions of pokie play and are just as much a monetary liability to Crown as any cash prize that might be payable at a later time.

Conversely, this analysis necessarily means that Crown was required to treat the redemption of Dining Rewards as the actual receipt of sums of money by it in cash for its taxable supplies of food and beverage services for the full price as charged. It correctly returned the full amount as assessable income for income tax purposes (and correctly deducted the Dining Rewards component as an outgoing incurred). But it did not follow this treatment through for GST purposes, as I discuss below.

(2) State Tax Credit

The conclusions that I have reached means that a correct operation of the GST Act is that (i) the **full** charge for food and beverage ought to have been treated as "consideration for, or in connection with," Crown's taxable supplies of food and beverages under Division 9 in Chapter 2 GST Act, and (ii) the Dining Rewards component ought to have been treated as being within "total monetary prizes" in the calculation of Crown Resort's Global GST amount under Division 126 GST Act.

This did not occur. Crown (i) incorrectly included only the actual cash receipt (net of the Dining Reward redemption) as "consideration for, or in connection with," Crown's taxable supplies of food and beverages under Division 9 in Chapter 2 GST Act but (ii)

correctly included the Dining Rewards as being within "total monetary prizes" in the calculation of Crown's Global GST amount under Division 126 GST Act.

Accordingly, Crown under-reported its "net amount" under s126-5 GST Act and so under-reported the amount due to the Commonwealth for GST. The Commissioner of Taxation will be entitled to amend Crown's GST assessments for the four years from the date that its GST returns were lodged. My instructors have calculated the underpaid GST to be approximately $2,820,818.

Crown's error in the under-reporting declaration of its net amount under s126-5 was not an error in the declaration of its Global GST amount under s126-5, but an error in reporting its "other amounts". Accordingly, Crown's State Tax Credit in the Period, which depends only on the Global GST amount, is not subject to adjustment under clause 22C.5 of the Management Agreement.

Accordingly, in respect of Dining Rewards, the State casino tax liability for the Period was reported by Crown correctly. It is not subject of potential adjustment by way of amended GST assessments to alter the Global GST amount and trigger adjustments under clause 22C.5 of the Management Agreement.

f) Other relevant matters

For the above reasons I consider that there must be re-calculations of Victorian gaming tax over the Period under clause 22C.2 of the Management Act only in relation to Bonus Rewards referable to accommodation and car-parking (a subcategory of Category 8). This recalculation will also depend on Crown obtaining reassessments of GST for

accommodation and car-parking for the last four years, which reassessments of the Global GST amount will trigger the adjustment mechanism in clause 22C.5 of the Management Act.

In undertaking these recalculations, however, Crown must also have regard to clause 22A of the Management Act and its corresponding part of the State Tax Credit and the recent decision of the Federal Court in *Crown Melbourne Limited v Commissioner of Taxation* [2020] FCA 1295. These are also components in the calculation of the single casino taxes debt owed each month by Crown to Victoria under clause 22C.2 of the Management Agreement.

That decision was that since 2011 the Commissioner has significantly over-assessed Crown's Global GST amount under s126-10 GST Act by reason of not including win rebates, loss rebates and volume commissions referable to Commission Based programs involving junkets in that calculation. Davies J's conclusions were as follows:

> [68] On the facts, there are two supplies: (1) the services provided by the junket tour operator in arranging the junket; and (2) the gambling supplies provided by the applicants under the junket arrangement, which are the relevant supplies for the purposes of Div 126. The Commissioner's contractual analysis fails to address the relevant transaction, which is the provision of gambling supplies by the applicants and the characterisation of commission and rebates in that context for the purposes of the application of the special GST rules. There are three responses to the Commissioner's case.
>
> [69] First, I accept the applicants' submission that a contractual relationship exists as between the applicants, the junket tour operator and the junket players with respect to the conduct of a junket at the casino upon gambling taking place. When there is gambling, the effect of the gambling is that the junket players agree to be bound by the rules that apply to the gambling: The Satanita case. Those rules are to be found in the standard rules set by the casino, as modified by the terms of the junket program selected by the junket tour operator and recorded in the Junket Program Agreement with respect to any gambling that takes place. As matter of contract law, the terms agreed by the casino with the junket tour operator with respect to the conduct of a junket at the casino constitute an offer by the casino to make gambling supplies to junket participants on the terms agreed, and the commencement of gambling by the junket players constitutes acceptance of that offer. Under those terms, there is an amount either paid by or to the junket tour operator at the conclusion of the junket, to be calculated by the collective wins and losses of the junket players and then adjusted by the commission and/or rebates to be paid under the special terms that apply to the particular junket.

> [70] Secondly, I accept that the accounting for the outcome of the applicants' gambling supplies is one integrated and indivisible transaction of which the commission and rebates to be paid to the junket tour operator by the casino and the rebates to be paid by the junket tour operator to the casino are inseverable components, such that it can be said that commission and rebates are not separate and distinct amounts to be disintegrated from the collective win/loss results. Rather, they are amounts which are required to be taken into account as stipulated by the Junket Program Agreement in settling what is to be paid and by whom as the result of the gambling, as evidenced by the settlement sheets, and either form part of the "consideration for" the applicants' gambling supplies or the "monetary prize" which the applicants are liable to pay on the outcome of the gambling under the junket arrangement, depending on whether it is a net win to the casino or a net loss to the casino: cf *Lend Lease*.

Her Honour then overlaid some GST principles to this contractual analysis.

> [71] Thirdly, and importantly, the High Court in *Qantas* rejected a strictly contractual approach to the application of the GST Act. It was held in relation to s 9-5(a) of the GST Act that the word "for" in the phrase "the supply for *consideration" was not used to adopt contractual principles but required "a connection or relationship between the supply and the consideration": Qantas at 292 [14] per Gummow, Hayne, Kiefel and Bell JJ. In that case, the majority found that fares received from prospective passengers who failed to take the flights for which reservation and payment were made were still "consideration for" a taxable supply by the airline, even though the airline supplied "something less than" actual air travel. Their Honours held that it was sufficient that there was "at least a promise to use best endeavours to carry the passenger and baggage, having regard to the circumstances of the business operations of the airline": *Qantas* at 299 [33] per Gummow, Hayne, Kiefel and Bell JJ. It is therefore not determinative that, in the case of a junket, the casino contracts directly with the junket tour operator and not the individual players. What is relevant for the purposes of Div 126 is that the applicants' gambling supplies are made to the participating junket players, with the adjustments for commission and rebates reckoned upon the gambling supplies actually made and by reference to the outcome of the gambling events. The operation of Div 126 does not depend on the characterisation of the commission and rebates as "consideration" as a matter of strict contractual principle: *Qantas*. Equally so, the definition of "monetary prize" is apt to apply where an amount is payable by the casino to the junket tour operator on the reckoning of collective gambling wins and losses adjusted by commission and rebates.

For the same reasons, since 2011 Crown has significantly overcalculated its Commission Based Players' Gaming Revenue under clause 22A of the Management Act in relation to programs involving junkets by incorrectly excluding notional volume commissions in the calculation of the Players' actual monetary win or loss as calculated at the conclusion of each junket. Under clause 22C.5 of the Management Agreement, Crown must recalculate its monthly Victorian casino tax liabilities having regard to the Commissioner of Taxation's forthcoming monthly reassessments of GST, which will require adjustments by way of effective reduction of the monthly State Tax Credit. I expect, after that overall recalculation has taken place for each month (being reduced

Commission Based Players' Gaming Revenue less State Tax Credit less assessed adjustment to State Tax Credit), that Crown's provisional Victorian casino tax payments each month will have resulted in its having paid significant casino tax in advance of its actual liabilities. Those advance payments should be credited against its future casino tax liabilities as and when they arise.

I note that the Commissioner of Taxation appealed that decision and that the Full Court of the Federal Court has heard the appeal and reserved its judgment. I expect that the Court will deliver judgment later this year.

3) Relevant jackpots and bonuses – description and existing treatment

Patrons of Crown who play the pokies are offered various jackpots and bonus incentives in doing so. A sample letter encapsulating these offers is as follows:

> **Your Bonus Pokie Offer Awaits**
>
> As a special bonus to selected Crown Rewards members we are pleased to offer you $20 in Bonus Pokie Credits. To activate this offer, please visit any Voucher Issuance Kiosk (VIK) on the casino floor and select the Special Offers icon. Following this, your $20 bonus Pokie Credits will be available on any gaming machine between 6.00am Monday 21 January 2019 and 6.00am Monday 4 February 2019.1
>
> Plus, as a Crown Rewards member you are eligible to receive a $17.50 Casino Dining Reward off any purchase at participating outlets by earning 650 points on Gaming Machines in a Day.
>
> Remember, you must have your Crown Rewards card with you to take up this offer.

The Victorian Commissioner for Gambling and Liquor Regulation (**"VGLC"**) sets out the requirements for these Pokie Credits, including that they are separately identifiable on each EGM:

> 7. Player Promotion / Bonusing System
>
> Overview
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> The following requirements shall only apply to Player Promotional/ Bonusing systems that can affect the financial settlement such as e.g. redemption of player loyalty points as creditsto the player account (which can be used as machine credits) or bonus awards which are paid directly to the EGM credit meter.
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> All promotional/bonusing credits given to the player have no impact on the calculation of theoretical payback percentage for a gaming machine. **Provisions must be made to ensure that these awards are metered uniquely by the electronic gaming machine, so that they can be reported correctly to the CMS for calculation of revenue and promotional/bonus awards reconciliation purposes.**
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> 7.2 Player Promotion Systems
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> A Promotional System is typically comprised of gaming devices that are configured to participate in electronically communicated promotional award payments from a host system. The host system controls the promotional award issuance parameters as well as the awarding of promotional credits. Promotional awards are additional elements that entitle players to special promotional awards based on the patrons play activity. Promotional awards are based on predefined patron play activity associated with a specific patron/account.
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> Static promotional awards are based on predefined criteria that do not require patron gaming machine activity prior to redemption and are generally for single instance use.

> The Player Promotion may include for example:
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> a) A player may be awarded 100 points for every $100 played on the gaming machine. These points may then be converted to machine credits at the gaming machine with a point to credits conversion ratio set in the player promotion host;
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> b) A player who has established a qualification for gaming machine play activity will be awarded a certain number of machine credits upon returning the next day (or any defined period); or
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> c) A player will be given a predefined credit when they first sign up for participating in the player promotion.
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> The promotional awards/credit in this context are referred to as "free play / match play credits" (i.e. player must contribute money first via gaming machine play to redeem the promotional awards).
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> 7.3 Bonusing Systems
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> Bonusing Systems are typically comprised of gaming devices that are configured to participate in electronically communicated bonus award payments from a host system. The host system controls the bonus award issuance parameters as well as awarding of the bonus payments. The bonus host system provides designated gaming devices with additional elements that entitle players to special Bonus Awards based on events triggered by the gaming device. Bonus awards are those based on a gaming machine event or some external trigger which do not include triggers based upon specific patron account activity.
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> The Player Bonusing may include for example:
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> a) Multiply wins with a specified value for a specified period on participating gaming machines; or
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> b) A small bonus prize given to all players playing on gaming machines when a large jackpot is won.
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> …
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> 7.4.1 Display Notification
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> Player shall be suitably notified, as a minimum, of the following events on the gaming device and/or interface display element:
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> Entry and exit from player loyalty mode (i.e. Indication of promotion participation - availability or unavailability, expiry, etc.);
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> Redemption of loyalty points to machine credits;
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> Promotional credits awarded; and
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> Promotional credits redeemed.

My instructors have identified eight categories of jackpots and bonuses. I have asked for summaries of the accounting, income tax, GST and Casino taxes treatment of each category.

<u>1. Pokie Credit Rewards (Welcome Back/Free Credits Program)</u>

A patron playing the pokies has their playing tracked and recorded by Crown to accumulate "Pokie Points". In order to encourage that patron to return to play the pokies, Crown provides the patron a Pokie Credit Reward denoted in monetary terms, say $100.

A Pokie Credit Reward cannot be converted into cash. The patron must return to the casino and use it to play the pokies.

Crown does not record any monetary amount as a deduction for merely conferring the Pokie Credit Reward upon the patron. Rather, if the patron uses the Pokie Credit Reward for, say, $100, then Crown will at that time recognize turnover of $100 even though it is not receiving any sum of cash or cash equivalent from the patron. This $100 nevertheless is entered into the Gross Gaming Revenue formula as such. The Crown system immediately records a (cancelling) deduction of $100 as a sum paid out as winnings even though Crown is not disbursing cash or cash equivalent to the patron. Its systems reverse that treatment by offsetting deduction. In short, the patron gets a free bet.

There are no net income tax, GST or State Gaming Revenue effects.

If the patron wins using the Pokie Credits, the patron will win a monetary amount from Crown as a prize, which is treated by Crown like any other winning.

The Pokie Credit arrangement is to be contrasted with an arrangement where Crown voluntarily gives coupons *fully exchangeable for cash* to patrons to encourage betting at the casino. The cash, when paid directly or in exchange for a coupon, would be a

marketing expense incurred by Crown. It would be a sum "in respect of the conduct or playing of games", but it would not be "paid out as a winning" within the definition of "Gross Gaming Revenue" in clause 22 of the Management Act. If the patron chose, at his or her option, to exchange the coupon for cash and walk away, then that would be the end of the matter. If the patron chose to place a bet with that cash (now his or her cash), then that would be a cash sum received by Crown from the conduct or playing of games and fall within "Gross Gaming Revenue" in clause 22 of the Management Act.

2. Mail Outs (Bonus Pokie Offer)

These are Pokie Credit Rewards sent by mail to various patrons to encourage them to return to the casino to play the pokies.

The treatment of Mail Outs is the same as Pokie Credit Rewards.

3. Pokie Credits (Matchplay)

These are Pokie Credits that have been created due to the patron exchanging his or her Crown Rewards points earned under the Crown Rewards program. All that is occurring is that the free bets earned in Crown Reward points are converted into Pokie Points recognizable by Crown's EGM systems.

The treatment of Pokie Credits (Matchplay) is the same as Pokie Credit Rewards.

4. Random Riches (Carded Lucky Rewards)

These are the same as Pokie Credit Rewards and are treated in the same way.

5. Jackpot Payments

Jackpot Payments are credits added at the EGM/pokie. They are generated automatically by actual play. They are non-transferable and they are non-redeemable for cash. They are to be used to make bets.

They are treated in the same way as Pokie Credits.

6. Consolation prizes

A Consolation arrangement is simply an arrangement where, for a certain period of time, the actual wins the patron makes on the machine being played is doubled.

The actual win resulting under a Consolation prize arrangement is deducted by Crown as a prize for the purposes of income tax, GST and Gross Gaming Revenue.

7. Pokie Credit Tickets

These are issued by Crown to a patron. They are non-transferable. They allow the patron to redeem them at a pokie machine for a dollar amount of Pokie Credits, which are treated as described above as and when play takes place. Their amount is recorded for management purposes only.

8. Bonus Jackpots

Patrons are awarded "Pokie Points" based on the amount that they put through the pokies. Pokie Points can be used by the patron to obtain the following benefits:

- "free" car parking
- accommodation where the patron is not presented with an invoice
- Credit as part payment for the patron's actual food and beverage expenditure.

If and when the Pokie Points are redeemed by the patron, Crown's treatment is as follows:

(i) *Accommodation Award*

Crown internally treats the value of the hotel room as revenue of the hotel operations department and as a deduction from EGM revenue as a cost to that gaming business unit.

Crown's income tax treatment is neutral, in that it does not affect its taxable income, being assessable income less allowable deductions.

The patron does not receive an invoice which shows an amount for the room charge and an offsetting claim of an Accommodation Award. The invoice that is presented to the patron will show only his or her actual charges in using the room (such as mini-bar charges). The patron is informed that the accommodation is free (either verbally or by conduct).

Although the hotel system may create two "windows" for a customer's account that are visible to Crown staff – one being for the room charge that is to be treated as a bonus jackpot and the other being for the actual charges such as mini-bar charges, the patron will only be presented with an invoice with the latter details.

I am provided an example of the Finance treatments for Accommodation Rewards redemption:

For one room of accommodation bonus jackpot equivalent to $180 internal charge:

DR Gaming Machine Revenue – EGM department	$180
CR Accommodation Revenue – Hotel department	($180)

For GST purposes Crown does not reflect the $180 credit as consideration for the taxable supply of accommodation under Division 9 GST Act.

Crown, however, treats the $180 debit as an amount it is liable to pay and a monetary prize in working out its Global GST amount under Division 126 GST Act.

Crown claims the $180 debit as a sum paid out as winnings to be deducted in the calculation of Gross Gaming Revenue.

(ii) *Car parking awards*

I am provided with an example of the Crown Finance department's treatments for car parking rewards redemption:

DR Gaming Machine Revenue – EGM department	$50
CR Car Park Revenue – Parking department	($50)

Crown does not provide the patron an invoice relating to the claiming of car parking awards. The patron is informed that the car parking is free.

Crown's income tax treatment is neutral, in that it does not affect its taxable income, being assessable income less allowable deductions.

For GST purposes Crown does not reflect the $50 credit as consideration for the taxable supply of car parking services.

Crown, however, treats the $50 debit as an amount it is liable to pay and a monetary prize in working out its Global GST amount under section 126-10 GST Act.

Crown claims the $50 as debit as a sum paid out as winnings to be deducted in the calculation of Gross Gaming Revenue.

(iii) *Dining Rewards*

Dining Rewards, unlike accommodation and free parking, appear to be more than a perquisite. They arise when a Crown Rewards Member plays EGMs and earns enough Crown Rewards points from that gaming activity. Earning 150 points on EGMs in a day generates a $7.50 Dining Reward. Earning 650 points on EGMs in a day generates a $17.50 Dining Reward.

Accordingly, Dining Rewards have an actual monetary value to the patron. In order to obtain that value the patron must purchase food and beverage at the casino.

To give an example, if a patron earns enough points by playing the EGM to be entitled to a $100 Jackpot, it is given the right via a non-transferable electronic coupon of up to a $100 credit against payment for any food and beverages purchased at a Crown restaurant for, say, $150. Let us say the patron chooses to use $50 of that entitlement.

Upon redemption, Crown internally recognises food and beverage revenue of $150 charged for the meal in its food and beverage business unit, and deducts $50 in its gambling revenue unit.

For income tax purposes, Crown recognizes the $150 as assessable business income and $50 as an allowable deduction. Its taxable income is $100.

A more detailed accounting and income tax example was provided by Crown to the ATO in 2018, where 100 points equates to $1, as follows:

Please see below a step by step walkthrough of a customer earning and redeeming Crown Rewards points. Noting that the tax treatment is the same as the accounting treatment.

Mr John Smith signed up as a Crown Rewards member and plays on a gaming table. After one hour of play, he has earned 10,000 points	DR Loyalty Program Deferred Revenue $100 CR Player Point Liability ($100)
Mr John Smith later joins his friends for a meal at Nobu. He presents his Crown Club card to redeem his points for meal value of $50	DR Player Point Liability $50 CR Loyalty Program Deferred Revenue ($50)

	DR Loyalty Program – Food $50 CR Nobu Revenue ($50)

For GST purposes:

- Crown reported that it had received consideration of only $100 for the taxable supplies of food and beverage services under Division 9 of Chapter 2 of the GST Act, rather than consideration of $150.

- Crown claimed $50 as a monetary prize in reduction of its Global GST amount for its gambling supplies under s126-10 of the GST Act.

So Crown's overall GST net amount under s 126-5 GST Act was $50 (in contrast to its taxable income of $100).

For the purposes of Victorian casino tax, Crown claimed the $50 Dining Rewards redeemed as a sum paid out as winnings in respect of gaming and deductible in the calculation of its Gross Gaming Revenue under clause 22 of the Management Act.

4) Analysis of the calculation of Victorian casino tax

The calculation of relevant Victorian casino taxes commences with a consideration of the *Casino (Management Agreement) Act* 1993 (Vic.) and the Management Agreement itself, relevantly clause 23C.2, to which reference is made to clauses 22 and 22A.

Clause 22 sets out the primary casino tax amount, which is based on Crown's "Gross Gaming Revenue". This is defined in clause 2 of the Management Agreement, as set out in schedule 1, to mean:

> the total of all sums, including cheques and other negotiable instruments whether collected or not, received in any period by the Company from the conduct or playing of games within the Temporary Casino or the Melbourne Casino (as the case may be) less the total of all sums paid out as winnings during that period in respect of such conduct or playing of games

a) Sums

This definition refers to Crown's receipt and payment of "sums, including cheques and other negotiable instruments". Whether this is to be broadly or narrowly construed depends on the context of the relationship of the parties at the time the agreement was made.

It may also be relevant to consider how the parties have conducted themselves up to and including every variation and re-ratification of the Management Agreement. For example, when the Management Agreement was varied in 2000, it may be relevant to consider whether up to that time certain non-monetary prizes had been expressly approved by Victoria as being equivalent to the payment of sums of money. One would be sitting in the armchairs of the parties in 2000, rather than drily construing a statute, to

determine the contractual context in which they have varied and ratified the Management Agreement, which then takes force as if it were enacted.

For example, I note from the promotional material that Crown sometimes offers as jackpot prizes new luxury cars, rather than cash directly. A winning patron might drive away with the new car on the casino floor that has a headline retail value, but would it be registered to Crown as owner (and so be a car in the second hand of the patron?) or would Crown make arrangements with the car dealer for the patron to take original and new ownership of a hitherto unregistered car? What is certain is that Crown would be paying an amount to the car dealer, not necessarily the headline retail value, because the patron has "won the car". The definition of Gross Gaming Revenue does not require the sum to be *paid to the patron*, only that it is paid out as winnings in respect of the conduct or playing of games.

In this example one could not cavil with what Lord Hannen said in *Tennant v Smith* [1892] AC 150: "That which could be converted into money might reasonably be regarded as money". However, when property or services are provided, the issue then arises as to what is the appropriate taxable amount, and to which party. To take a classic example: an employer rewards an employee with a bespoke suit from Savile Row. The employee is fitted and three months later a beautiful suit, to that employee's exact measurements, is provided to him. Its cost to the employer is 1,000 pounds, being for the services of the tailors and fabric, but its market value in the hands of the employee as a suit is but 100 pounds, for the market is small. The employee has not had any debt for 1000 pounds discharged; he has simply received a bespoke suit. The revenue gap of 800 pounds has to be expressly filled by legislation, such as s 26(e) *Income Tax Assessment Act* 1936 or the *Fringe Benefits Tax Assessment Act* 1986.

I consider that the question of what is meant by a sum within the definition, which requires the perspective of Crown to be considered, may be looked at as one of substance, as a "plain business question" upon which the correct taxation of Crown depends. In *J C Williamson's Tivoli Vaudeville Pty Ltd v Federal Commissioner of Taxation* [1929] HCA 33; (1929) 42 CLR 452 Isaacs J said

> The Commissioner contends at the threshold that such a transaction is outside the proviso, since the words "amount" and "paid" and "sum" connote money.
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> The question is not free from doubt. But on the whole I apply to this branch of the case the "substance" doctrine of *Spargo's Case*[33], and other cases such as *Pott's Case*[34]. *Spargo's Case*, as Lord *Cozens-Hardy* said in *Parsons v. Equitable Investment Co.*[35], is only an illustration of a principle. That is, I treat as "money" whatever was the amount of money that it is considered could on the day of the "payment" have been realized by selling the shares. That and that alone can be the "money's-worth" that was then given.

The plain business question here would be: what sum did Crown pay out to provide the car as the winnings in respect of the patron's gaming? The answer would be the ex-GST sum to the car dealer.

It is also well established that receipt and payment of money "in cash" can occur by way of agreed set-off of two independent monetary obligations. On the other hand, merely providing what is referred to as a "perk", viz, perquisite, is not usually treated as the equivalent of providing an amount equivalent to money. The authorities are replete with examples of where this is the issue in controversy.

Three relevant examples (in Category 8) are free accommodation, free car parking and subsidised food and beverages. There is a fringe where it is hard to distinguish between a payment of money (by way of offset of mutual obligations) and the provision of a valuable perquisite. In *Heaton v Bell* [1970] AC 728 the House of Lords was divided as to whether a "salary sacrifice" arrangement involving the employer lending a car to the employee and receiving a reduced wage was the payment of the original wage to the

employee and the payment of the difference by the employee to the employer, or whether it was the payment of a reduced wage by the employer and the free provision of the car by the employer.

What is clear, and this is critical in the present circumstances, is that a person cannot unilaterally create a transaction of payment and receipt by way of accounting entries. In *Manzi v Smith* referred to earlier, Barwick CJ said:

> We were referred to cases in which a payment of money was held to have been made by means of entries in books of account. But in those cases the entries represented the agreement of the appropriate parties e.g., Eyles v. Ellis [1827] EngR 409; (1827) 4 Bing 112 (130 ER 710) ; In re Harmony and Montague Tin and Copper Mining Company (Spargo's Case) (1873) 8 Ch App 407 . These decisions, quite clearly, are not authority for the proposition for which they were advanced, namely, that a payment of money was made by the making by the company of a journal entry in the books of account without reference to, or without the agreement of, the persons said to be the recipients of the money. The company's assertions in its books of account did not establish the indebtedness of the appellants or any payment of money in discharge of that indebtedness

Even where two persons might agree between themselves that payments between them should occur by way of journal entries, or even the crossing of cheques, that will not necessarily mean that an underlying transaction that affects the existing rights and obligations of the parties for which the payment of money was a real consideration has occurred: see e.g. in *re Associated Electronic Services Pty Ltd* [1965] Qd R 36. Returning to the judgment of Isaacs J in *Williamson*, his Honour made the peculiarly apposite observation:

> "Payment as between them is not necessarily payment where the Crown revenue is concerned."

The casebooks are replete with arrangements said to involve the "payment" of subscription moneys for the issue of shares or the "payment" of dividends by way of some offsetting demand.

A typical example is *Bouch v Sproule* [1887] 12 AC 385 (see also *Hill v Permanent Trustee Company of New South Wales Ltd* [1930 AC 720. A company declared a dividend to be satisfied by the issue of bonus shares. The shareholder was a trustee. Shares when issued must be paid in full. So a dividend cheque is made out on the real basis that it must cross with a cheque in the same amount for the subscription for the shares. In that case a dispute arose as between the income and the corpus beneficiaries as to which class of beneficiaries should obtain the benefit of the bonus shares issued by the company to the trustee as fully paid. The income beneficiaries claimed that the trustee had effectively received cash dividends and, for their benefit, the trustee then subscribed that income as the cash payment up of the shares. The corpus beneficiaries claimed that nothing had occurred but that the share capital of the company had been reordered, and thus they were to benefit from the bonus shares. The corpus beneficiaries succeeded.

Reasonable minds can differ where facts are changed even slightly. One may take Isaacs J's powerful dissent on the facts in *J C Williamson's Tivoli Vaudeville Pty Ltd v Federal Commissioner of Taxation* [1929] HCA 33; (1929) 42 CLR 452 as an example:

> 1. *Spargo's Case*.—Nothing could be more distinct than *Spargo's Case*[5] and the present case. In *Spargo's Case* the shareholder subscribed for *contributing* shares, and owed the company the whole subscription money, which could have been sued for. On the other hand, the company by an independent agreement bought his property and owed him the price in cash as a debt. The Court allowed the *two pecuniary debts* to be set against each other, and each debt was paid in cash without the form of passing the money backwards and forwards. That is the way also in which the Privy Council viewed the matter in *Larocque's Case*[6], namely, the existence of two independent agreements, each creating a liability to pay presently in cash. Such an agreement as the present, said Lord *Macnaghten*, he regarded as contravening a statute requiring shares to be paid for in cash. That pronouncement, which in itself is sufficient to exclude *Spargo's Case*[7], is only the recognition of a very distinct series of decisions dating back sixty years. In 1879 *In re Government Security Fire Insurance Co.—White's Case*[8] was decided by *James*, *Brett* and *Cotton* L.JJ., which, if sound law, leaves, as to both contentions, no loophole of escape in the present case. There a newspaper proprietor did work for a company, and made a money claim against the company in respect of part of which, £30, they issued to him by agreement six fully paid-up shares of £5 each. No contract was filed under sec. 25 of the Act of 1867, so that it became a question of whether in law there had been *a cash payment* for the shares. It would be impossible, I think, to find a case

more directly in point, or more decisive. *James* L.J. said[9]:—"The bargain was that Mr. White should accept payment in shares, and must not look for cash. Therefore there never was that money demand which was capable of being, I do not say set off in the ordinary legal sense, but set off by the parties meeting and agreeing to put debt against debt. That being so, it seems to me utterly impossible to bring the case within Spargo's Case." *Brett* L.J. said[10]:—"Now he has not actually paid for these shares in cash. He did not take any money out of his pocket in cash and pay for these shares. The only question, therefore, is whether there has been a transaction which is equivalent to a payment in cash in point of law." Then[11], having examined the contract and found that on its fair construction White was to be paid in shares and shares only he says[12]:—"For a breach of the agreement on the part of the company the action would not be for a money demand at all, the action would be for a breach of the agreement to deliver shares, and on a non-delivery of shares the damages would be the value of the shares." Therefore in his opinion *Spargo's Case*[13] was inapplicable. *Cotton* L.J. said[14] that the matter had to be dealt with as a matter of substance, and said:—"What in substance was the real contract and agreement between White and the company; the only point which is material being this, whether or no ... any money ever became due by the company to White. ... He was to have nothing from the company except fully paid-up shares, that is to say, the company, wishing to start itself, said to him in substance, If you will take fully paid-up shares, shares on which you are to be subject to no call, you shall advertise for us, the shares being given to you in consideration of your doing that work. ... He bound himself to accept, as the company were also bound to give, shares, in consideration of his doing the work." That established that the shareholder owed no debt to the company. Then, on the other side, the learned Lord Justice said there was really no debt of the company to White. I invite attention to the last quoted words of the Lord Justice, and those about to be quoted when we come to the question of value. As if anticipating one main argument in the present case, the learned Lord Justice refers to the money account that was rendered to the company, and he says[15]:—"It was for the purpose of ascertaining what quantity of fully paid-up shares should be allotted to White in the company. It was not, in my opinion, referred to ... as recognizing the liability on behalf of the company to pay cash, but it was merely for the purpose of ascertaining the quantum, as a measure of the number of shares that were to be allotted to this gentleman as fully paid-up shares." So there was no debt by the company either, because the company was *never bound to pay money*.

In *In re Barangah Oil Refining Co.—Arnot's Case*[16], in 1887, another Court of Appeal (*Cotton* L.J., *Bowen* L.J., *Fry*L.J.) had to consider a question greatly canvassed in this case, namely, the effect of a promise to pay a *stated sum of money to be paid by paid-up shares*. Referring to what is in fact the doctrine of *Spargo's Case*[17], *Cotton* L.J. said[18]:—"In my opinion, it would be wrong to apply that principle to a case where the only transaction which is claimed to amount to a payment in cash is an agreement to be paid in shares, which is embodied in the same resolution as that which allots him the sum in respect of which he is to take the shares." *Bowen* L.J. said[19] unless paid-up shares were given the company would not fulfil their contract. *Fry* L.J. said[20]: "I think it plain that a mere agreement to give money contemporaneous with an agreement to take shares cannot be a payment in cash." In *In re Rosherville Hotel Co.—Roberts' Case*[21] there was an agreement between vendors to a company and the company, the second clause stating the consideration as £3,000. Clause 4 provided that the £3,000 should be paid £1,000 in cash and £2,000 in fully-paid shares. The shares were allotted. No contract was registered. Held, by *Stirling* J., that the shares had not been paid for in cash. *Spargo's Case* was cited. *White's Case*[22] was acted on. Mr. *Buckley*, of counsel, referred to Lord *Selborne's* decision in *In re New Zealand Kapanga Gold Mining Co.; Ex parte Thomas*[23], which was to the effect that in such circumstances the shares were not paid up in cash. In *Credit Co. v. Pott*[24] Lord *Selborne* L.C. restated the *Spargo* doctrine. The distinction where independent agreements exist, each resulting in a purely money claim, is at the root of the matter, as shown by *Larocque's Case*[25] already mentioned and the *Barrow-in-Furness &c. Co.'s Case*[26]. In the *Johannesburg Hotel Co.'s Case*[27] *Fry* L.J. observed that the contract to take paid-up shares in payment of property does not raise *cross pecuniary debts* which to avoid circuity may be used to extinguish each other mutually, and so work a virtual payment in cash. And the learned Lord Justice said: "A contract to take fully paid-up shares creates a liability to take the shares, but no liability to pay

> money, and no debt under any circumstances." *Buckley* on *Companies* (7th ed., at p. 600, and 8th ed., at pp. 635-636) shows that unless *calls* are due on the shares, the *Spargo* doctrine cannot operate.
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> During the argument reliance for the taxpayer was placed on *Palmer's Company Precedents*. The reference is adverse. In the 5th ed. (1891), at p. 99, after citing sec. 25 of the Act of 1867, this is said:—"Hence, whenever an agreement provides for the issue of paid-up or partly paid-up shares as the consideration or part of the consideration for property or rights sold or services rendered to the company, the agreement should be duly filed pursuant to the above section before the shares are allotted, otherwise the allottee will be liable to pay the nominal amount thereof in cash." The form 15 at p. 113 undoubtedly contemplates a contract in the form as in *Roberts' Case*[28], but there is appended a cautionary note as to registering the contract, and referring back to p. 99, a note scarcely necessary. The quotation from p. 99 is repeated at p. 130 of the 6th ed., the last before the repeal of the 25th section of the Act of 1867, and at pp. 134-135 the cases I have cited up to 1895 are mentioned, with others to the same effect. There is nothing contrary to this in the *Bullfinch Case*[29]. I cannot there find any statement that the consideration was payable or was paid "in cash," or that a pecuniary liability or debt was created. *Spargo's Case*[30] was never mentioned, nor had the Court any concern with what we are considering here. What was held, rightly or wrongly, was that the *amount* of the consideration was for the purposes of the particular Act to be taken at the agreed amount, £400,000. Two members of the Court, *Griffith* C.J. and *Barton* J., based their decision avowedly[31], not on the cash price mentioned, but on the nominal value of the shares being taken conclusively as their value. I am not concerned with the accuracy of that decision as applied to its circumstances, for in my opinion it has no relation to the point we have to consider. I am not at present prepared to assent to it. If it is in conflict with the cases I have cited, it is certainly erroneous, and sitting here it would be our duty to say so. I leave that case out of consideration for present purposes.
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> 2. *Money or Money's-worth*.— *Spargo's Case*[32] being inapplicable for the reason that *no debt on either side* existed, it follows that the only property in fact and in law given for the assignment of the leases was shares in the Company.

These observations support the proposition that a Rewards Member would merely be provided, in the example given earlier, food and beverages for a price of $100, and that the link between the perquisite of Dining Rewards, which entitled him or her to pay only $100, with the Reward Member's gambling, was of historical significance only.

The other members of the High Court, however, disagreed with his Honour on the facts before them, which calls into question whether the principle as adumbrated by Isaacs J in that case (and in *Saxton's case*) is as strict as his Honour thought it was. *Williamson's case* concerned a person selling leases to a company where the consideration was relevantly expressed to be:

> the sum of £170,000 which shall be paid and satisfied by the allotment to the vendor or his nominees of 170,000 fully paid-up shares in the Company of £1 each

Knox CJ held:

> The contract in the present case was in substance that the Company should pay the vendor £170,000 as purchase-money of the leases and that the vendor should pay to the Company £170,000 in payment of £1 each on 170,000 shares in the Company to be issued to him as fully paid up. The transaction was carried out by appropriating the £170,000 payable to the vendor by the Company in payment of the £170,000 payable by him to the Company on the shares which he had agreed to accept in satisfaction of the amount payable to him as consideration for the sale of the leases. The £170,000 stated in the agreement as the consideration for the sale of the leases was paid by the Company by agreed set-off against the amount payable by the vendor on the shares allotted to him. That discharge of an obligation by set-off operates as payment, and even as payment in cash, is clear from the decision in *Spargo's Case*[3]. In my opinion the facts agreed on in this case show that the taxpayer paid £170,000 for the transfer to it of the leases in question, and that it is therefore entitled to the allowance of £17,000 which it has claimed, the unexpired period of each lease at the date of payment being ten years.

For my own part, I would have considered the contract to be, "in substance", a barter: property for shares.

Rich J, in finding that payments had been made for each item of property by way of mutual set-off, said:

> I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount

It must be concluded that what is only necessary for *Spargo's case* to apply is that there be two genuine promises to supply property or services between the parties that each genuinely sound in money, (rather than two independently debts established after separate consideration has been executed and a subsequent agreement to set off those debts).

These principles, applied to the definition of Gross Gaming Revenue and how the parties have conducted themselves entering into and during the ordinary course of their

relationship, inform what is meaning by the receipt of sums by Crown from conducting gaming and the payment out by Crown of sums in respect of gaming.

b) "As winnings"

The next question is to determine when a sum is paid out "as winnings" within the definition of Gross Gaming Revenue. Obviously the credited money sum directly referable to the outcome of the bet on the pokie is a winning. Likewise, the random jackpots that occur for a patron on the relevant pokie are plainly within the meaning of sums paid out "as winnings". In my view, there is no basis in substance between such winnings and any other sums credited to the patron in respect of playing the pokies and advertised by Crown as a bonus or reward.

Returning to the Management Agreement, clause 22A identifies another item of revenue upon which an additional amount of casino tax is imposed, being the profits derived from "Commission Based Players".

> 22A. Tax on Commission Based Players' Gaming Revenue
>
> 22A.1 In addition to any fees or taxes payable by the Company under clause 22 or otherwise, while the Casino Licence remains in force, the Company must pay to the State, in respect of each month in which gaming is conducted in the Temporary Casino or the Melbourne Casino, as the case may be—
>
> (a) casino tax in an amount equal to 9% of the Commission Based Players' Gaming Revenue for the month in question, such tax being payable within 7 days following the end of each month, the first payment to be made in relation to the month commencing 1 January 1996; and
>
> (b) a community benefit levy in an amount equal to 1% of the Commission Based Players' Gaming Revenue for the month in question, on the same dates as payments are made to the State under paragraph (a); but
>
> (c) if in any month the Commission Based Players' Gaming Revenue is less than zero, the amount of the negative Commission Based Players' Gaming Revenue may be carried forward to the following month and applied to reduce the Commission Based Players' Gaming Revenue in that month.

"Commission Based Players' Gaming Revenue" is defined to mean:

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

"Commission Based player" is defined to mean:

> A person who participates in a premium player arrangement or a junket where the person and the Company satisfy the requirements of any relevant controls and procedures approved by the Authority under section 121 of the *Casino Control Act* in respect of a premium player or a junket player (as the case may be).

"Junket" is defined in the *Casino Control Act* 1991 as follows:

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

"Commission", so far as a player is concerned, is something based on play, not commission in the sense of a real estate agent. It is part of the gambling return. Traditional Baccarat, for example, requires the patron to "pay" a 5% "commission" for a winning bet on Banker. That is no more or less than paying odds of 19:20 on the bet. The Premium Player and Junket Program Agreements were subject to detailed consideration in the *Crown Melbourne case*. They reveal that the turnover commission referred to in Crown's agreements is not separately paid at all. Rather, it is merely part of the agreed formula that determines a single monetary outcome from the premium player(s) gambling activities. It is inherent stamped as part of either Crown's wins or the player(s)' wins. In the *Crown Melbourne* case, it was held that a turnover based commission was an integer in a single integrated and inseverable gambling transaction that produced a single outcome and one monetary win or loss.

This aspect of the Management Agreement informs the answer to the issue of whether a "turnover" based commission or other monetary reward that is not an immediate win on an individual bet comes within the concept of a receipt of money from the conduct or playing of games, or the payment out "as winnings" in respect of such conduct or playing of games.

In my opinion the answer is in the Affirmative, for it is integral to commission-based players that their gambling outcome should include money or monetary credit based on the bets that they place. This forms an inseverable part of the reward against which they measure their risk in placing bets. Crown likewise would be fully justified in considered that in conferring such rewards it has received full value, being the opportunity, with the odds on its side, to win more money from the patrons.

Whether any player places one bet for $400,000 which produces a defined monetary outcome or a commission-based player places 100 bets notionally totalling $400,000 that produces the same monetary outcome does not matter. Crown gets the opportunity and the patrons "win" the money that they receive from giving Crown that opportunity. They do nothing else for that money. This analysis obtains in a GST context, if the activity to which the calculation of the monetary liability is referable is "for, or in connection with," gambling supplies.

c) State Tax Credit

The next part of the process of Victorian gaming tax calculation under clause 22C.2 of the Management Agreement concerns Crown's GST liability on Crown's gambling supplies to which clauses 22 and 22A apply. That liability, referred to in clause 22C of

the Management Agreement (see schedule 7) as the State Tax Credit, reduces the amount of the Victorian casino tax.

Before turning to clause 22C, it is important to understand how GST is imposed on Crown. This can be seen most conveniently in the judgment of Gzell J in *TAB Ltd v Commissioner of Taxation* [2005] NSWSC and, specifically in the case of Crown, in the judgment of Davies J in *Crown Melbourne Limited v Commissioner of Taxation* [2020] FCA.

Gzell J said:

> "54. Section 126-1 of the GST Act provides that the global accounting system for GST on gambling is an alternative to the usual system. The provision is as follows:
>
> "Gambling is dealt with under the GST by using a global accounting system that provides for an alternative way of working out your net amounts by incorporating your net profits from taxable supplies involving gambling."
>
> 55. Consistent with the notion that the GST Act, Div 126 is an exclusive code, are the exclusions of key provisions in the ordinary way in which GST is calculated. Thus s 126-5(3) provides that that section has effect despite s 17-5 relating to net amounts. Section 126-20(1) and s 126-20(4) exclude the operation of Div 21 dealing with bad debts and s 126-20(2) and s 126-20(3) contain specific provisions with respect to bad debts of consideration for gambling supplies. Section 126-25 excludes the operation of Subdiv 9-C. It deals with the amount of GST payable on taxable supplies. Section 126-30 provides that gambling supplies do not give rise to creditable acquisitions despite s 11-5 that deals with creditable acquisitions. Section 126-32 provides that repayments of gambling losses do not constitute consideration despite s 9-15 that defines the concept of consideration. Section 126-33 provides that a tax invoice for a gambling supply is unnecessary, despite s 29-70 that deals with the requirement to issue a tax invoice." (our emphasis added)

How Davies J resolved the issue in the *Crown Melbourne case*, which concerned the GST treatment of volume commissions, win rebates and loss rebates, is of some significance to the present issues as I have discussed above.

As for the relevant GST regime, her Honour's judgment expands on Gzell J's summary set out above and provides:

"2. Division 126 of the GST Act contains special rules for the calculation of GST on "gambling supplies". These rules override the provisions of Ch 2 (except for s 29-25, which is not relevant in this case), which contain the basic rules, but only to the extent of any inconsistency: s 45-5 of the GST Act.

The basic rules in Chapter 2 of the GST Act

3. Subdivision 9-C of Ch 2 sets out how to calculate the amount of GST on taxable supplies for a particular tax period. The sum of all the GST for which an entity is liable on the taxable supplies attributable to a particular tax period is then taken into account, along with any input tax credits, in determining that entity's entitlement to receive a refund or its liability to pay an amount of GST in respect of that tax period: s 17-5 of the GST Act.

4. Section 7-1 of the GST Act is identified as a "central provision". It relevantly states that GST is payable "on *taxable supplies". Division 9 is headed "Taxable supplies". Until 25 February 2015, s 9-5 of the GST Act defined "taxable supply" to mean:

9-5 Taxable supplies

You make a taxable supply if:

(a) you make the supply for *consideration; and

(b) the supply is made in the course or furtherance of an *enterprise that you *carry on; and

(c) the supply is *connected with Australia; and

(d) you are *registered, or *required to be registered.

However, the supply is not a *taxable supply to the extent that it is *GST-free or *input taxed.

On 25 February 2015, the word "Australia" in sub-s (c) was replaced with "the indirect tax zone": Treasury Legislation Amendment (Repeal Day) Act 2015 (Cth), Sch 4, Pt 4, s 31.

5. "Consideration" for a supply or acquisition is relevantly defined to mean "any consideration, within the meaning given by sections 9-15 and 9-17, in connection with the supply or acquisition". Section 9-17 is not presently relevant. Section 9-15 relevantly provides:

9-15 Consideration

(1) Consideration includes:

(a) any payment, or any act or forbearance, in connection with a supply of anything; and

(b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.

(2) It does not matter whether the payment, act or forbearance was voluntary, or whether it was by the *recipient of the supply.

…

The special rules in Division 126 of the GST Act

6. Division 126 was introduced to reduce the administrative complexity that entities which make gambling supplies would have faced in applying the basic rules regarding accounting for GST. Paragraph 6.203 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 (Cth) explained:

However, determining individual bets or ticket sales (wagers) and prizes and then applying GST and input tax credits would be difficult. For example, a casino operator would have to

apply GST on every spin of the roulette wheel for every player for every square on the table. For this reason, the GST on gambling is applied to the margin of the person providing the gambling opportunity (for example, the casino operator). Applying the margin to gambling activities achieves the same result as applying GST to individual wagers and allowing input tax credits in relation to prizes paid out.

7. A "gambling supply" is defined in s 126-35(1)(b) relevantly to mean a taxable supply involving the acceptance of a bet (however described) relating to the outcome of a "gambling event". A "gambling event" is defined in s 126-35(2) to mean:

(a) the conducting of a lottery or raffle, or similar undertakings; or

(b) a race, game, or sporting event, or any other event, for which there is an outcome.

8. In the case of an entity that makes a "gambling supply", sub-s 126-5(1) prescribes a special rule for the calculation of its net amount as follows:

126-5 Global accounting system for gambling supplies

(1) If you are liable for the GST on a *gambling supply, your net amount for the tax period to which the GST on the supply is attributable is as follows:

Global GST amount + Other GST – Input tax credits

where:

global GST amount is your *global GST amount for the tax period.

input tax credits is the sum of all of the input tax credits to which you are entitled on the *creditable acquisitions and *creditable importations that are attributable to the tax period.

other GST is the sum of all of the GST for which you are liable on the *taxable supplies that are attributable to the tax period, other than *gambling supplies.

For the basic rules on what is attributable to a particular period, see Division 29.

(2) However, the *net amount worked out under subsection (1) for the tax period:

(a) may be increased or decreased if you have any *adjustments for the tax period; and

(b) may be increased or decreased under Subdivision 21-A of the *Wine Tax Act; and

(c) may be increased or decreased under Subdivision 13-A of the A New Tax System (Luxury Car Tax) Act 1999.

(3) This section has effect despite section 17-5 (which is about net amounts).

(Notes omitted)

Prior to 1 July 2012, sub-s 126-5(2) did not include the references in paras (b) and (c) to the A New Tax System (Wine Equalisation Tax) Act 1999 (Cth) and the A New Tax System (Luxury Car Tax) Act 1999 (Cth). These amendments do not impact on the interpretation of the statutory scheme for the purposes of the present case.

9. Section 126-10 (as it was in the income years in question) defined "global GST amounts" as follows:

126-10 Global GST amounts

(1) Your global GST amount for a tax period is as follows:

> [Total amount wagered –Total monetary prizes] x 1/11
>
> where:
>
> total amounts wagered is the sum of the *consideration for all of your *gambling supplies that are attributable to that tax period.
>
> total monetary prizes is the sum of:
>
> (a) the *monetary prizes you are liable to pay, during the tax period, on the outcome of gambling events (whether or not any of those gambling events, or the *gambling supplies to which the monetary prizes relate, take place during the period); and
>
> (b) any amounts of *money you are liable to pay, during the tax period, under agreements between you and *recipients of your gambling supplies, to repay to them a proportion of their losses relating to those supplies (whether or not the supplies take place during the tax period).
>
> For the basic rules on what is attributable to a particular period, see Division 29.
>
> (2) However, your global GST amount is zero for any tax period in which total monetary prizes exceeds total amounts wagered.
>
> (3) In working out the total monetary prizes for a tax period, disregard any *monetary prizes you are liable to pay, during the tax period, that relate to supplies that are *GST-free.
>
> (4) Your global GST amount for a tax period may be affected by sections 126-15 and 126-20.

10. The word "consideration" in the definition of "total amounts wagered" has the meaning given in ss 9-15 and 9-17.

11. The expression "monetary prize", as defined in s 195-1 in the income years in question, meant:

> (a) any prize, or part of a prize, in the form of *money; or
>
> (b) if the prize is given at a casino – any prize, or part of a prize, in the form of *money or in the form of gambling chips that may be redeemed for *money.

In relation to "monetary prizes", her Honour also adverted to GST Ruling 2002/3, which is binding against the Commissioner of Taxation and has relevance to the present issues. Her Honour said by way of *obiter*, in relation to an alternative argument that Crown had put (in the event that it was not successful in its main argument):

> 73. Finally, the applicants argued that the Commissioner's contention that a commission was not a monetary prize as defined in s 195-1 was contrary to his public ruling in GSTR 2002/3 at [189]–[192]. The Commissioner had submitted that a commission is not a monetary prize because it is calculated on the basis of participation, i.e. by reference to total turnover of a junket program, rather than to a win or loss on baccarat or roulette. The relevant paragraphs of the GSTR provide:

GST treatment of points awarded as prizes by providers of gambling supplies

189. A common practice in the gambling industry is for points to be awarded to players to encourage their further participation in gambling events or to facilitate the purchase of products or services sold in the club, hotel or casino.

190. These points have a monetary value. For example, 30 points may be worth $15. Points may be issued in the following circumstances:

- as a prize or part of the prize on a gambling event or a competition (for example, points are awarded for a win on a gaming machine or a player's success in a card game at a casino);
- on the basis of participation rather than for a win on a gaming machine or a card game at a casino (for example, points awarded on the basis of the number of games played, time or money spent playing on gaming machines, or the time spent at gaming tables); or
- on the purchase of meals, beverages and other non-gambling services supplied by the entity.

191. We consider that participation in a gambling event has its own outcome. Points awarded for participation, or on a result, are points awarded on the outcome of the gambling event.

192. When points are awarded for a winning bet, or for participation, and the points are redeemed for money (or redeemable gambling chips if paid by a casino), the money (or chips) is a monetary prize. This monetary prize is included in the total monetary prizes for the purposes of calculating the global GST amounts in section 126-10.

74. As the Commissioner correctly pointed out, these paragraphs concern an entirely different factual context, namely the awarding by a club, hotel or casino of points that have a specified value to individual players. There is nothing inconsistent between the Commissioner's submission in this case and GSTR 2002/3.

As can be seen, the Commissioner agrees that turnover points that can be redeemed for money fall within "monetary prizes".

There is perhaps one difference, not relevant here, between the Gross Gaming Revenue definition in clause 2 of the Management Agreement and the Global GST amount formula. The Commissioner of Taxation asserts that the GST formula deliberately excludes prizes of property, rather than money.

So in the luxury car example I set out earlier, the Commissioner asserts that whilst property is clearly within the concept of "consideration" as defined in Chapter 2 of the

GST Act, it is not a "monetary prize" within Chapter 4 of the GST Act, which overrides the Chapter 2 treatment if inconsistent with it. The policy reason, revealed upon consideration of the language of the GST Act as a whole, is that the casino, if it purchases the luxury car, will obtain a GST input tax credit under Division 11. So if that cost also forms part of the Global GST amount calculation (to reduce the Global GST amount), then the casino would be getting a double GST reduction in the calculation of its monthly net amount under s126-5.

Turning now to the State Tax Credit, clause 22C of the Management Agreement must be considered. It relevantly provides:

> 22C.1 The Intergovernmental Agreement requires the State to adjust its gambling tax arrangements to take account of the GST on gambling operations.
>
> 22C.2 The total amount of casino tax as described in and calculated under clauses 22 and 22A shall be reduced by the State Tax Credit calculated with respect to gambling supplies to which those clauses apply. The State Tax Credit will be allowed as a reduction in the total amount of casino tax payable under clauses 22 and 22A when calculated on the seventh day after the end of the relevant month.
>
> 22C.3 Where no casino tax is payable with respect to the relevant month due to Gaming Revenue being less than zero, the State Tax Credit will be calculated with respect to the following month to which the negative Gaming Revenue is carried forward and applied. When the Casino tax is less than the State Tax credit in any month, the State Tax Credit remaining after applying it to the casino tax in that month, shall be carried forward to the following month.

"State Tax Credit" is defined, incorporating the language of Division 126 of the GST Act, but depending on the subjective belief of Crown itself by way of its declaration as to the Global GST Amount, to mean:

> an amount equivalent to the amount determined under Division 126 of the GST Act, declared by the Company to the Commissioner as the Global GST Amount with respect to gambling supplies to which clauses 22 and clause 22A

That is, the taxable fact, the jurisdictional criterion of liability, is Crown's declaration of the Global GST Amount, not the amount itself as objectively determined.

d) Adjustments

Provision is then made by clause 22C.5 for subsequent adjustment by the Commissioner of Taxation in relation to Crown's actual GST liability, which since 2011 takes place by way of an actual GST assessment for the relevant month.

> 22C.5 The Company must provide to the State, within 48 hours of lodgement, a copy of its GST return as lodged under Division 31 of the GST Act, together with a statutory declaration as to the accuracy and authenticity of that document. The State Tax Credit will be varied in the following month by the amount of any difference between the amount allowed by the State as a State Tax Credit in a particular month when compared with the actual Global GST Amount declared by the Company to the Commissioner for that month for gambling supplies to which clauses 22 and 22A apply. **Any adjustment made by the Commissioner to the Global GST Amount subsequent to the declaration by the Company shall be reflected as a corresponding adjustment in the following monthly State Tax Credit and the Company must include details of such adjustments in the monthly Schedule Six Return**.

The Schedule 6 Return to be filled out by Crown, entitled "Components of Global GST", sets out in detail each component of the Global GST amount. Item (1) is:

> "Amounts wagered by [Commission Based Players] less monetary prizes paid to [Commission Based Players]"

Importantly, an assessment includes an amended assessment, for there is only ever one correct assessment for a particular period, even if that correct assessment must be revealed by litigation and the exercise of judicial power. So if the Commissioner makes in 2021 a reassessment of GST for the month of August 2011, then under clause 23C.5 the Management Agreement Crown's Victorian gaming tax liability must be recalculated for that month and the following month's casino tax recalculated. Likewise if that amended assessment is successfully challenged in Court, then a further amended assessment must be made to arrive, finally, at the correct outcome.

e) Conclusions on the Management Act

As can be seen, the amounts under clauses 22 and 22A, the State Tax Credit and the adjustment for the GST assessment (if any), are one part of a single calculation under clause 23C.2 of the casino tax actually payable by Crown each month. There is a single amount payable by Crown to Victoria that has taken the GST into account each month.

Accordingly, one cannot determine whether Crown has underpaid casino taxes without considering all the integers in clause 22C.2 and their interrelationship with each other. There is one *provisional* amount only payable by Crown to Victoria, for which adjustments are contemplated by reference to the Commissioner of Taxation's own subsequent GST assessment for that month under clause 22C.5. If authority is needed, it is readily found in the judgment of Lord Mansfield in *Green v Farmer* (1768) 4 Burr 2214, 2221; 98 ER 154 and the many authorities that have followed that case.

> Where the nature of the employment, transaction or dealings necessarily constitutes an account consisting of receipts and payments, debts and credits; it is certain that only the balance can be the debt and by the proper forms of proceedings in Courts of Law or Equity the balance only can be recovered.

As can be seen, Crown's Victorian casino tax liabilities commenced in 1994 with clause 22. Clause 22A was subsequently added to impose further Victorian tax and in 2000 clause 22C was added to alter fundamentally the calculation to take into account GST.

In my opinion, this contractual regime must be construed as a cohesive whole. In particular, whatever might have been the position before 2000, from 2000 Crown and Victoria are to be taken as contemplating that Crown's gambling activities each month give rise to a net profit that may be subject to the various Victorian casino taxes and to GST.

In this regard, sums that go into the calculation of Crown's real net profit from gaming, as a practical business question, ought not be artificially excluded unless the language of the relevant State or Commonwealth provision requires that conclusion. Conversely, amounts that are not part of Crown's real net profit should not be artificially included in that calculation.

5) Further Analysis of Categories

a) Categories involving Pokie Credits

These six categories are:

- Pokie Credit Rewards (Welcome Back / Free Credits / Seniors promotion)
- Mail Outs
- Pokie Credits (Matchplay)
- Random Riches (Carded Lucky Rewards)
- Jackpot Payments
- Pokie Credit Tickets

Crown has treated the Pokie Credits that it provides the patrons as part of its gambling turnover when bets are placed and included these amounts as "sums" received from its gambling activities within the Gross Gaming Revenue calculation.

These Pokie Credits are certainly not sums received from the patrons in fact or in law. The patrons have not paid money to Crown in any of the ways I have described.

When Crown, on the same notional basis, also treated these Pokie Credits as sums paid out to the patrons, it was also wrong. This is a clear case. One error has merely corrected the other. Crown's systems treatment produced the correct end result.

And neither credit nor debit needs to be examined further insofar as the definition of Gross Gaming Revenue in clause 22 of the Management Agreement is concerned.

The patrons were, at best, provided a perquisite, being the right to have a free bet on the pokies. In law the patrons were provided a conditional gift, which was to expire within a certain time and was to be taken by visiting the casino and playing the pokies commencing with real money credited and the special Pokie Credits, separately identified as non-cash redeemable.

If the patrons "lost" their bets using the Pokie Credits, they lost no sum of money and Crown received no sum of money. If, however, they won, *then*, and only then, would they have won a sum from Crown that properly would form part of Crown's Gross Gaming Revenue calculation.

I note for completeness that Crown, in providing free bets, was conferring rights upon the patrons that had a real value to them. They might immediately agree with another person to receive $95 on the basis that the person would receive the winnings from the $100 free bet. Conversely, the free bet promotions represented real contingent liabilities to Crown that could be valued in monetary terms. For example, bets on the pokies are supposed over time to result in a margin to Crown of, say, 15%. That is, Crown will pay out $85 for every $100 bet received. In giving away a free bet for $100 then, Crown will come under a contingent liability with a value of $85. It is prepared to do this, in the expectation that the patron will stay at the casino and bet more than the free bet. This valuable liability, however, cannot to be accounted for as part of Gross Gaming Revenue. Accounting for free bets must occur as and when bets are placed. If the patron loses the free bet, then Crown accounts for nothing. If the patron wins the

free bet, then the actual win is paid out and accounted for as part of Gross Gaming Revenue.

b) Consolation prizes category

Consolation prizes can also be dealt with quickly. Here Crown doubles the prizes payable to the patron over a short period of time. So what would be an actual $100 payout becomes an actual $200 payout. The $200 sum is clearly deductible in Crown's Gross Gaming Revenue calculation as the payment of a sum as winnings.

c) Bonus Rewards category

i) *Accommodation and car parking rewards*

Accommodation and car parking rewards are, in my view, mere perquisites provided to the patrons by Crown as winnings in respect of their gambling activities. They are not payments of sums, nor the provision of property whose monetary cost to Crown (itself a problematic issue) may be treated as a sum paid out within Gross Gaming Revenue.

In relation to a *Spargo's case* analysis, there is no evidence of any actual transaction between Crown and a patron where the latter has otherwise agreed to incur a monetary liability to Crown for accommodation or car parking. There is no option in the transaction to pay for accommodation or car parking. The patron presents the Bonus Reward voucher for "free" parking or accommodation, and that is all that is asked for and all that is provided.

Crown's accounting entries do not themselves create any such transaction, as I have discussed above. That Crown has for income tax or other purposes treated a notional

value as money received by it for services does not make it so. Crown's internal books will have utility to Crown in terms of management performance measures and other information. But they do not create legal receipts and payments of sums of money discernible to the two relevant Revenue authorities.

It follows, in my opinion, that Crown was incorrect to treat these amounts as sums paid out by it as winnings and deductible in its Gross Gaming Revenue calculation for the purposes of clause 23C.2 of the Management Agreement. On this basis, my instructors estimate that Crown underpaid $8,075,418, comprising Accommodation Rewards ($4,419,933) and Parking Rewards ($3,655,486) of primary casino tax before any correction to the reduction for the State Tax Credit is taken into account.

Crown's GST treatment must now be considered.

Crown did not treat its supplies of free accommodation and free parking as taxable supplies. It did not treat itself as having received any consideration for or in connection with those supplies.

However, Crown did include their notional value, the same amount as it claimed as a deductible in its Gross Gaming Revenue calculation, as part of total monetary prizes in the calculation of its Global Gambling amount in section 126-10 GST Act. This was incorrect for the same reasons.

Importantly, the definition of State Tax Credit for the purposes of clause 23C.2 of the Management Agreement operates upon Crown's own subjective declaration of the Global GST Amount, as verified by Crown at the time. That is the criterion of liability

or, treating the Management Agreement "as if it were enacted", the relevant subjective jurisdictional fact. So the State Tax Credit for the purposes of clause 23C.2 operates upon Crown's opinion of an objective fact, not the objective fact itself. That is what the parties agreed, and that agreement has the force of statute. It cannot be overridden because merely because it is wrong. As Isaacs J put it in *Moreau v FCT* (1926) 39 CLR 65:

> Unless the ground or material on which his belief is based is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason cannot be overridden

That is, the State Tax Credit for the purposes of clause 23C.2 is not adjusted merely because it is later asserted by either party that the amount declared by Crown as the Global GST Amount is wrong. Clause 23C.5 deals with that eventuality. If and when the Commissioner of Taxation assesses Crown on a different Global GST Amount, then a positive or negative adjustment will arise under clause 23C.

Assuming that the Commissioner of Taxation seeks to amend Crown's GST assessments to correct this error, does he have the power to do so? The power to amend is limited by time, here four years from the date of each relevant GST return in the (ten year) Period. (I note that the Commissioner will be obliged to amend Crown's GST assessments from 2011 onwards if his appeal against Davies J's decision is dismissed. This power is confined to giving effect to that decision. He cannot tack on other matters not the subject of that decision: see *Federal Commissioner of Taxation v Australia & New Zealand Savings Bank Ltd* [1994] HCA 58, at [31] –[33]; (1994) 181 CLR 466.)

Leaving the *Crown Melbourne case* aside, when the Commissioner amends Crown's assessments, it would be to increase the net amount by increasing the Global GST

amount for the past 48 or so months. Those amended assessments will trigger the operation of clause 22C.5 of the Management Agreement. In short, what Crown must give to the Commissioner in GST will reduce the amount of additional casino tax payable by Crown to Victoria. My instructors have estimated that amount to be $917,661.

ii) ***Dining Rewards***

The position with Dining Rewards when redeemed is one upon which reasonable minds may differ. Crown confers upon the patron what may be said immediately to be a perquisite, somewhat like free accommodation and free parking and so placed in the same arbitrary Category. But it is not a "free" meal.

The patron has a contingent right to receive a real monetary discount on an independent transaction for food and beverage with a genuine price that gives rise to a monetary debt owing to Crown when the food and beverage is supplied. The patron has a real not colourable option, and whether he or she in a particular case communicates his intention to discharge that food and beverage debt before it is incurred by handing over the relevant coupon does not affect an objective *Spargo's case* analysis.

It is plain that "for the application of these principles there must be cross-liabilities and agreement, express, tacit or implied" (per Dixon J, *Federal Commissioner of Taxation v Steeves Agnew & Co (Vic) Pty Ltd* [1951] HCA 26; (1951) 82 CLR 408).

The patron has provided valuable consideration, by EGM gaming, for Crown's promise to provide him or her Dining Rewards. It may be said that this is not a strictly

independent cross-liability in the sense of a debt owing by Crown to the patron. But it is a contractual liability that sounds in money. *Spargo's case* does not depend on both parties first having to demonstrate they each have the right to sue in a common law court for a debt, as the majority decision in *Williamson's case* makes clear. It is the existence of two independent transactions that would give rise to two separate and genuine liabilities that is important, coupled with the parties' agreement that one satisfy the other. Here there is a liability upon Crown that any debt for food and beverage must be treated by it as discharged in full, at the option of the patron, upon presentation of the Dining Reward card/voucher.

Is this enough? Were Crown to sue a patron for the balance of the bill on the basis that the Dining Rewards were a mere puff, it could certainly be successfully pleaded in defence that full payment of the food and beverage debt has been made by way of the tendering of part in money and part by the Rewards coupon. A limited recourse debt is in law repaid in full by transfer of the nominated asset, even though no payment is made. Conversely, the patron's right conferred by the Dining Rewards coupon to use it on other occasions is fully discharged.

I think it is enough, having regard also to the High Court's discussion of principles in *Saxton's case* (*Commissioner of Stamp Duties (NSW) v Perpetual Trustee Co Ltd* [1929] HCA 27; (1929) 43 CLR 247) and the majority's decision in *Williamson's case* referred to earlier.

In *Saxton's case* shareholders owed money to a company as subscription for their shares. The company then agreed to lend them funds. So the company owed loans moneys to the shareholders which, upon payment, would mean that the shareholders

owed a debt to the company. And the parties agreed that the company ought treat the loan funds as payment of the outstanding subscription moneys. They had attempted to convert a specialty debt into a personal debt. The High Court held that there was no mutual offsetting of independent obligations and therefore payments as discussed in *Spargo's case*. Knox CJ and Dixon J said:

> these principles are called into play … and only where there is a sum lawfully payable by the Company which when paid might lawfully be repaid to the Company in discharge of the liability upon the shares. The liability upon shares cannot be discharged unless the Company obtains in funds or assets that which is, or is supposed to be, a real equivalent to the capital represented by the shares. Thus, although an agreed extinguishment by set-off of the liability of the shareholder to the Company and of the Company's liability to him is undoubtedly payment, yet probably it is not competent to a Company to incur a voluntary liability for the purpose of enabling such a set-off to be had.

The relevant part of their Honours' conclusion, which is complicated a little by a company law prohibition on a company lending to a shareholder to finance the acquisition of its shares, is as follows:

> It never was intended that the Company should put any funds under the control of the supposed borrowers, nor even incur an obligation to do so. The Company after issuing its cheques remained entitled to recover back the very cheques or their proceeds. It was one inseverable transaction which could not, and was not intended to, increase the total assets of the Company. The Company was to obtain nothing.

Here, in contrast, the two transactions are legally and factually severed and independent of each other. There are real acquisitions of food and beverages for which Crown intended that it be paid in full. There are real gaming activities under terms and conditions that confer at large rights upon the patrons, if they have passed real money to Crown by gaming on the pokies, to require Crown to treat the price of their food and beverage purchases as paid in part.

This analysis obtains even in the case that the patron's Reward coupon or card is provided in advance at the Crown restaurant. One might consider that no debt in respect

of the amount shown on the coupon could arise. But it is well established that a cash payment in advance of goods or services being provided is to be applied provisionally in discharge of the debt that arises only once those goods and services are provided. Dixon CJ has made this point in several cases. One was *Copping v Commercial Flour & Oatmeal Milling Co Ltd* [1933] HCA 65; (1933) 49 CLR 332, where his Honour said:

> As Lord Campbell said, in *Timmins v Gibbins*, (1852) 18 QB 722 at p 726 -
>
> It is difficult to say that there can be any case in which the debt is not antecedent to the payment. Even where the money is paid over the counter at the time of the sale, there must be a moment of time during which the purchaser is indebted to the vendor.
>
> The payment is made in advance to be applied in discharge of an indebtedness eo instanti when it arises under the agreement. The legal character of the payment is that of money receivable in anticipation of an obligation, to be used in or towards its discharge when it is ascertained.

In this regard, I consider that the better view is that Crown was also correct to treat the whole food and beverages charge as income derived by it for income tax purposes.

There remains the question of whether Crown's payment to the patron by way of discharge of the patron's debt to it is the payment of a sum "as winnings" "in respect of" gaming within the Gross Gaming Revenue definition.

One may say by the word "as" that there is stated to be a subjective element as well as an objective element in this question. The subjective element is satisfied: it is a "Bonus Reward". And, as I discuss below, the objective element need only require a broad connection.

In my view that connection is established for the same reasons that the gaming turnover commission in Commission Based Players' Gaming Revenue is within the formula.

I note the use of the words “in respect of, rather than “for”, which also appears in the definition. So prima facie, different meanings are to be given. In *Berry v FCT* (1953) 89 CLR 653, at 659 Kitto J said:

> Now, while it is true that a payment cannot be described as a consideration "for" anything but that which is given in exchange for it, to speak of a consideration being "in connection with" an item of property parted with is to use language quite appropriate to the case of a payment received as consideration "for" something other than the property in question, so long as the receipt of the payment has a substantial relation, in a practical business sense, to that property. A consideration may be "in connection with" more things than that "for" which it is received.

In a not dissimilar context, the Victorian Supreme Court observed in *Gas and Fuel Corporation of Victoria v Comptroller of Stamps* [1964] VR 617:

> The installation charge of 107 pounds 10s. specified in the agreement itself is therein expressed to be an estimate based on the hirer's estimate of requirements, but it is therein provided that the total amount payable under the agreement is to be reduced or increased in the event of actual cost of installation being less or greater than such estimated charge. In fact there was no variation in the cost of the installation from the said amount of 107 pounds 10s.
>
> Sir James Tait, for the appellant, first contended that the installation cost referred to in the agreement was not included in "the total amount payable under the agreement by the purchaser on any account whatsoever in respect of the goods the subject matter of the agreement", and for that reason fell outside the definition of "purchase price" in the Stamps Act. He did not, and could not have successfully contended that this sum was not included in "the total amount payable under the agreement", but contended that it did not answer the description of money payable "in respect of the goods". His argument was that this money was payable in respect of services to be rendered by the corporation to enable its gas apparatus to be operated effectively. That is no doubt true, but that in itself would not necessarily preclude this charge also being one "in respect of the goods" in question. The words "in respect of", as Mann, CJ, said in Trustees Executors and Agency Co Ltd v Reilly, [1941] VicLawRp 22; [1941] VLR 110, at p. 111; [1941] VicLawRp 22; [1941] ALR 105, "have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer". And see Powers v Maher [1959] HCA 52; (1959) 103 CLR 478, at p. 485. The fact that the agreement makes it obligatory for the hirer to first pay the installation charge as a condition of acquiring title to the apparatus hired clearly evinces, in our opinion, as Little, J, held, a sufficient connexion between the sum in question and the goods, so as to require the sum to be treated as one payable in respect of the goods.

The promise to provide Dining Rewards was, objectively, part of the agreed gambling terms for the pokies. It was characterized by the parties “as winnings”. It was part of the suite of inducements offered by Crown to encourage actual EGM gambling by the patrons, of which only the main one was the chance to win money when the numbers came up on the pokies. It may be objectively considered that the inducement becomes

stronger as turnover increases and the prospect of obtaining sufficient points to obtain a Dining Reward nears. Indeed, it may be the final bet on the pokie that triggers the win, in that that bet triggers enough points to qualify. In this regard, the actual knowledge of any individual patron, including his or her particular desire to accumulate qualifying points, must be considered irrelevant to the analysis.

In conclusion, I consider that it is necessary for Crown to identify and separate out in Category 8 its Dining Reward *payment*s from the accommodation and car parking *perquisites*. Only the former should be included as a deduction in the Gross Gaming Revenue formula.

There remains the question of the State Tax Credit for each tax period in the Period for the purposes of clause 23C.2, and its adjustment under clause 23C.5, of the Management Agreement.

As set out earlier, Crown's GST treatment in the example of a meal for which the full charge was $150 but a $50 Dining Reward was applied such that the actual cash which changed hands was $100 was as follows:

- Crown has supplied food services and recognized that it has received consideration of only $100 for those taxable supplies under Division 9 of Chapter 2 of the GST Act, rather than consideration of $150.

- Crown claimed $50 as a monetary prize in reduction of its Global GST amount for its gambling supplies under Division 126 of the GST Act.

So Crown's GST net amount under s126-5 GST Act was $50, not $100.

On the view I have taken, it is the case for GST purposes that Crown ought to have treated the Dining Reward amount as consideration received for its taxable supplies of food and beverage services under Division 9 of Chapter 2 (i.e. the whole $150) AND as a $50 deduction in the calculation of its Global GST amount under Division 126.

For GST assessment purposes, this treatment produces a GST net amount of $100 under s126-5 GST Act. It underpaid GST in the Period.

However, Crown's declaration of the Global GST amount for the purposes of clause 23C.2 of the Management Agreement was correct.

With compliments

[redacted]

M L Robertson QC

19 June 2021

RE: VICTORIAN CASINO TAXES

EX PARTE: CROWN RESORTS LIMITED

Opinion

Attn: Mr Mark Tafft, partner
EY

Ground Floor, Wentworth Chambers
180 Phillip St
Sydney NSW 2000
Telephone: 02 9230 3216
Fax: 02 3232 8435
Mobile: 0411 426746

Level 27 Chambers
Hitachi Building
239 George St
Brisbane QLD 4000
Telephone: 07 3236 5556
Email: Robertson@qldbar.asn.au