TC01558

Appeal number: LON/2008/2414

VAT – exemption for providing facilities for the placing of bets – item 1 Group 4 Schedule 9 VATA 1994 – whether extending to betting syndicate's agent which negotiated odds – No – whether breach of fiscal neutrality - No

FIRST-TIER TRIBUNAL

TAX

RATING REPORT LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)
HELEN MYERSCOUGH (MEMBER)

Sitting in public at 45 Bedford Square, London WC1 on 27 and 28 June 2011

Mr Paul Lamford a Director of RRL Company for RRL

Mr Mark Sheldon of Counsel for the Respondents

DECISION

Introduction

1. The Appellant, Rating Report Limited (RRL), appeals against an assessment of Value Added Tax (VAT) in the sum of £38,582 raised in respect of the VAT period 05/05 to 11/07.

2. The assessment, raised on 28 April 2008 followed a Decision by HMRC that the supplies made by RRL during the material period did not qualify for exemption from VAT under Item 1, Group 4, Schedule 9 of the VAT Act 1994. In particular, it was decided that RRL's activities could not properly be described as "the provision of facilities for the placing of bets..." for the purposes of the exemption.

Applicable law

3. Section 5 of the VAT Act 1994 defines the making of a 'supply' for the purposes of the Act. Section 5(2)(b) states: *"anything which is not a supply of goods but is done for a consideration .. is a supply of services."*

4. Section 31 of the VAT Act 1994 provides that a supply of services will be an exempt supply if it is of a description specified in Schedule 9 of the Act.

5. Item 1 of Group 4 of Schedule 9 of the Act defines the following activity as an exempt supply of services : *"The provision of any facilities for the placing of bets or for the playing of any games of chance for a prize."*

6. Item 1 of Group 4 of Schedule 9 ('Item 1') transposes into domestic law Article 13B(f) of the Sixth Directive (now Article 135(1)(i) of European Directive 2006/112) which provides that the following activities should be exempt from VAT : *"Betting, lotteries and other forms of gambling subject to conditions and limitations laid down by each member state."*

The factual background

7. RRL commenced operations on 2 December 2002 as a software development company having been formed to develop a data-base and betting models for a variety of popular sports including football, golf and tennis. The purpose of its work was firstly to enable the company to place bets on behalf of individuals and secondly to offer its services to the betting industry once it had been able to create an extensive data-base and reliable betting models.

8. RRL placed bets on sporting events on behalf of members of its sports investment fund (SIF). Individuals who contributed to the SIF were collectively known as the syndicate and consisted of shareholders and their nominees. The company had a separate bank account in which shareholder funds were invested for the sole purpose of betting on events. Shareholders were invited to invest by purchasing 'units' in the betting fund to a pre-determined maximum. Money in the fund was aggregated and bets placed on sporting events at the discretion of the company. The administration of the fund by RRL consisted of the placing of those bets and the collection of winnings

on behalf of the syndicate. Membership of the betting syndicate was a distinct and separate role to that of being a shareholder as not all contributors to the syndicate were shareholders, nor were all shareholders necessarily involved in the syndicate. The two sets of people were therefore not synonymous and HMRC therefore say that the supply of the company's services to the syndicate (although not an argument advanced by RRL) was not a non-business relationship for VAT purposes.

9. RRL's income was derived from two sources during the period in question. First it would retain a percentage of the winnings derived from successful bets made on behalf of the syndicate. The percentage retained by the company varied during the period in question. The balance held in the SIF (assuming the betting activities were successful and overall winnings exceeded the value of bets placed) was distributed back to shareholders proportionate to the number of units purchased in the betting fund.. The percentage of winnings retained by RRL appeared to reflect the degree of success or otherwise of its betting activities. The second source of RRL's income was an annual fee equivalent to 2% of the SIF.

10. Invoices were issued by RRL to the syndicate in respect of the services it provided. The invoices were described as being in respect of 'fees' charged by the company to the syndicate and in its annual accounts this income was described as 'sales'.

11. Following consideration of the nature of RRL's business, HMRC concluded that at no stage during the material period did the arrangement between RRL and the syndicate involve any liability for the payment of winning bets on the part of RRL In the event of the insolvency of RRL, syndicate funds would be returnable to its members. HMRC say that it is apparent that the administration and calculation of VAT on supplies made by RRL to the syndicate would have been entirely straightforward, involving no more than the application of VAT to each invoice for fees. The supply of the company's services to the betting syndicate were therefore regarded by HMRC as one of an administrative nature and not of betting itself, and therefore was taxable at the standard rate rather than being an exempt activity. HMRC accordingly raised an assessment on the basis that RRL were providing standard rate administrative services to the syndicate. The assessment was calculated on the basis of spreadsheet information provided by RRL showing its income from 'syndicate fees' during the assessment period.

12. RRL disputes the decision by HMRC to raise an assessment, primarily on three grounds. Firstly it is contended that not only did it provide betting facilities, it also took an active part in the betting process. It is argued that RRL's activities involve '*…the provision of facilities for the plac*ing of *bets..'* pursuant to Item 1 and plainly fall within the wording of the exemption. RRL argues that, contrary to HMRC's submissions, there was no direct transactional link between the consideration paid to the company and the provision of services which it offered and that its activities were therefore not merely administrative in nature. Secondly it is contended that the bearing of risk is not a requirement of the exemption nor a criteria on which to base a decision as to the nature of the supply. Thirdly it is argued that RRL's activities are in essence the same or similar to those provided by a bookmaker or a betting exchange,

the services of which are regarded by HMRC as VAT exempt. It contended that HMRC has acted contrary to its own internal guidelines and that HMRC has therefore been inconsistent in it VAT treatment of similar trading entities with the result that there has been a breach of the principle of fiscal neutrality.

Nature and scope of the VAT exemption under Schedule 9 Group 4 Item 1

13. HMRC say that the exemption in Item 1 must be interpreted strictly and referred the Tribunal to the case of *United Utilities v HMRC* [ECJ.89105 [2006] STC 1423] where the ECJ considered the nature and scope of the exemption. In that case Vertex Data Services Limited (part of the United Utilities Group) provided a call centre to take bets from customers of Littlewoods. Vertex merely received telephone calls and recorded the bets in accordance with conditions stipulated by Littlewoods. Vertex's charges were based on the number of call minutes and calls received. United Utilities argued that article 13B(f) of the Sixth Directive is intended to exempt the activity of providing the framework within which gambling can take place. The Court disagreed with this argument and said that the provision of a call centre to a telephone bookmaking organiser did not constitute the provision of facilities for betting transactions within the meaning of article 13B(f) and therefore could not qualify for the exemption from VAT.

14. HMRC say that the exemption in Item 1 is in place, not as with many exemptions to confer a desirable social benefit, but to reflect the fact that the administration of VAT can be difficult as a matter of practice in the context of the provision of gambling services. It is submitted that *United Utilities* made it clear that the critical question is whether the provider of services assumes the risk of paying winnings in consideration of taking bets. In the absence of risk on the part of the provider the service cannot be properly characterised as 'the provision of facilities for the placing of bets' for the purposes of the exemption. HMRC says that even on RRL's own case there is no question that it ever assumed the risk of paying out winnings on successful bets, and therefore it follows that its activities must fall outside the scope of the exemption.

15. It is submitted by HMRC that *United Utilities* established three propositions of a general principle which are material to this appeal :

(i) the scope of the exemption conferred in respect of betting/gambling should be strictly interpreted : "*The terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exemptions to the general principle that VAT is to be levied on all services provided for consideration by a taxable person ..*" (paragraph 21)

(ii) the scope of the exemption should be determined by reference to the purpose for which the exemption has been conferred : "*The interpretation of the terms used in that provision must be consistent with the objectives pursued by those exemptions .. it should be noted that the exemption from which betting, lotteries and other forms of gambling benefit is based on practical considerations, gambling transactions not lending themselves easily to the application of VAT.*" (paragraphs 21-22)

(iii) the key determining factor in assessing whether a transaction falls within the scope of an exemption is whether the supplier of the service assumes the risk of paying out on a winning bet. The betting activity described in Article 13B(f) of the Sixth Directive is "*characterised by the offer to customers placing bets of a chance of winning in consideration for accepting the risk of having to pay for winnings.*"

16. It is contended by HMRC that the application of *United Utilities* principles to the facts of the case shows that the supply of services made by RRL to the syndicate during the period in question did not fall within the nature or scope of the exemption.

17. HMRC further argue that RRL is seeking to take advantage of the fact that its services happened to have been offered in the context of gambling in order to benefit from an exemption to the general rule that taxable persons who provide services should account for VAT. HMRC reason that if RRL was seeking to provide, for example, an investment management service which offered similar prospects of gain or loss (but not at the direct expense of RRL) there would be no question of exemption.

18. It is contended by HMRC that adopting the first general proposition established by the ECJ in *United Utilities* the scope of exemption should be interpreted strictly, and that on any reasonable interpretation the service provided by RRL did not amount to '*the provision of facilities for the placing of bets*'. It is argued that, insofar as there may be doubt or ambiguity as to the extent to which the exemption applies, that doubt or ambiguity should be resolved in favour of RRL having to account for VAT in the same manner as any other taxable person.

19. HMRC further submit that the second proposition in *United Utilities* recognised that the application of VAT to certain types of betting transactions might raise practical difficulties, particularly to those contexts where the supplier of the service is at risk of payout out on winning bets. In this case it is argued that there would be no difficulty whatsoever in applying VAT to the fee invoices submitted by RRL to the syndicate and the fact that the amount of each invoice might fluctuate depending upon the winnings achieved from successful bets in the period in question did nothing to alter the position. It would have been entirely straightforward for RRL to calculate the sum due in the period concerned and apply VAT to that figure.

20. Finally HMRC argue that, irrespective of any potential uncertainty as to whether RRL's activities fall within the exemption by reference to the first two propositions established by *United Utilities*, adopting the third proposition and taking RRL's own account of the nature of its business at face value, the company had not offered betting services of a type contemplated by article 13B(f) of the Sixth Directive, as transposed into domestic law by Item 1. RRL did not offer customers the chance of winning in consideration for the risk of it paying out on winning bets. RRL assumed no risk in respect of the payment of winning bets whatsoever.

<u>RRL's response</u>

21. It is argued on behalf of RRL that the company provided facilities which allowed the syndicate to place bets and that its activities fell squarely within the wording of the exemption. It refutes the argument that it was merely providing administrative services. It is submitted that RRL was paid a share of profits if, and only if, such profits were earned from the betting activities which depended upon profitability which varied between 10% at the start of operations and 30% at the end of the period of the VAT assessment. No payment was made by the syndicate to RRL for bets which lost, which it is argued show that payments were not related to the provision of administrative services. The 2% charge on the SIF value was purely to cover running costs and not dependent upon the success of bets placed.

22. RRL contends that, in the *United Utilities* case, the value and success or otherwise of each bet had no bearing whatsoever on Vertex's charges whereas in contrast the fees charged by RRL, were critically dependent on these factors. It is therefore submitted that RRL's services were entirely different from those provided by Vertex and that consequently the decision by the ECJ in *United Utilities* is not relevant to this case.

23. In addressing HMRC's submissions and the propositions laid down in *United Utilities* RRL argues that its activities, and the service provided to the syndicate has similarities with the services provided by UK betting exchanges, who charge fees based on a percentage of customer winnings and which are regarded by HMRC as exempt from VAT.

24. RRL referred the Tribunal to HMRC's VAT guidance V1-7, chapter 19, section 2.1 which states :

'… The source of revenue for most exchanges is a commission charged on customer winnings. The charge usually varies between 2% and 5% with lower fees for larger and more frequent customers. For VAT purposes we regard this commission as consideration for an exempt supply of the provisions of facilities for the placing of bets under VAT A 1994 schedule 9, group 4, item 1 …'

25. RRL also refers to internal guidance of HMC&E Policy Group [October 2004] (obtained by RRL under the Freedom of Information Act 2000) which contains the following statements of practice :

> *'(i) traditionally we have regarded betting exchanges as exempt on the grounds that they were clearly providing facilities for the placing of bets*
>
> *(ii) if an agent actually takes some risks on behalf of the principal (i.e. negotiate orders or shares the financial risk of the bet, then the exemption would still apply*
>
> *(iii) accepting money is currently our key criterion for exempting betting agents*
>
> *(iv) although our guidance does not explicitly say so only.. the services of agents to accept money on behalf of bookmakers qualify for exemption. This*

would apply even if the agents have no discretion of their own as to whether to accept bets'

26. RRL says that each of the statements has relevance to the services it provides, arguing that it:

(i) provided facilities for the placing of bets

(ii) negotiated odds through bookmakers and betting exchanges, sharing the financial risk of each bet in that it received no payment for a particular bet if that date was unsuccessful

(iii) accepted money for the placement of bets

(iv) had complete discretion as to which bets were placed

RRL argues that the principle of fiscal neutrality dictates that it should receive the same tax treatment as betting exchanges and other business which undertake similar transactions. Where it places bets with, say, Betfair, in every case there is a 'back' or a 'lay' bet where RRL requests specified odds before deciding on whether to place the betting stake. It says that with all bets RRL is accepting a bet from another customer of Betfair. The lay bets are on offer to accept a bet at specified odds and RRL therefore has input into the odds. It submits that consequently its activities must be seen as the undertaking of VAT exempt betting transactions for which it has provided facilities and received consideration from its customers.

27. RRL argues s that it is providing a similar facility to that provided by Betfair and similar organisations and that if HMRC's analysis of RRL's activities is correct then Betfair's activities should also not benefit from the exemption as they are merely matching up bets as between two of their customers for which they receive a commission. Advancing this argument further, RRL says that diary notes of statements made by an officer of HMRC during discussions prior to the raising of the assessment indicated that the officer dealing with the matter disagreed with HMRC policy and that Betfair's services should in fact be taxable. This appears to be confirmed in internal guidance [January 2005] (again, information obtained under the Freedom of Information Act 2000) which proffers the view that :

'.. betting exchanges services should be taxable. But in view of our past treatment of these and the Treasury's view … HMRC should continue the same policy

Background to the reasons for the VAT tax treatment of the gambling industry

28. The rationale behind the introduction of the EU exemption for betting and gaming was discussed by Advocate General Jacobs in *HJ Glawe Spiel v Finanzamt Hamburg – Barmbeck – Uhlenhorst [1994] STC 543* who said :

'the underlying problem is that gaming transactions are ill suited to value added taxation. This was recognised by the Commission in its proposal for the Sixth Directive

which provided for the qualified exemption of gaming and lotteries …the exemption of gaming and lotteries is based on purely practical considerations. ..'

Advocate General Jacobs further discussed the problems inherent in betting gambling activities :

20.'Whilst gambling for money entails expenditure by a gambler, it does not in its simplest form give rise to consumption of goods or services. Suppose for example that A enters into a private bet with B, both placing their respective bets on the table. A wins the bet and collects the money on the table. In such a case it would be absurd to suggest that A and B provide services to each other for consideration equal to the amount of their respective bets. The placing of the bets and the collection of the winnings is simply part of the gambling transaction. The placing of bets, although it involves the outlay of money does not constitute the consumption of goods and services which is the taxable event under the VAT system.

21.Commercial gambling is different insofar as the person organising the gambling arranges matters in such a way that on average his winnings are sufficient to meet his costs in organising the gambling and to provide him with a reasonable profit. To that extent the person organising the gambling may perhaps be regarded as not only taking part in the gambling himself but also providing a service to the other gamblers consisting in organising the gambling. The service provided by the organiser consists in providing the framework within which such activity can take place, his reward for that service being the surplus of winnings that he arranges for himself together with any specific omission which he may charge.

22.There may be some theoretical difficulty viewing for example a bookmaker's net winnings as the consideration of the services. Whilst it seems possible to regard him as providing a service the 'price' which he receives for that service varies and depends partly on chance and partly on his skill in settling the odds … That difficulty explains why betting and gaming are ill suited to taxation on a value added basis and lend themselves better to specific taxes..'

Conclusion

29. RRL does not claim to be a bookmaker but nonetheless says that it is providing facilities for the placing of bets. It was however the agent of the syndicate, not an agent of the bookmaker or betting exchange which took the risk of the bets. This distinguishes RRL's activities from those of a bookmaker, betting agent or similar organisation which actively offers betting facilities in the ordinary accepted meaning of the expression.

30. RRL assumed no risk. The company had no direct risk in respect of the individual bets which were placed from a separate syndicated fund. That liability remained with the bookmaker with whom RRL placed the betting question on the part of the syndicate. Although RRL's margins were based on the profitability and performance of its betting fund this did not amount to direct exposure to the risk of the bet itself. Indeed RRL's business model was designed to ensure that its costs were covered regardless of how well or poorly the SIF performed. There was no gain by RRL at the expense of the syndicate for bets which lost, nor any loss by RRL to the advantage of

the syndicate for bets which were won. RRL simply administered the betting fund, placing bets and collecting any winnings on behalf of the syndicate.

31. RRL argues that it is not necessary to assume risk in order to fall within the exemption. However the case of *United Utilities* clearly shows that argument to be incorrect. It is clear from Advocate General Jacobs' rationalisation referred to in paragraph 29 above that the reason gambling is exempt from VAT is that it is often impossible to identify what is the consideration for the supply by the person providing the framework for the gambling. Bookmakers, betting exchanges, and to varying degrees betting agents, clearly fall within that framework. The provision of betting facilities has to be characterised by the assumption of risk. A service of a administrative or mechanical nature such as that provided by RRL, not involving the risk of loss clearly does not amount to the provision of betting facilities.

32. RRL's argument that there is no need to assume risk, would appear to be a tacit acknowledgement that its activities were not in fact similar to those of a conventional bookmaker. RRL says that its activities are similar to those of organisations such as Betfair, which services include the matching up of bets between customers out of which they make a profit and that, on the principle of fiscal neutrality. there is no reason why the VAT treatment of its activities should be any different. However, Betfair and similar organisations do not refer customer's bets to a third-party but actually provide the betting facilities. Although RRL decide what to bet on, Betfair and similar organisations allow individuals to offer to lay odds with them, not a third party. They provide the entire framework for customers to place bets. To that extent, therefore, the 'similarity test' referred to in *The Commissioners for HMRC v Rank Group*, [2009] EWCH (Ch) 1244. is not satisfied. RRL's supplies and the consideration for the supplies were entirely different to those of a bookmaker or a betting exchange, both of which to varying degrees accept money, negotiate odds and assume an element of risk.

33. As HMRC submit, in attempting to distinguish the *United Utilities'* analysis, RRL has focused on differences in the factual background to the two cases and ignored the general principles set out by the ECJ. *United Utilities* did not turn on the fact that RRL in that case provided only telephone services or levied charges pursuant to a formula, whether based on the number of minutes spent on calls or otherwise; it turned on the ECJ's general propositions of law referred to in paragraph 15 above.

34. The information obtained by RRL pursuant to freedom of information requests referred to in paragraphs 25 and 27 above, which may indicate HMRC's internal guidance on the interpretation of VAT legislation, is not relevant to the issue. The law relating to exemption from VAT is made by legislation interpreted as far as necessary by the Courts. In any event there is nothing in the material disclosed which may indicate that HMRC's interpretation of the law as it applies to the services provided by RRL is inconsistent with its decision not to treat those services as VAT exempt. Further, providing the similarity test is not satisfied, it is not the function of the Tribunal to assess whether or not HMRC have been consistent in their treatment of this issue in respect of other traders. The Tribunal does not have jurisdiction under s 83 VATA to consider or decide whether HMRC's treatment of another trader for

VAT purposes is unfair or otherwise - *National Westminster Bank v HMRC* [2003] STC 1072. On the evidence the 'similarity' test has not been satisfied. A case of unfair treatment has not been made out. It has not been shown that there has been differing treatment of similar supplies in competition with one another.

35. For the above reasons the Tribunal concludes that RRL's activities during the material period cannot properly be described as 'the provision of any facilities for the placing of bets' for the purposes of the exemption in Item 1 of Group 4 Schedule 9 VATA 1994

36. The appeal is accordingly dismissed.

37. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MICHAEL S CONNELL

TRIBUNAL JUDGE
RELEASE DATE: 9 November 2011