TC04138

Appeal number: TC/2013/01013

BINGO DUTY - ***electronic hand held devices - Bingo receipts - whether rental is for entitlement to participate - sections 19 and 20 Betting, Gaming and Duties Act 1981 – appeal dismissed.***

FIRST-TIER TRIBUNAL
TAX CHAMBER

CARLTON CLUBS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
MS HELEN M DUNN, LLB

Sitting in public at George House, 126 George Street, Edinburgh on Tuesday 17 June 2014

Having heard Andrew Hitchmough, QC instructed by Ernst & Young LLP for the Appellant and Sean Smith, QC instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. This is an appeal against HMRC's decision dated 9 January 2013 that the appellant is liable to bingo duty on charges made for the hire of certain electronic hand held devices ("EHDs") popularly called "Bingo Bees" in the period August 2009 to September 2012. The total amount of duty at stake is £129,215.

The issues

2. The parties were agreed that it was a very limited point that was in issue.

3. The appellant's stance is that the issue in the appeal is whether the charges constitute "payments … in respect of entitlement to participate in bingo" within the meaning of Section 19(1) of the Betting and Gaming Duties Act 1981 ("BGDA"). The appellant contends that they do not; they are simply a payment to use the EHDs. Accordingly, the charge is a taxable supply for VAT purposes at the standard rate and not subject to Bingo Duty.

4. HMRC agree that that is an issue but also argue that there is a second issue as to whether or not, having regard to the substance or the reality of the transaction in question, it is appropriate to regard the charge for EHDs as anything other than a payment in respect of an entitlement or opportunity to participate in bingo and specifically as akin to an admission fee.

Facts

5. We heard no evidence, however, we had the benefit of extensive documentation and the witness statement of Mr Watret, the operations director of the appellant.

6. The facts are not in dispute. The material core facts are: -

(a) The appellant operates 13 bingo clubs at various locations in the United Kingdom and a broadly similar procedure applies throughout those clubs in relation to EHDs. The appellant supplies EHDs to customers who intend to play bingo and who choose to use an electronic terminal.

(b) With the exception of free admission sessions customers are charged a £1 admission fee and do not have to buy bingo tickets. The cost of the bingo tickets is precisely the same for both paper and electronic games. The customer is charged a £1 (day time) or £1.50 (evening) hire fee for the use of the EHDs. The rental charge is shown separately on the ticket receipt, and in the marketing materials.

(c) The tickets are loaded on to the EHD and the player then marks off the numbers by touching the EHD screen. Each time a customer touches the screen the EHD marks off the number and then displays the best placed ticket at the top of the screen, letting the customer know which numbers they are waiting for in order to win.

(d) Customers who do not wish to use EHDs, and they are in the majority, play bingo using paper bingo tickets marking off numbers with a "dabber" or a pen.

(e) Both paper ticket players and EHD players participate in the same game of bingo and both have to shout out "Bingo" when they have a winning combination. The EHD or paper ticket is then checked.

(f) The EHDs can be used to play main stage bingo or mechanised cash bingo both of which are liable to Bingo Duty.

(g) EHDs can also be used to play category D games (not liable to Bingo Duty) and that is available at two locations only. Assessments have been made by HMRC apportioning 61.5% of the EHD rental charges at those two locations to reflect the use of the EHDs for bingo games.

(h) The appellant has accounted for VAT on the hire of the EHDs.

(i) The appellant itself rents the EHDs from a third party and the rental charge to the bingo players is intended to cover the appellant's own rental costs plus the associated utility costs, repairs and cost of damage.

The Legislation

7. The relevant legislation is to be found in Sections 17, 19 (as amended by section 113(5)(a) of the Finance Act 2009) and 20C(5) (which refers to sections 17 to 20C and Schedule 5) of BGDA and those sections read as follows: -

"**17 Bingo Duty**

(1) A duty of excise, to be known as bingo duty, shall be charged—

(a) on the playing of bingo in the United Kingdom, and

(b) at the rate of 20[1] per cent of a person's bingo promotion profits for an accounting period.

…

(3) The amount of a person's bingo promotion profits for an accounting period is—

(a) the amount of the person's bingo receipts for the period (calculated in accordance with section 19), minus

(b) the amount of his expenditure on bingo winnings for the period (calculated in accordance with section 20)…

19 Bingo receipts

(1) A person has bingo receipts for an accounting period if payments fall due in the period in respect of entitlement to participate in bingo promoted by him.

(2) The amount of the person's bingo receipts for the accounting period is the

[1] Prior to 29 March 2010 the rate was 15%

aggregate of those payments.

(3) For the purposes of subsections (1) and (2)—

(a) an amount in respect of entitlement to participate in a game of bingo is to be treated as falling due in the accounting period in which the game is played.

(b) …

(c) it is immaterial whether an amount falls due to be paid to the promoter or to another person,

(d) it is immaterial whether an amount is described as a fee for participation, as a stake, or partly as one and partly as the other, and

(e) where a sum is paid partly in respect of entitlement to participate in a game of bingo and partly in respect of another matter—

(i) such part of the sum as is applied to, or properly attributable to, entitlement to participate in the game shall be treated as an amount falling due in respect of entitlement to participate in the game, and

(ii) the remainder shall be disregarded."

20C Supplementary

(5) In those provisions a reference to entitlement to participate in a game of bingo includes a reference to an opportunity to participate in a game of bingo in respect of which a charge is made (whether by way of a fee for participation, a stake, or both)."

Statutory Interpretation

6. The appellant argues for a restricted interpretation of these provisions, namely that the payment must be for the *entitlement* to participate, rather than a payment in connection with playing bingo. If it is not, which is their argument in this appeal, then the payment cannot be subject to Bingo duty.

7. HMRC argue that it is necessary to give full effect to the width of the statutory language: -

(i) The payment need not be for the *entitlement* to participate, but only *in respect of* the entitlement to participate; and

(ii) entitlement to participate includes the opportunity to participate.

Case law

8. We were referred to two primary cases, namely:-

Cosmo Leisure Ltd v HMRC [2012] UKFTT 733 (TC) (*Cosmo),*

Thomas Estates Ltd t/a Beacon Bingo v HMRC [2013] UKFTT 662 (TC) (*Thomas)*

Two further cases were referred to in passing, namely:-

Vaughan-Neil v IRC 1979 STC 644, (*Vaughan*),

Pepper v Hart [1993] AC 593

The remaining cases, which were produced to us but not referred to, are listed at Appendix 1.

The Arguments

The appellant's arguments

9. The appellant argues that the charges paid by customers who use an EHD are not paid "in respect of entitlement to participate in bingo". Simply put the customer who chooses to hire an EHD is paying for the option to play electronically as opposed to playing on paper.

10. The appellant's stance is that the rental fees are essentially analogous to the sums that might be paid (say) to purchase a bingo "dabber". They affect the manner in which players participate in bingo but not the actual participation itself. The rental charge represents a distinct and separate supply (taxable for VAT purposes) for the rental of a tangible asset used by a customer to play bingo. It is not a stake or participation fee.

11. They do not dispute that the rental is in connection with playing bingo but that is not the statutory test. Admission fees are also incurred in connection with playing bingo but are not, in general, subject to duty. The hire of the EHD confers no greater entitlement to play bingo than the payment of the admission fee or the purchase of a dabber. The hire is entirely optional. The majority of players do not use an EHD.

12. It is the purchase of the bingo tickets that confers the entitlement to play bingo. The cost of the tickets is exactly the same whether bingo is played on paper or on an EHD.

13. The appellant supported and adopted the analysis and conclusions of the Tribunal in *Cosmo* and argued that in that case, the Tribunal decided that only payments that were just for playing bingo were caught by BGDA. Accordingly, although payment for admission to a bingo club might be argued to give the customer an opportunity to play bingo a charge to duty did not arise. The legislation implied a causal connection between the payment and the playing of bingo. That Tribunal also sought to derive support for this interpretation from a review of the Government consultation, in 2002-2003, on the abolition of bingo duty paid by bingo players, and its replacement by a tax on bingo profits.

14. The appellant distinguished *Thomas* on the basis that although the Tribunal in that case held that "the words '*in respect of*' should be given their plain and unvarnished meaning, so as to require relationship between the payment and the

entitlement or opportunity to participate in bingo". The appellant argued that that was not helpful in that it did not define the type of relationship required.

15. Lastly, the appellant argued that HMRC ignore the limitations set out in Sections 19(3)(d) and 20C(5) and that the issue was a short question of statutory interpretation. In that context, it was argued that, in the appellant's view, there was not such ambiguity in the legislation such that recourse was required to extra statutory materials. The appellant did however request the Tribunal to consider that aspect if the Tribunal did not accept the arguments on interpretation.

HMRC's arguments

16. HMRC say that the payments made by bingo players for the use of EHDs are payments in respect of an entitlement or opportunity to participate in the game of bingo. Indeed, their use gives the play the opportunity to pay for and play more bingo than players using paper tickets. They are therefore bingo receipts within the meaning of the legislation.

17. HMRC argue that Cosmo was wrongly decided but even if the test adopted in Cosmo – "What were the payments for?" - is adopted the answer would be that they are for the entitlement or opportunity to participate in games of bingo. It is artificial to say that the payments are akin to payment for admission fees or pens and dabbers.

18. HMRC supported and adopted the analysis and conclusions of the Tribunal in *Thomas.* In particular it was argued that Thomas was authority for the proposition that section 19 BGDA, with the extended meaning provided by section 20C(5), must be read as a whole. The words, "*in respect of*", should be given their plain, unvarnished meaning, so as to require a relationship between the payment and the entitlement or opportunity to participate in bingo (see para 14 above). That opportunity did not have to arise because of the payment; it may arise independently.

19. Although, HMRC had advanced an argument on statutory interpretation, HMRC argued that although the legislation may not have been "entirely happily drafted" there was not sufficient ambiguity to meet the test in *Pepper v Hart*. Such ambiguity as there is relates to the very different decisions by the Tribunals in *Cosmo* and *Thomas*.

Discussion

20. Both Counsel argued their cases very eloquently and we were assisted by the detailed written submissions.

21. The Tribunal in *Cosmo* decided that there was an argument for saying that the legislation is ambiguous about the scope of bingo receipts and the Tribunal reviewed the Government consultation, in 2002-03, in relation to the Abolition of Bingo Duty. Whilst we agree with HMRC that the legislation might usefully have been more felicitously framed, nevertheless we find that it does not fall within the parameters of *Pepper v Hart*. It does not give rise to absurdity and nor is it unduly ambiguous or obscure. In any event, the extra statutory material in this instance is certainly not clear ministerial statements. It is a consultation document with responses and there is no indication as to what notice, if any, Parliament attributed thereto. Further, it antedated

the development of EHDs. We have looked at it but have derived no assistance therefrom.

22. Since *Cosmo* and *Thomas* are both decisions of the First-tier Tribunal, neither is binding on this Tribunal and both were decided on their own unique facts. Both cases were concerned with admission fees so neither is directly in point with this appeal. *Thomas* had been stood over pending determination of *Cosmo*, but at paragraph 8 of *Thomas*, it was made explicit that the Tribunal had derived no assistance from *Cosmo* and had not based their decision on any comparative analysis *even* although both parties in *Thomas* had requested the Tribunal to compare the facts of those two cases.

23. The facts in this appeal are different again. As an example, in *Cosmo*, players using an EHD (there known as a Planet) paid a higher price to play bingo (para 55); there was no rental fee as here.

24. In both cases the admission fee was included in the cost of the bingo session, albeit the cost thereof was separately identified in the charges notices. In *Cosmo*, it was decided that the all inclusive fee was not just for the playing of bingo and that the admission charge was not an amount in respect of entitlement or opportunity to participate in bingo (para 117). In *Thomas*, by contrast the Tribunal found that even if they had considered that "the main session price could be treated as being both in respect of the playing bingo and for admission, the proper application of s 19(3)(e) BGDA must in our view be to attribute the whole of the charge for the main session to an entitlement or opportunity to participate in a game of bingo". (para 42).

25. This appeal falls to be decided on its own facts having due regard to the relevant law.

26. The Tribunal in *Thomas* took a different view to that adopted by the Tribunal in *Cosmo* on certain aspects of the construction of the relevant provisions of BGDA and the consequential impact thereof.

27. We agree with and adopt the finding of the Tribunal in *Thomas* at paragraph 11 that:-

> "Section 19, with the extended meaning provided by section 20C(5), must in our view, be read as a whole."

28. We also agree with and adopt the reasoning in the following paragraphs at 12 to 16 in *Thomas*. Those read:-

> "12. In our view, s 19(1) should not be construed so as to require any causal connection. We consider that the words "in respect of" should be given their plain and unvarnished meaning, so as to require a relationship between the payment and the entitlement or opportunity to participate in bingo. That opportunity does not have to arise because of the payment; it may arise independently.
>
> 13. To apply a causal test in relation to s 19(1) would, in our view, fail to give proper effect to the circumstance envisaged by s 19(3)(e). It is clear from that provision that the draftsman had in mind both payments that could be identified as giving rise to the entitlement and payments that could not. Thus a payment, such as an admission charge, might not be regarded as having been made "for"

the entitlement to play bingo, but would nevertheless, at least partly, be in respect of that entitlement along with something else, such as the right to be admitted and the right to enjoy the facilities of the club. If that were the case, then s 19(3)(e) would require an exercise to ascertain which part should be treated as attributable to the entitlement or opportunity to play bingo, and so would be bingo receipts. On the other hand, if the payment, whilst not itself for the entitlement or opportunity, is in respect of that entitlement or opportunity and cannot be regarded as in respect of something else, we see no reason why that should not fall within s 19(1).

14. It follows that we respectfully disagree with the tribunal in *Cosmo* in respect of the following of its findings:

> (1) "Payments in respect of entitlement or opportunity to participate in bingo are construed as payments just for the playing of bingo" (*Cosmo*, para 42(4)).
>
> In our view such an analysis fails to take account of s 19(3)(e), which expressly contemplates an attribution exercise in cases where a payment is not just for playing bingo, but is in respect of that and something else.
>
> (2) "Section 19(3)(d) of the 1981 Act restricts bingo receipts to participation fees and stakes" (para 42(5)).
>
> We do not consider that s 19(3)(d) has such an effect. It is merely clarifying that labels, such as fees for participation, and stakes, are not decisive. This cannot, in our view, be taken to have cut down the wording of s 19(1), having regard in particular to the fact that s 19(3)(e) can clearly encompass payments outside these descriptions.
>
> (3) "Parliament … chose to limit the scope of the tax to the money spent on cards for bingo, and the total amount spent playing mechanised cash and prize bingo" (para 42(6)).
>
> This finding was based, in part at least, on the tribunal's review of the Government consultation, in 2002-2003, on the abolition of the bingo duty paid by bingo players and its replacement with a tax on bingo company profits, and the summary of responses published by the Government in April 2003. The tribunal considered itself able to refer to the extra-statutory material because it regarded it as arguable the legislation was ambiguous on the scope of bingo receipts. We do not take the same view; in our judgment the statutory provisions are clear and unambiguous, and if the extra-statutory materials considered by the tribunal in *Cosmo* had been before us, we would not have derived any assistance from them.

15. In our view, admission fees can in appropriate circumstances be regarded as payments in respect of entitlement or an opportunity to participate in bingo. Such amounts may be paid partly in respect of that entitlement and partly in respect of other matters. In such a case, it will be necessary to ascertain whether, and to what extent, part of that sum is applied to, or properly attributable to, the entitlement or opportunity to participate.

16. Whilst we disagree with the tribunal in *Cosmo* on certain aspects, we agree with them in one important respect. In common with the tribunal, at para 27, we

consider that the critical question in determining what the payment is in respect of is: what is the reality? That is the case whether one is considering s 19(1) or the proper attribution, under s 19(3)(e), of part of a composite payment."

29. Crucially, we agree with paragraph 16 in *Thomas* (which endorses paragraph 27 in *Cosmo* (and that in turn endorses *Vaughan*)) to the effect that the critical question in determining what the payment is in respect of is: what is the reality?

What is the reality?

30. Firstly, not all payments are subject to duty. If it were the case that any payment connected with participating in a game of bingo "counted" then there would be no need for section 19(3)(e). Clearly therefore the appellant must be correct in their assertion that it is not enough for the payment to be connected with participating in bingo. It must be made for, or in return for, an opportunity to play bingo for money.

31. When paying for the tickets, the admission fees and rental of EHDs, if any, are included in the composite fee. The ticket element, whether paper or electronic, amounts to £4 for six tickets. Only a minority of those playing bingo in the appellant's clubs use the EHDs. It is possible to play bingo, without an EHD using paper tickets and therefore the hire is optional. The choice is made when choosing what type of ticket to buy. The entitlement to play bingo arises from the purchase of the tickets. The ticket price, per ticket, does not vary if a greater number of tickets are purchased, unless there is a Manager's Promotion. Prices and discounts available are set by the Club Managers in accordance with the appellant's policy.

32. In our view, it is clear that admission fees are, on the face of it, payment for an opportunity to play bingo (and obviously connected with bingo). It is only if one reads Section 19(3)(e) and Section 20C(5) together that admission fees can at times be excluded. Hence our adoption of the reasoning in *Thomas* (see paragraphs 26 - 28 above).

33. Admission fees are not in contention in this appeal.

34. Bingo dabbers and pens are utilised to mark on the paper tickets the numbers that have been called. There has never been any suggestion that the purchase price thereof would ever be described as being a payment made in respect of an entitlement to participate in bingo. Whilst no doubt, an enterprising artist might choose to use bingo dabbers to create some picture or decoration, it is difficult to imagine any use for these items other than for playing bingo. That is analogous to the relatively minor use of EHDs for category D games. Of course pens and other items could be used to mark off the numbers and they have multiple applications.

35. The appellant argued strenuously that there was no real argument to differentiate between the use of a dabber and an EHD. HMRC were equally clear that it was not possible to play electronically without using the EHD; it was an integral part of the participation in the game. The data loaded on to it (see paragraphs 37 and 38 below), as opposed to the hardware itself was the equivalent of the paper ticket. We accept that. However, we also find that the charge for the data or "ticket" is distinct from the rental charge for the hardware. HMRC say that that is a commercial decision and that it is still a charge for participation.

36. We have given this considerable thought and return to the "reality". The reality is that those playing on paper simply could not do so without the use of a pen, dabber or similar. It is not practically possible. The purchase of a pen or dabber from a newsagent is not a payment to participate in bingo although it undoubtedly facilitates that.

37. EHDs had not been invented when this legislation was drafted and the concept probably had not even been considered.

38. How does the EHD actually function? The electronic ticket packages are pure data represented by an electronic or digitally coded sequence. When purchased that data is loaded onto the EHD. The data or "ticket" cannot be read without the EHD.

39. When the number is called, the customer touches the number on the screen. It is the customer who identifies and "marks" the numbers as they are called. The EHD then checks all the "tickets" on the EHD and "marks" that number on each of them. The EHD is used to vouch the winning claims in the same way as the paper ticket marked with the dabber or pen is produced.

40. Does the EHD fulfil the function of a dabber or pen as the appellant argues? We think not, or to the extent that it does in the sense that it records the numbers touched by the customer's finger, then that is a very marginal element of its function. The primary function is as the "ticket". Dabbers and pens are an option when playing; the EHD is a necessity to read the tickets loaded thereon.

41. The rental payments enable the customers to play bingo in a format that they prefer; presumably because it is faster and there is an enhanced chance of winning. The reality is that when playing electronically the EHD is physically the "ticket". Payment for the ticket undoubtedly falls within the ambit of bingo duty (whilst the charges for dabbers and items such as pens that fulfil that function do not).

42. We therefore find that without the EHD the customer who chooses to play electronically would have neither the entitlement nor the opportunity to participate in playing bingo. It does not suffice to say that they could play on paper; that player wishes to play electronically and cannot do so without the EHD.

43. Lastly, for the avoidance of doubt, to the extent that EHDs are used to play category D gaming machines, it is a matter of agreement between the parties that it is appropriate to carry out an apportionment under s 19(3)(e) BGDA, since to that extent the profits are not subject to bingo duty. The methodology for so doing has been agreed between the parties.

44. Accordingly, for all these reasons the Appeal is dismissed and the assessment in the sum of £129,215 is confirmed.

45. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 17 November 2014

APPENDIX 1

1. *Colt Group v Couchman* (2000) ICR 327

2. *R (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* (2001) 2 AC 349

3. *Chilcott v HMRC* (2009) EWHC 3287; (2010) STC 453

4. *O'Rorke v HMRC,* [2013] UKUT 499 (TCC)