[2015] UKUT 0682 (TCC)

Appeal number: UT/2015/0026

BINGO DUTY – bingo receipts – charge for hire of electronic handheld device – whether payment for entitlement or opportunity to participate in a game of bingo - Betting and Gaming Duties Act 1981, sections 17, 19 and 20C(5) – appeal allowed.

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

CARLTON CLUBS LIMITED

Appellant

v

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: LORD TYRE

Sitting in public at George House, 126 George Street, Edinburgh on 27 October 2015

Andrew Hitchmough QC, instructed by Ernst & Young LLP, for the Appellant (Carlton Clubs Limited)

Sean Smith QC, instructed by the Office of the Advocate General for Scotland, for the Respondents (HMRC)

LORD TYRE:

Introduction

1. The appellant operates bingo clubs at various locations in the United Kingdom. The issue in this appeal is whether bingo duty is payable by the appellant on charges which it makes to customers for the hire of hand-held devices (EHDs) used to play bingo electronically. It requires the application to new technology of legislative provisions enacted some years before the technology was brought into commercial use.

2. The appellant appealed to the First-Tier Tribunal (FtT) against a ruling by the respondents that charges made during the period from August 2009 to September 2012 for hire of EHDs were subject to bingo duty. That appeal was refused and the matter now comes before this tribunal by appeal, with leave, on point of law.

Findings in fact

3. The facts are not in dispute. The FtT heard no oral evidence but made the following findings in fact based upon documents and a witness statement by the appellant's operations director:

   (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.

4. Certain additional findings in fact may be extracted from the FtT's decision:

- The data loaded on to the EHD, as opposed to the hardware itself, are the equivalent of the paper ticket (paragraph 35).
- The electronic ticket packages are pure data represented by an electronic or digitally coded sequence. The data or "ticket" cannot be read without the EHD (paragraph 38).

Statutory provisions

5. Bingo duty is charged on the playing of bingo in the United Kingdom, at a rate which has varied from time to time, on a person's bingo promotion profits. The relevant charging provisions are contained in sections 17-20C of the Betting and Gaming Duties Act 1981, as substituted by section 9(1) of the Finance Act 2003 for the provisions originally enacted. So far as material to this appeal, the Act provides as follows:

"17(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 [ ] per cent of a persons' 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(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 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,

...

(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(5) …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)."

6. The question to be determined in the present case is whether the charge for hire of an EHD is a payment "in respect of entitlement to participate in bingo" so as to fall within section 19(1), whether with or without the extended meaning conferred upon the expression "entitlement" by section 20C(5).

The decision of the First-tier Tribunal

7. The FtT made detailed reference to two earlier First-tier Tribunal decisions concerning the meaning of section 19 when read together with section 20C(5), namely *Cosmo Leisure Ltd v HMRC* [2012] UKFTT 733 (TC) and *Thomas Estates Ltd t/a Beacon Bingo v HMRC* [2013] UKFTT 662 (TC), recognising that those decisions were not binding on it and were in any event decided on their own facts. It was noted that the Tribunals in *Cosmo* and *Thomas* had reached different decisions as to whether the words "in respect of" in section 19(1) required a causal connection between a payment on the one hand and an entitlement to participate in bingo on the other. The FtT preferred the view of the Tribunal in *Thomas* that they did not. The FtT agreed with the view expressed by both Tribunals that the critical question in determining what the payment was in respect of was: what is the reality?

8. The FtT accepted that it was not enough for a payment to be "connected with" participating in bingo; the payment had to be made for, or in return for, an opportunity to play bingo for money. It was clear that admission fees were, on the face of it, payments for an opportunity to play bingo; only if one read sections 19(3)(a) and 20C(5) together were admission fees at times excluded. Admission fees were not in any event in contention in this appeal.

9. Having returned to the "reality", and having described (at paragraphs 38 and 39) how the EHD functioned, the FtT continued:

> "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.
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> 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).
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> 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."

For those reasons the FtT dismissed the appeal and confirmed the assessment to duty.

Argument for the appellant

10. On behalf of the appellant it was accepted that sections 19 and 20C(5) had to be read together to the effect that the legislation catches payments in respect of entitlement *or* an opportunity to participate in a game of bingo. At first sight that appeared to be very wide, and capable of encompassing *inter alia* admission fees, the cost of a dabber, or even car parking charges. Such an interpretation would give rise to highly anomalous results which demonstrated the need to read the sections as containing some restriction on their scope. It was appropriate to read them as requiring a causal connection between payment and entitlement or opportunity to play bingo: in other words, to construe the words "in respect of" as meaning "for". Support for this approach was provided by the analysis of the Tribunal in *Cosmo* at paragraphs 26-29. The FtT's rationale in the present case in relation to causal connection was unclear. On the one hand it had adopted the reasoning in *Thomas* as to why a causal connection was not required but then (at paragraph 30) accepted the appellant's contention that the payment had to be made for, or in return for, an opportunity to play bingo.

11. The Tribunal erred in deciding that the critical question was what was the "reality". Such a question was appropriate in cases such as *Cosmo* and *Thomas* where the dispute between the parties concerned the proper characterisation of payments described by the appellant as admission fees but alleged by HMRC to be participation fees or stakes. In the present case there was no allegation of mislabelling; the FtT's task was simply to apply the legislation, properly construed, to undisputed facts. In any event the FtT's conclusion (in paragraph 41, above) that the "reality" was that the EHD was the "ticket" was unsustainable because it contradicted its own finding in fact that the data loaded on to the device was the equivalent of a paper ticket.

12. It was further submitted that the FtT erred at paragraph 42 (above) in addressing the customer's entitlement or opportunity to play bingo *electronically*. The statutory test referred to entitlement or opportunity to play bingo *simpliciter*; as the FtT had found in fact, customers could choose to participate on paper in the same game for the same price per ticket. The only conclusion open to the FtT on the facts was that payment to hire the EHD was not in respect of entitlement to participate in a game of bingo. That entitlement arose from the purchase of a ticket, whether in the form of a paper ticket or in the form of loading data on to an EHD.

13. Although the FtT had not addressed "opportunity" specifically, it appeared to have concluded that because the customer could not play bingo electronically without an EHD, the charge for hire must be in respect of an opportunity to participate in bingo. The error, once again, was to focus on playing electronically, when the statute merely referred to playing.

14. Finally, in the alternative, it was submitted that on a proper construction of sections 19(3)(d) and 20C(5), duty was payable only on participation fees and stakes. The scope

of the duty was defined by those words where they appeared in section 19(3)(d) and in parentheses in section 20C(5). Otherwise, without a requirement of causal connection, there would be no intelligible basis for excluding admission fees from duty. In support of this contention, reference was made to a Government document entitled "The Modernisation of Gambling Taxes: Consultation on the Abolition of Bingo Duty – Summary of Responses" (April 2003). It was noted in that document (at paragraph 2.19) that the industry's favoured definition of gross profits was by reference to "stakes", including money spent on cards for main stage bingo but excluding, *inter alia*, the cost of admission, and that "the Government has decided to use the industry's favoured definition". If there were doubt as to the proper interpretation of the legislation, assistance could be obtained from this material.

Argument for the respondents

15. On behalf of the respondents, it was submitted that the FtT had made no error of law in holding that payments for the use of EHDs were properly characterised as payments in respect of an entitlement – or opportunity – to participate in a game of bingo. Central to the issue was the novelty of the EHD technology, which separated the numbers given to a customer from the physical object on which they were displayed. In the case of paper tickets, the numbers could not be separated from the paper on which they were printed. In the case of EHDs, it was inaccurate to speak of "tickets" being loaded on to the device; all that was loaded was electronic data. The EHD itself was essential to store, display and read the information loaded. It was accordingly essential to play the game and to vouch a winning claim. Properly analysed, the charge for hire of the EHD was one of the two ingredients (the other being the charge for loading data) of the customer's payment "for" and "in respect of" entitlement to participate in the game.

16. It was not contended that duty was chargeable on admission fees. However, the appellant's attempted analogy between the charge for EHDs and a charge for admission was artificial, as was the analogy with the dabbers used by some customers playing with paper tickets. The customer did not need to buy a dabber in order to play paper-based bingo whereas he/she clearly did need to pay for an EHD in order to play electronically.

17. The respondents were in agreement with the view expressed by the Tribunal in *Thomas*, and adopted by the FtT in the present case, that section 19(1) should not be construed as requiring a causal connection, but rather should be given "their plain and unvarnished meaning" so as to require a *relationship* between a payment on the one hand and an entitlement or opportunity to participate in bingo on the other; the opportunity did not have to arise because of the payment but might arise independently. It was acknowledged that difficulties might arise in applying this analysis to admission fees but the concession that admission fees were not within the scope of the duty was not departed from. Use of the premises or of the tables and chairs therein was qualitatively different from use of the

EHD for the playing of the game in electronic form. Customers played the game *with* the terminal; the same could not be said of the premises or other facilities.

18. In the alternative, it was submitted that the charge for an EHD was a payment for an opportunity to participate, within section 20C(5). There was no basis for the appellant's contention that the charge was restricted to payments that were in substance participation fees or stakes. If such a restriction had been intended by Parliament, those words would have appeared in the charging provision and not in provisions merely clarifying the scope of the charge. It was legitimate to have regard to what had been said in the 2003 summary of responses to the consultation document, but no weight should be attached to it as the legislation was clear and unambiguous.

Decision

19. In my opinion the FtT erred in approaching this case on the basis that the critical question was what was the "reality". That was the question which required to be addressed in *Cosmo* and in *Thomas* because in both of those cases the issue was whether a charge specified by the club operator as being for admission was correctly characterised as such or was properly to be characterised as a payment for playing bingo. No such question arises in the present case. It is common ground that the charge stated to be for hire of the EHD is exactly that; the issue for determination is not whether there is a reality to be ascertained but rather how to apply the statutory provisions to this particular means of playing the game. It respectfully seems to me that the FtT's attempt to focus on reality has led it into further error. Having found (at paragraph 35) that the data loaded on to the EHD, as opposed to the device itself, was the equivalent of the paper ticket, charged for separately from the hire of the device, the FtT subsequently held (at paragraph 41) that the "reality" was that "when playing electronically the EHD is physically the 'ticket'". In proceeding on the basis of a "reality" which contradicted its own findings in fact, the FtT, in my view, reached a conclusion that was not open to it. I accept also the appellant's submission that the FtT erred in law in addressing the question of what was essential for a customer to play bingo electronically, which is not the statutory test that requires to be applied.

20. In order to determine whether charges for hire of EHDs fall within the scope of bingo duty, I consider that it is necessary to reach a view, of more general application, as to the meaning of the phrase "payments …in respect of entitlement to participate in bingo" in section 19(1), when read in the context of the whole of sections 17-20C including the extension of "entitlement" to include "opportunity". On one view, the phrase is open to a broad interpretation. Construed as a "but for" test, it could encompass not only admission fees but also other expenditure associated with an opportunity to participate in a game, such as club membership fees or the purchase from the operator of a specialist dabber or even an ordinary pen. If all that was required was a "relationship" between the payment

and the entitlement or opportunity (to use the phrase favoured by the Tribunal in *Thomas* and by the FtT, and advocated by the respondents in this appeal), I would see no reason to exclude any of these charges from the scope of the duty. But such a broad interpretation would, in my view, be impossible to reconcile with the general charging provision in section 17(1) which provides for bingo duty to be charged "on the playing of bingo". I therefore conclude that a broad interpretation of section 19 based upon a "but for" test or the existence of a "relationship" between the payment and the entitlement or opportunity would not accord with Parliamentary intention.

21. In the course of the hearing I found the respondents' position in relation to admission fees somewhat difficult to pin down. It was accepted by them that admission fees (if correctly characterised as such) were not within the scope of bingo duty, and a similar position appears to have been adopted by HMRC in both *Cosmo* and *Thomas*, where the issue between the parties was whether charges said to be for admission were in reality for playing bingo. Such acceptance appears also to be consistent with the conclusion reached by the Government in the consultation document to which reference has been made. I do not suggest that such acceptance is wrong, but unless it amounts to an extra-statutory concession (and no-one contended that it did), it must have some basis in the charging provisions. Contrary to the respondents' submission, it is not consistent with the test of "relationship" proposed in *Thomas* and said to be adopted by them in the present appeal.

22. In my opinion the appellant is correct in its submission that sections 17(1), 19(1) and (3) and 20C(5), read together, require a causal connection between the payment and the entitlement or opportunity to participate in a game of bingo. I agree that the words "in respect of" entitlement or opportunity to participate should be construed as meaning "for" such entitlement or opportunity. This interpretation provides a clear distinction between those payments in respect of such entitlement or opportunity which fall within the scope of "the playing of bingo" and those which do not. On this aspect I find myself in agreement with the analysis of the Tribunal in *Cosmo* at paragraph 26. Conversely, I respectfully disagree with the opinion of the Tribunal in *Thomas*, at paragraphs 12-13, that the application of a causal test fails to give proper effect to section 19(3)(e), which makes provision for a proportionate attribution of a sum paid partly in respect of entitlement to participate in a game of bingo and partly in respect of another matter. For my part, I see no difficulty in carrying out such an attribution under reference to a causal test, so that, for example, a payment combining an admission fee (correctly so characterised) and a purchase of tickets could be apportioned in accordance with section 19(3)(e).

23. I do not go so far as to accept the appellant's alternative submission that on a proper construction of the legislation, read as a whole, the words "fee for participation" and "stake" which appear in sections 19(3)(d) and 20C(5) provide an exhaustive definition of the payments falling within the scope of the duty. On this point I respectfully disagree with the view of the Tribunal in *Cosmo* at paragraph 42(5). These two subsections simply make clear that duty is chargeable regardless of whether a payment is labelled as a

participation fee or a stake. If it had been the intention of Parliament that these two expressions should define the scope of the charge, one would have expected to find them used in the main charging provision instead of the expression "payments …in respect of entitlement to participate in bingo".

24. How, then, is this approach to be applied to the charge for hire of an EHD? In my opinion, the charge falls clearly outside the scope of bingo duty. The fact that use of the EHD is essential in order for a customer to play electronically does not lead to the conclusion that the charge for hire is a payment for entitlement or opportunity to play. Hire of the EHD of itself confers no such entitlement or opportunity, any more than does admission to the premises or the purchase of a dabber or pen. Entitlement/opportunity to participate in a game is obtained rather by the purchase of a ticket for that game, and it matters not whether the ticket is purchased in the form of paper or in the form of data loaded on to an EHD. The relevant causal link is between the purchase of the ticket – in whatever form – and participation in the game. On this analysis, the legislation is applied in a consistent manner to the playing of bingo according to the traditional method in use at the time when it was enacted, and to the playing of bingo with the assistance of electronic technology not in use at that time.

Conclusion

25. For these reasons, I hold that the FtT erred in law in deciding that the appellant was liable to bingo duty on charges made during the period in question for the hire of EHDs. The appeal is allowed.