TC01890

Appeal number: TC/2011/00544

GENERAL BETTING DUTY – Missing till rolls – "Best judgement" assessments made – Whether HMRC had acted perversely or in bad faith in making assessments – No – Whether taxpayer had positively shown assessments were wrong – No – Appeal dismissed
PENALTY – Whether betting stakes deliberately understated – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT JOHN VAUGHAN **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
JOHN COLES

Sitting in public at Vintry House, Wine Street Bristol BS1 2BP on 5 March 2012

The Appellant in person

Christopher Staker, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Robert John Vaughan appeals against:

(1) An assessment to general betting duty in the sum of £14,070.77 for the period from 6 July 2007 to 24 January 2008, issued by HM Revenue and Customs ("HMRC") on 14 January 2009 under s 12 of the Finance Act 1994 ("FA 1994");

(2) An assessment, to general betting duty in the sum of £7,926.73 for the period 1 August 2006 to 4 July 2007, issued by HMRC on 15 July 2009 under s 12 FA 1994; and

(3) A Penalty of £15,395.25 (set at 70% of the unpaid betting duty) issued by HMRC on 5 November 2010 under s 8(1) FA 1994.

2. Although Mr Vaughan had made separate appeals against each of the assessments and the penalty we heard all three appeals together (under reference TC/2011/00544) in accordance with the direction of the Tribunal (Judge Michael Tildesley OBE) issued on 31 May 2011.

Law

General Betting Duty

3. Subject to specific exceptions which do not apply in this case, general betting duty is charged, under s 2 of the Betting and Gaming Duty Act 1981 ("BGDA"), "on a bet made with a bookmaker who is in the United Kingdom" at a rate of 15% of his "net stake receipts" during an accounting period.

4. A bookmaker's "net stake receipts", as defined by s 5 BGDA, are essentially the difference between the total bets taken and the winnings paid out. An accounting period is either a calendar month or other period specified by HMRC (s 5D BGDA).

5. Under paragraph 2(1) of schedule 1 BGDA general betting duty is "under the care and management" of HMRC and "shall be accounted for by such persons and accounted for and paid at such times and in such manner as may be required by or under regulations of" HMRC. Under the Betting Duty Regulations 2001 (as amended) a bookmaker is required to "furnish" HMRC with a general betting duty return and pay any duty due "by the fifteenth day following the end of the accounting period to which it relates". In the present case Mr Vaughan's accounting period was a calendar month.

6. Paragraph 6(1) schedule 1 BGDA provides that any person carrying on a general betting business shall "keep such books, records and accounts" as HMRC may direct and permit any authorised officer "to enter on any premises used for the purposes of the business" to "inspect and take copies of any books, records, accounts or other documents … used for the purposes of the business".

7. HMRC's direction to bookmakers of the books, records and accounts they should keep, which has the force of law, is contained in Public Notice 451 and includes:

(1) A “clear and indelible record of winnings paid out;

(2) All till rolls (if till rolls are used); and

(3) For all off-course bookmakers, a “general betting duty account” which must consist of a summary for each duty accounting period and include information required to complete duty returns for each class of bet made.

8. It is clear from s 1 BGDA that general betting duty is “a duty of excise”.

Assessments

9. Section 12(1) FA 1994 provides that where it appears that “any person from whom any amount has become due in respect of any duty of excise” and there has been a “default” within s 12(2) FA 1994, HMRC may “assess the amount of duty due from that person “to the best of their judgement”. A “default” within s 12(2) FA 1994 includes any failure to keep records or other documents as required or directed. This would include a till roll and the omission of income from betting duty returns

10. The approach the Tribunal should adopt in a “best judgement” case has been considered by the Court of Appeal and the Upper Tribunal. In *Khan v HMRC* [2006] EWCA Civ 8 Carnwath LJ said, at [69]:

> “The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:
>
> > "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right." (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC per Lord Lowry).
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> That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509; [2004] EWCA Civ 1015. We also cautioned against allowing such an appeal routinely to become an investigation of the *bona fides* or rationality of the "best of judgment" assessment made by Customs:
>
> > "The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment." (para 38(i))

> It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see e.g. Brady v Group Lotus Car Companies plc [1987] STC 635, 642 per Mustill LJ)."

11. Sir Stephen Oliver QC, in the Upper Tribunal, in *Mithras (Wine Bars) v HMRC* [2010] STC 1370 said, at [10-11]:

> [10] "In *Rahman (t/a Khayam Restaurant) v Customs and Excise Comrs* [1998] STC 826 ('*Rahman 1*'), Carnwath J (as he then was) stated that a tribunal should not treat an assessment as invalid merely because the members disagreed as to how the commissioners' judgment should have been exercised. A much stronger finding was required, for example that the assessments had been reached dishonestly or vindictively or capriciously, or was a spurious estimate or guess in which all elements of judgment were missing or was wholly unreasonable.
>
> [11] The principles established in *Van Boeckel* and *Rahman 1* indicate that the FTT's [First-tier Tribunal's] jurisdiction when considering whether an assessment was raised to the best of the commissioners' judgment is akin to a supervisory, judicial review type jurisdiction. The FTT does not have a true appellate function in that it cannot set aside the assessment on the basis that it disagrees with the commissioners' decision to make the assessment. The circumstances in which the FTT can decide that the assessment was not raised to the best of the commissioners' judgment, and therefore should not have been made at all, are very limited, essentially being restricted to cases where the commissioners have acted perversely or in bad faith. Carnwath J in *Rahman 1* indicated that this 'kind of case is likely to be extremely rare' and that in the normal case 'it should be assumed that the Commissioners have made an honest and genuine attempt to reach a fair assessment': see page 836 of the judgment."

Penalty

12. Under s 8(1) FA 1994 "where any person engages in any conduct for the purpose of evading any duty or excise" and "his conduct involves dishonesty" he shall be liable to a penalty of an amount equal to the amount of duty evaded. Where a person is liable to such a penalty, s 13 FA 1994 provides that HMRC "may assess the amount due by way of penalty and notify that person or his representative accordingly." However, s 8(4) FA provides that HMRC or the Tribunal may reduce the penalty "to such amount (including nil) as they think proper."

13. At the time with which this case is concerned HMRC's policy regarding reduction of penalties was set out in paragraph 2.1 of the 2007 version of Public Notice ("PN") 160 which stated:

> The maximum penalty of 100% of the tax evaded will normally be reduced as follows:
>
> - Up to 40% - early and truthful explanations as to why the arrears arose and the true extent of them.

- Up to 40% - fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, disclosure & quantification of irregularities, attending meetings and answering questions.

In most cases, therefore, the maximum reduction will be 80% of the tax on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a full and unprompted voluntary disclosure.

14. In *Rahman (t/a The Viceroy Indian Restaurant) v HMRC* [2009] UKFTT 244 (TC) which considered similar evasion penalty provisions, albeit in relation to VAT, the Tribunal Judge (David Demack) said, at [54-55]:

> [54] "Although the standard of proof in evasion penalty proceedings is the civil standard, namely the balance of probabilities, since the assessment involves the grave charge of dishonesty, the tribunal should be satisfied with nothing less than a high degree of probability (see the judgment of Dyson J in *Akbar v Commissioners of Customs and Excise* [2000] STC 237 at page 251).
>
> [55] The two elements of the penalty, evasion and dishonesty (albeit in a criminal law context), were the subject of consideration by the Court of Appeal in *R v Dealy* [1995] STC 217 where McCowan LJ cited, implicitly with approval, the following direction on law of His Honour Judge Crabtree to the jury:
>
> > "Well, what does 'evasion' mean? Evasion is an English word that means to get out of something. If you evade something, you get out of its way, you dodge it …
> >
> > What is dishonesty in English Law? It is a common English word and it carries its ordinary English meaning. You [the Jury] must decide for yourselves, first of all, whether ordinary, right-thinking people would describe what Mr. Dealy did as dishonest. If the answer is "No, ordinary, sensible people would not regard what he did as being dishonest" then he is not guilty. However, if you decide that ordinary, reasonable people would see his conduct as dishonest, you must then go on to decide what he thought about it. If you come to the conclusion that Mr. Dealy might have thought, quite honestly, that he had a perfect right to do as he did, and that no-one would regard it as dishonest, then he is not guilty. If he was convinced, throughout, that he was doing the right thing, and that other people would agree with him, that is not dishonesty.""

He continued at [56]:

> "… the fact that suppression of takings took place on a scale that Mr Rahman must have been aware of, and on the basis of the whole of the evidence presented to us, as we have already found, it was he who suppressed the takings, we are satisfied to the high degree of probability required that he dishonestly evaded the tax we have determined to be due."

Facts

15. There is little, if any, dispute to the background and circumstances in which the assessments and penalty have arisen. Having heard from Mr Vaughan, HMRC officers, Susan Gauld and Roger Reed and having read the documents provided by the parties we make the following findings of fact.

16. Mr Vaughan is a bookmaker who, during the period with which we are concerned, traded as R J V Racing from premises in St Werburghs, Bristol.

17. On 24 January 2008 HMRC officers, Susan Gauld and Mairi McConnell visited Mr Vaughan's premises to inspect the business records and accounts and satisfy themselves that he was properly calculating and declaring general betting duty to HMRC. There were two tills on the counter, one was switched on and operating and set to key position "B" ("Till B"). The other, which was set to key position "A" ("Till A") although plugged into the mains electricity, was switched off. The tills, "Halo 440" cash registers had originally been used by Ladbrokes.

18. Mrs Gauld asked Mr Vaughan to switch on Till A. Although the date displayed was 23 January 2008 Mr Vaughan could not recall when it was last used. The till roll for Till A showed a cumulative total of £122,995.05. This till roll, together with bundles of betting slips and other till rolls was taken from the premises for detailed examination by HMRC.

19. In addition to the accumulated total, which is the total amount of bets received whilst that till has been used or since it had been re-set, the till roll also records the key position of the till (eg Till A), a "Z reading" and "bet numbers".

20. A "Z reading" provides a total of the amount of money received in bets since the last "Z reading" was taken as well as a starting and closing Z number. A bet number is as its name implies, the number given to each bet made. Taking the till roll for 12 June 2007 in relation to Till B as an example, this showed that that £1,575.20 was taken in bets, a start Z number of 0252 and a close Z number of 0253, a start accumulated total of £357,564.94 and a close accumulated total of £359,140.14 and a start bet number of 0300 and closing bet number of 0605.

21. However, the till rolls only contain details of bets made and not winnings paid out. These are recorded separately by Mr Vaughan who uses a Z reading at the end of the day to make a record of the amount of bets taken. He deducts the winnings paid out from the bets received with the difference being the net stake receipts which form the basis of his general betting duty return. Mr Vaughan told us that on average he would expect the net stake receipts to amount to 10% – 15% of the total bets received.

22. Having examined the material taken during the visit Mrs Gauld found that, other than the till roll inspected during her visit on 24 January 2008, the only other till rolls relating to Till A were dated 15 June 2007 to 5 July 2007.

23. The till roll for 5 July 2007 in relation to Till A has:

(1) a start Z number of 0022 and a close Z number of 0023;

(2) a start accumulated total of £28,934.55 and a close accumulated total of £29,190.77; and

(3) a starting bet number of 5778 and a closing bet number of 5843.

The Till A till roll taken by HMRC during the visit to Mr Vaughan's premises on 24 January 2008 has:

(1) a start Z number of 0096 and a close Z number of 0097;

(2) a start and close accumulated total of £122,995.05; and

(3) a starting and closing bet number of 7711.

24. On the basis of this information Mrs Gauld concluded that Till A had been used between 6 July 2007 and 24 January 2008 and that bets of £93,805.18 had been taken. Having examined Mr Vaughan's betting duty returns for the period between 1 January 2007 and 31 January 2008 and found that this £93,805.18, giving rise to general betting duty at a rate of 15%, had not been declared by Mr Vaughan on his returns, Mrs Gauld issued an assessment in the sum of £14,070.77 on 14 January 2009. This is the first of the assessments with which we are concerned.

25. Further analysis of the till rolls supplied by Mr Vaughan for the period from 1 April 2004 showed that although there was a roll for Till B for 31 July 2006 there was not another for that till until 12 September 2006.

26. The till roll Till B for 31 July 2006 has:

(1) a start Z number of 0008 and a close Z number of 0009;

(2) a start accumulated total of £5.074.50 and a close accumulated total of £7,042.05; and

(3) a starting bet number of 1189 ad a closing bet number of 1475.

The 12 September 2006 Till B till roll has:

(1) a start Z number of 0018 and a close Z number of 0019;

(2) a start accumulated total of £24,026.72 and a close accumulated total of £24,048.12; and

(3) a starting bet number of 1768 and a closing bet number of 1774.

27. Having examined his general betting duty returns for the period Mrs Gauld concluded that £16,984.67, the difference between the opening accumulated total for 12 September 2006 and the closing accumulated total for 31 July 2006, had not been declared by Mr Vaughan.

28. The next available roll for Till B was for 3 November 2006 when the opening accumulated total was £45,785.27. As the closing accumulated total on the 12 September 2006 Till B till roll had been £24,048.12, Mrs Gauld concluded that the difference, of £21,737.15, had not been declared for general betting duty purposes.

29. Another gap in the rolls produced for Till B occurred between 15 June 2007 and 4 July 2007. The accumulated total at the start of 5 July 2007 was £376,926.72 whereas at 14 June 2007 it was £362,803.62. Mrs Gauld concluded that the difference, of £14,123.10, had not been declared by Mr Vaughan on his return.

30. Therefore, on 14 January 2009, Mrs Gauld assessed Mr Vaughan to general betting duty in the sum of £7,926.73, being 15% of the total undeclared amounts of £16,984.67, £21,737.15 and £14,123.10 (total £52,844.92). This is the second of the assessments with which we are concerned.

31. In the light of the assessments Mrs Gauld referred the case to her fellow HMRC officer, Roger Reed to investigate whether Mr Vaughan had dishonestly evaded general betting duty by incorrectly declaring his net stake figures in his betting duty returns. Following two formal meetings, conducted in accordance with PN160 (which explains what happens during an enquiry where HMRC suspect conduct involving dishonesty) on 28 January and 15 July, Mr Reed concluded that there had been deception and that the amount evaded was in the sums assessed. However, in view of Mr Vaughan's co-operation in attending the PN160 meetings and explanation of events he considered that any penalty should be mitigated by 30%. He therefore issued the penalty in the sum of £15,395.25 on 5 November 2010

Discussion

Assessments

32. As there is no question of HMRC having acted perversely or in bad faith in this case, and we accept that there was an honest and genuine attempt to reach a fair assessment, it is for Mr Vaughan to show the assessments are wrong and what corrections should be made in order to make the assessments right or more nearly right.

33. Mr Vaughan, who was unable to recall when or from whom he had purchased the tills, suggested that they may have been either faulty or possibly retained information when used by Ladbrokes.

34. He produced a receipt dated 14 June 2006 from a Ron Millard who had repaired a till. He also provided us with an undated statement from Mr Millard who explained the particular type of till used by Mr Vaughan, the Halo 440, also had been developed by Halo Cash Registers and Ladbroke Racing.

35. As these tills do not have anti-surge or mains spike protection in the power supply circuit they are prone to memory loss or corruption in the event of power surges or if turned on and off quickly. If this occurs Mr Millard says that the till will re-format itself and all figures such as bet numbers and accumulative total will re-set to zero.

36. We were also shown an internal email that had been sent to Mrs Gauld by a specialist from HMRC's Large Business Service, Leisure & Media, Betting and Gaming Team who had been in contact with Ladbrokes and ascertained that while it

was unusual for Ladbrokes to sell old tills they had done in the past and that their policy had been to cleanse the till of any Ladbrokes data.

37. In the circumstances we do not consider that the increase in the accumulated totals during the periods for which there are no till rolls can be attributed to either a fault with the till or information remaining on the till from a previous user. Therefore, as Mr Vaughan has not shown them to be wrong, applying the principles enunciated in *Khan v HMRC* and *Mithras (Wine Bars) v HMRC*, we uphold the assessments.

Penalty

38. Having upheld the assessments we have to consider whether the conduct of Mr Vaughan, in failing to declare his liability to general betting duty, "involves dishonesty" and if so and therefore liable to a penalty whether it should be mitigated further than the 30% already allowed by HMRC

39. HMRC contend that the overall number of missing till rolls and the amount of income contained on them is "very significant" especially as they could only be stakes for bets. It is submitted that omissions of such magnitude cannot be accidental and that the circumstances establish the high degree of probability that Mr Vaughan acted deliberately and dishonestly.

40. We agree.

41. Also, in answer to a question from the Tribunal as to how he chose which till to use Mr Vaughan explained that it depended on whichever of the two tills was nearer the part of the counter approached by a customer. It would therefore seem likely that both tills were used but, despite the requirement to do so, all till rolls were not retained.

42. In addition his average net stake receipts during the periods for which the assessments were made amounted to 5.6% of the declared recorded receipts, approximately half of the average amount Mr Vaughan told us he would expect to receive. We consider that the most probable explanation for this is that while he accounted for winnings paid out Mr Vaughan did not declare all of the bets taken.

43. We therefore find that, having regard to all the circumstances, Mr Vaughan deliberately and dishonestly failed to declare his liability to general betting duty.

44. As Mr Vaughan has not established any basis for further mitigation of the penalty, beyond the 30% already allowed by HMRC, we confirm the penalty in the sum of £15,395.25

Conclusion

45. The appeals against the assessments and penalty are therefore dismissed.

Right to apply for permission to appeal

46. 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.

JOHN BROOKS

TRIBUNAL JUDGE
RELEASE DATE: 15 March 2012