1987 No. 11 & R

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THE HIGH COURT

BETWEEN

THE RACING BOARD

APPELLANT

AND

S. O'CULACHAIN

RESPONDENT

Judgment of Mr. Justice Murphy delivered the 27th day of April 1988.

This is an appeal by way of Case Stated from a decision given on the 12th October 1983 by Mr. C.V.B. Diggin and the late D.U. O'Neill the then Appeal Commissioners. The question posed in the case, which is stated under section 428 of the Income Tax Act 1967, is expressed in paragraph 11 thereof in the following terms:-

> "The question of law for the opinion of the High Court is whether we were entitled on the foregoing facts and evidence adduced to hold that the Board was assessable to tax in respect of levies on course bets

by bookmakers on the basis that this was an activity analogous to a trade: and if so how should such levy be taxed".

It is of course necessary to put that question in context.

The Racing Board (hereinafter referred to as "the Board" was established and incorporated by virtue of section 4 of the Racing Board and Racecourses Act 1945. The preamble to that Act is particularly informative. It provides as follows:-

> "An Act to provide for the improvement and development of horse breeding and horse racing and for the better control of racecourses, and for this and other purposes to establish a Board to be called the Racing Board, to define its powers and duties, to make provision in relation to bookmakers engaged in course betting and to impose levies on bookmakers in respect of course bets, to dissolve the Board of control for mechanical betting in Ireland and to transfer its property and liabilities to the Racing Board, to authorise the Irish Turf Club and the Irish National Hunt Steeplechase Committee to exclude persons from racecourses, and to provide for certain other matters connected with the matters aforesaid".

Under section 14 of the 1945 Act the Board may, subject to certain conditions and consents establish, equip and maintain racecourses and organize and hold racemeetings thereon. As I understand it the Board has never attempted to exercise that power. The income of the Board derives from two distinct provisions in the Act, namely, section 15 which empowers the Board to apply for and hold a totalizator

licence and section 27 (1) which provides for the payment of certain levies to the Board. That subsection is expressed in the following terms:-

> "Every person who, as a licensed bookmaker, enters into a course bet on or after the commencement of this section shall pay to the Board a levy calculated at the rate of the prescribed percentage for the time being of the amount of such course bet".

The amount of the levy is determined by the Board with the consent of the Minister but limited to a prescribed figure.

The Act contains detailed provisions enabling the Board to grant permits to licensed bookmakers permitting them to carry on business at racecourses which are authorised within the meaning of the Act and other provisions relating to the admission by the owners of those racecourses of bookmakers to the racecourses. In addition the Act empowers the Board to make regulations, in certain cases with the consent of the Minister for Finance, relating to the payment of levies and otherwise for the purpose of carrying out the provisions of the Act.

The Board holds and has for many years held a totalizator licence and has derived substantial income from its operation of a totalizator. The other source of finance available to the Board consists of the receipts received from the licensed bookmakers by way of levy on the "on course" bets taken by them.

It is common case that the profits derived from the operation of the totalizator are liable to income tax under Case I of Schedule D of the Income Tax Act 1967. However, the Board have contended that the levies payable to them by the

licensed bookmakers are not liable to income tax either under Case I or the present Case IV of Schedule D aforesaid. It is that contention on behalf of the Board which was rejected by the Appeal Commissioners. In the Case Stated the opinion of this Court is sought as to the correctness or otherwise of that decision.

The basis on which State, semi-State and municipal bodies or authorities fall to be taxed or exempt from taxation has been the subject matter of numerous decided cases. The authorities in the United Kingdom are further complicated by arguments relating to the prerogative of the Crown and the bodies said to be "emanations of the Crown". In addition to arguments as to immuntiy from tax the decided cases have considered a variety of propositions affecting the liability of such bodies to taxation. It has been contended that the establishment of a particular corporate body with a duty to devote its funds to a particular object constitutes an implicit repeal of the Income Tax Acts which might otherwise have applied. Alternatively, it has been argued that the payment of tax would be ultra vires such a body. The principle that no taxable profits arise as a result of "mutual dealings" has likewise been invoked particularly in relation to municipal authorities. Moreover, it has been suggested that the imposition of taxation on bodies established for public purposes is little short of absurd. For example, to finance a public body by way of grant from the Central Exchequer and then to tax the grant or even the balance of the grant remaining in the hands of the public body at the end of a financial year would seem to be a meaningless exercise which might well defeat

the object for which the body concerned had been established by the Act of Parliament.

Whilst arguments and concerns aforesaid have been made and expressed in a variety of cases I refer to their existence merly to dismiss them. They formed no part of the argument presented on behalf of the Appellant in the present case. The substantive issue between the parties was whether the activity of the Appellant in collecting the "on course betting" levy from the licensed bookmakers amounted to a carrying on of a trade or carrying on "something analogous to a trade". It was contended on behalf of the Appellant that it did not and the Respondent submitted that it did.

Where a Body carries on a trade and in the course of that trade makes profits it is prima facie liable to tax. The fact that the Body is incorporated under an Act of the Oireachtas, or enjoys a State monopoly or is required to dedicate its profits to a particular purpose would not render it immune to taxation. This proposition was unequivocally laid down by O'Byrne J. in delivering the decision of the Supreme Court in Export Live Stock (Insurance) Board .v. Carroll 1951 I.R. 286 and in particular at page 297 where he summarised the position as follows:

> "Where a person, or a statutory body, carries on a trade and, in the course of that trading, makes an income in excess of expenditure, I am of opinion that, after making all necessary and proper allowances, such excess should prima facie be regarded as the profits or gains arising from that business, and I am further of opinion that the statutory dedication of that excess to a specific

purpose is not sufficient to deprive it of this character, unless the statute, by express enactment, or necessary intendment, relieves it from liability to tax".

Again at page 300 he reiterates the position as follows:-

"In the present case the Board is carrying on activities so similar to those of an ordinary insurance company as to be almost indistinguishable. It has been found that these activities constitute a trade and that the Board is carrying on such trade. This finding has not been, and, in my opinion, could not be, questioned. In the carrying on of that trade there has been an excess of income over expenditure. Prima facie, that excess constitutes the profits or gains arising from the trade".

The Appellant did not in any way seek to challenge that clear and authoritative ruling of the Supreme Court.

The finding in the present case by the Appeal Commissioners to the effect that the activities of the Appellant constitute something "analogous to a trade" depended partly upon the facts - in respect of which there is no dispute - and also upon the application to those facts of certain decided cases and in particular the unreported decision given by the late Circuit Court Judge McCarthy on the 1st June 1949 on the very point in issue. Having analysed the powers and functions of the Board as set out in the 1945 Act the Learned Circuit Court Judge (at page 6 of the transcript of his Judgment) concluded as follows:-

"It is of course correct to say that the levies are conferred by statute and that the right to them exists without anything done by the Racing Board to confer a right to recover them but I cannot accept the contention that the annual revenue from the levy is not the fruit of any taxable activity. I am satisfied that the receipt of this annual revenue is in connection with an undertaking with which the subject of profit could be thought of. I am clearly of opinion that the monies received from the levies and totalizator are annual profits or gains".

Prior to the 1949 decision it appears that two lines of authority had evolved in this country and in the United Kingdom in relation to the nature of the activities of local authorities. In Severn Fishery Board .v. O'May 1919 2 K.B. 484 the Fishery Board had power to issue licences for fishing and to impose fines for breach of regulations made for the conservation of the river under their control. It was held that these activities did not constitute a trade or "something analogus to a trade" and that the surplus of receipts over expenditure did not constitute taxable profits. Whilst The House of Lords cast serious doubts upon the correctness on that decision in the Commissioners of Inland Revenue .v. Forth Conservancy Board 1931 A.C. 540 it was expressly followed in this country by Maguire J. in Moville District Board of Conservators .v. Uaclothasaigh, I.T.C. 1. Whilst the Supreme Court upheld the decision of Maguire J. they did not find it necessary to resolve the apparent conflict between the authorities.

In the Severn Fishery case Rowlatt J. held that the activity of collecting fines and fishery licence fees was not taxable. Having analysed the activities of the Board he concluded (at page 206 of the report):-

> "There is no analogy with any property or source of income taxed by the Income Tax Acts expressly; I do not think that there is any analogy to a trade, manufacture, adventure or concern in the nature of a trade, which is also mentioned in the Income Tax Acts. Under these circumstances I do not think this emergent balance is a profit at all ---".

Similarly, in the Moville D.B.C. case it was held in the High Court that the surplus income of that Board which was derived from (1) fishery rates (2) licences issued to fishermen and (3) fines (as well as a small amount of bank interest), was not liable to tax as the actitivies of the Board did not consitute,nor were they analogous to,a trade. The Supreme Court upheld that decision on the simple grounds which may be summarized in the following sentence taken from the judgment of Murnaghan J. (at page 9):-

> "The Board of conservators is a rating authority and if it collects more money in rates than is required, upon faulty estimation, the surplus remaining is not profits or gains liable to income tax".

In the <u>British Broadcasting Corporation .v. Johns</u> 41 T.C. 471 the Court of Appeal held that the surplus income representing the amount by which the grants paid in any given year by the Postmaster General to the Corporation exceeded the expenditure of the Corporation in that year did not constitute

taxable profit of the B.B.C. essentially for the reason that the Postmaster General was himself entitled to that surplus and that it was not a profit of the Corporation.

The case on which the Respondent relied most heavily was the decision of the House of Lords in the Forth Conservancy Board case. The Respondent Board in that case had been constituted by statute to carry out the duties of conservators and were empowered to levy dues in respect of vessels, goods and passengers coming within its jurisdiction. It was required to apply its revenue in maintaining its undertaking, in meeting interest and sinking fund charges and in maintaining a reserve fund. No part of the dues levied could be employed for any purpose other than the statutory purposes of the Board and no individual was entitled to make a personal profit out of any of the monies received by it. Nevertheless it was held, though as Viscount Dunedin made plain, with the greatest reluctance, that the Board was liable to tax on its surplus income. Again, it seems to me that the essence of the decision of the House of Lords is to be found in a single paragraph from the speech of Lord Warrington of Clyffe (at page 122) as follows:-

> "In the present case the Board is collecting dues and tolls from persons using the river, but those persons are in no sense their constitutents, as are the ratepayers in the case of a local body. The profits here are those of the Board itself arising from an undertaking analogous to a trade and, as I have already pointed out, the fact that the application of those profits is regulated and limited by the Order

cannot on the authorities, prevent those profits from being taxable".

It seems to me that there is not necessarily a conflict between the decision of the Supreme Court in the Moville case and that of the House of Lords in the Forth Conservancy Board case. What the Supreme Court made abundantly clear was that rates as such imposed by a rating authority are not liable to tax whereas the House of Lords was deciding that dues and tolls collected from persons who were enjoying the services in respect of which the tolls and dues were imposed were taxable as constituting a trade or something analogous to a trade even though the service was a public service which was monopolistic in character and provided in accordance with express statutory requirements. In my view this is a valid and correct distinction. I see no basis on which the fruits of pure taxation, whether local or national, could be taxed as constituting something analogus to a trading activity. (Indeed the ultimate absurdity would be the imposition on the Revenue Commissioners of tax on the tax raised by them annually or even any surplus which remained after expenditure in any year). On the other hand there is no reason why a public body should be exempt from taxation on moneys received by them for services which they provide whatever the reason for providing those services or on whatever basis the cost may be calculated or imposed.

In these circumstances it seems to me that the question which falls to be answered in the present case is whether in collecting the levies from the licensed bookmakers the Board is exercising a franchise or function delegated to it by the State

to raise tax or whether it is charging for services which it is required to provide. In my view the scheme of the Act as set out in the preamble and in the specific provisions thereof is to enable the Board to raise funds by imposing what is properly described as "a levy" on licensed bookmakers, to whom it provides directly no service,and to use the moneys so raised "for the improvement and development of horse breeding and horse racing" generally. No doubt the achievement of that purpose would benefit bookmakers but only indirectly and perhaps in the sense that taxation generally, hopefully, benefits all taxpayers to a greater or lesser extent. Obviously, the improvement and development of horse breeding is a desirable ambition which the Oireachtas was anxious to achieve. Perhaps it might have been attempted by the direct intervention of a Department of State using moneys derived from the Exchequer. Perhaps the taxation derived from the duty on bets imposed by section 24 of the Finance Act 1926 or some part thereof might have been used in that way. Instead the Oireachtas determined by the 1945 Act to establish a Board presumably comprising persons possessing the appropriate expertise to achieve this national goal and in doing so gave to that Board the right to raise a particular form of levy or taxation on specified persons up to a specified maximum percentage to enable them to effect this purpose. I cannot see why that activity delegated to the Racing Board should be anymore a trade or something analogous to a trade in the hands or under the control of the Board than it would have been had it been undertaken directly by the Government through a Department of State. That is not to say that a scheme might

not have devised under which the Racing Board would have been empowered to carry on a business - as indeed it was in relation to the totalizator - and given particular advantages such as a monopoly which would enable it to generate profits and in that way achieve its purpose. That scheme of things would result in taxation but the delegation of the taxation function in my view would not.

In my view the surplus income in the hands of the Racing Board derived from the on course betting levy is not liable to taxation and the question raised by the Appeal Commissioner must be answered accordingly.

A number of other issues were canvassed before me. It was contended that the assessment on the Racing Board describing the taxable income of the Board as "racing profits" was incorrect. Again, it was argued that the assessment under Case I of Schedule D was erroneous and that the error could not be remedied, as the Appeal Commissioners purported to do, under section 537 of the Income Tax Act 1967. Moreover, there was a very serious disagreement between the parties as to the stage which had been reached in the argument when the Appeal Commissioners purported to give their judgment. In turn these various arguments gave rise to debate as to how far and by what means the Case Stated could be rectified. Having regard to the view which I take on the main issue it is not necessary for me to express any view on these vexed problems. I would content myself with repeating what I have said in a number of occasions before, namely, that it is extraordinarily difficult to devise any means by which a Case Stated can be prepared which will record to the satisfaction of all parties the facts admitted or determined and identify the particular question of law on which the opinion of the Appellate Tribunal is sought.

Richard D. Walsh
9/5/89