TC02994

Appeal number: TC/2011/07964

VAT – analysis of the facts and on those facts finding there was no taxable supply and no consideration – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VICTORANGLE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE LADY JUDITH MITTING
DEREK ROBERTSON

Sitting in Manchester on 3 and 14 October 2013

Nigel Gibbon, Counsel for the Appellant

Kim Tilling, Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant appeals against two decisions of the Respondents. The first decision was to refuse to accept a Voluntary Disclosure claiming a refund of VAT in the sum of £85,095.12 for the period 1 November 2008 to 30 June 2010. This decision was notified in a review letter dated 12 September 2011. The claim had been made on the basis that the company had, in error, continued to pay over VAT in respect of betting proceeds which had been paid into the company bank account. The refusal was on the grounds that there had been a supply and consideration and thus a taxable supply and output tax had therefore been returned correctly. The second decision under appeal was the refusal of the Respondents to accept the Appellant's application for deregistration dated 18 November 2010. This decision was notified by letter dated 25 May 2011 and the refusal was on the grounds that the Appellant was still making taxable supplies and was therefore correctly registered.

2. We heard oral evidence on behalf of the Appellant from its sole director, Mr Jeffrey Laughton and a Mr Reginald Blandford. The Respondents called no oral evidence but we had before us the unchallenged witness statement of the decision-making officer, Ms Jacqui Quirke. In respect of Mr Blandford, Mrs Tilling informed us of certain episodes in Mr Blandford's recent past, in the light of which she cast doubt on his credibility and urged us to treat his evidence with caution. We should record at this stage that we have considered his evidence against this background but found no reason to doubt the accuracy of his evidence to us or his honesty and credibility in giving that evidence.

3. As we have said, Mr Laughton is the sole director of the Appellant. He is its only controlling mind and decision-maker and all decisions made by the company are in fact his and all actions of the company are equally dictated by him. Throughout this decision we have therefore referred to the actions and decisions of the company as those of Mr Laughton but this is not to overlook the fact that it is the limited company which is the registered entity and the Appellant.

4. The Appellant was originally registered for VAT with effect from 1 August 1996, the nature of the business being described as "racing tipster". The company deregistered with effect from 31 March 2007 and a partnership of the Appellant and BigWigs Entertainment was registered with effect from 1 April 2007. The business activities were described as "racing tipster and entertainment agency". The partnership deregistered with effect from 31 December 2009 on the basis that it had ceased to trade. The Appellant registered again in its own right with effect from 1 December 2008, the business activity being described as "racing tipster" and categorised as "gambling and betting". Throughout this entire period it was Mr Laughton who operated the betting side and his then wife, the entertainment agency.

Evidence on behalf of the Appellant

5. Mr Laughton told us that he was a professional gambler and makes his living from betting on horse races. He has been involved in horse racing for over 30 years.

In around 1997-98 he set up in business as a horse racing tipster. This entailed setting up a premium rate telephone line via BT and he ran advertisements in order to entice callers. Each morning he recorded on the line for about 5 minutes giving some 4-6 tips. The caller would dial the relevant number, hear the information and use it for his own means. The caller would be charged £1 per minute in those days and BT would pay Mr Laughton a percentage of the call. This business turned over a reasonable income to the extent that the company became registerable for VAT in 1996. In about 2000-01, the marketplace was swamped with people doing much the same thing and Mr Laughton decided to change direction and developed a rather different method of operation. This involved direct mailing to prospective clients inviting them to pay him a monthly fee in return for which they received a local cost telephone number and a personalised code. The member client would then dial the local cost number, insert their code and listen to a pre-recorded message. This message would contain some 4-6 tips. In the first of these two enterprises, the company's sole income was the percentage received from BT. In the second enterprise, the company's sole income was the monthly subscriptions paid by clients. The company did not receive any more money if the tips won or indeed pay out if any or all of the tips lost. All monies on both services were fully accounted for and VAT duly paid on all income.

6. In around 2004, Mr Laughton found that his earnings on this private service were beginning to fall and yet his tipping was seemingly ever more successful. Mr Laughton at this stage decided he would bet more with his own money. He had accounts with virtually every bookmaker but such was his success, the bookmakers initially started to restrict the amount of money he could place with them and eventually closed his accounts altogether. The closure of his accounts was evidenced by letters dated 15 July 2008 from William Hill and 9 August 2008 from Paddy Power. Mrs Tilling pointed out that these letters merely recorded the fact that both companies had decided to close Mr Laughton's accounts but did not support Mr Laughton's contention that the closure was down to his success. We do not believe this to be in any way material. First, we have no reason to doubt Mr Laughton's evidence and we accept that he was being truthful when he told us that the closure was down to his success. Secondly, and in any event, the reason does not matter. What is material to Mr Laughton's case is that he could no longer place his own personal bets.

7. In approximately 2004-05, Mr Laughton hit upon the idea of getting other people to place bets on his behalf. Throughout the hearing, these people were referred to in various terms. The Appellant to them as "agents". Mrs Tilling referred to them as "clients". Throughout this decision we will adopt the neutral phrase of "punters". Mr Laughton used a number of methods to approach prospective punters. Initially he wrote directly to personal contacts and people who were already on the company's database or mailing list. He advertised in publications such as the Racing Post and he wrote directly to people who might be interested or who had expressed an interest.

8. Central to the issue before the Tribunal is just how the business operated. Mr Laughton's simple idea was that he would at all times provide the stake; the punter would place the bet and would then account to the company for any winnings. No other moneys would change hands either way. To attract punters, Mr Laughton

clearly had to make them see that there was something in it for them, and what was in it for them was quite simply the opportunity to back, themselves, the horses which Mr Laughton was backing. It was therefore central to Mr Laughton's business case that he had to make himself look as attractive as possible to prospective punters. This was done through the terms of the mail shots and advertisements.

9. The letters were all in similar format, beginning with setting out the successes which Mr Laughton had had. They all then went on to set out what Mr Laughton was asking for. A letter dated 18 March 2004 included the following:

> "Therefore, I am going to need your help. Ideally I need people who can place bets with only two hours notice and as I have dealt with you before I know that should not be difficult for you.
>
> The main bets I will require your assistance with will be my own horses or those from my trainers. I would expect a maximum of 25 to 40 bets in total this year.
>
> I would absolutely insist on your total confidentiality and would cease our arrangement forthwith should it transpire you are divulging information regarding my horses to a third party.
>
> For this kind of information I expect total honesty and prompt payment and would require you to place £75 on each of these horses on my behalf. Obviously all losers are deductable from any winnings you send me as I stand the cost of any losers so you have none of the risk.
>
> Although I will be having runners fairly imminently I am expecting the first bet in the next 2 weeks.
>
> If you think we can help each other, contact me as soon as possible. I am looking for people in different parts of the country, so as not to wreck the price, and who have no trouble placing bets at short notice.
>
> I will not be contacting you often, but when I do, it will mean I am having several thousand pounds of my own money on and you will be able to back with confidence, which in the present climate is something of a rarity.
>
> I don't believe that anyone who owns the quality and quantity of horses that I do, has made this type of information available before, so make sure you benefit from it by calling me on the above number.
>
> Kind regards
>
> Jeff Laughton"

A letter dated 6 May 2008 read similarly:

> "However as you know bookmakers do not like winning clients, and over the past 5 years I have had 16 accounts closed.

Over the last few years in order to combat this I have had a limited number of people who are prepared to place bets on my behalf with the guarantee that it won't cost them a penny should the horse get beaten as I stand all the losses. This has normally been restricted to no more than 30 people but recently 8 of my clients have syndicated two 2 year olds with me for this flat season. This has now left me in an awkward situation.

Consequently I am looking for a small number of new clients, who, with the strength of information I receive **plus the quality of horses which I own** is proving to be my most successful time ever.

The information I get is usually very strong and not the kind of thing you would normally see advertised in the sporting press. **It is as near first hand as you are likely to get without owning horses yourself.**

Unlike other similar services, I do not charge you a joining fee. Once I have your money, it then wouldn't matter whether I gave you any winners or not. I operate on the basis that you would place £75.00 on my bet, which means I only get paid on results. Knowing that I stand the cost of all the losers gives you added security in that it won't cost you a penny."

A letter dated 30 June 2010 contained the following:

"I will however need your guarantee that you will place £50 for on the horse on my behalf at the requested price and send the win part of the bet within 48 hours (i.e. if the horse wins at 5/1 you must send £250). Any bets you place for me are on a deductable basis as I always stand all the losses."

A letter dated 23 July 2010 contained the following:

"I am looking for people in various parts of the British Isles who, at this stage, can place money fairly easily. It needs to be moved quietly without arousing suspicion and causing prices to disappear quickly.

You will need to place £100 on each horse on my behalf plus whatever you want for yourself. But this is not a one way street where only I can win because should the horse get beaten, which will obviously happen on occasions, then you get your money back because you will take your £100 back from the next winner. You will only pay me out of your profit and I will stand the losses. Therefore you will receive highly sensitive information for nothing.

Very few people would ever offer this service as they would not be able to sustain a profit situation and therefore make no money from you.

However, I am more than happy to allow my results to do the talking.

If you wish to be involved for what undoubtedly is and will be another superb year, please contact my office to confirm this. You will need to provide a landline number where I can contact you and a mobile if possible."

10. That Mr Laughton ran his operation, through the company, as a business was beyond doubt, and indeed not disputed by Mr Gibbon. The operation was highly organised and effective. It operated from its own premises, employing its own telesales staff. It maintained a full set of business records and employed its own bookkeeper. It maintained a database and placed effective adverts and mail shots.

11. Mr Laughton went through in some detail what actually took place on a racing day. The company had some 40 punters which it used. Mr Laughton would begin the day by selecting those horses which he wished to place a bet on and identifying the bookmakers who were offering the best price. He and his staff would then make a series of phone calls to a selected number of his punters who were asked if they would be able to place a bet for him that day. Inevitably some didn't pick up the call and some were unable to place the bets as asked. They were told nothing and no information was passed to them. Of those who were willing to place the bets that day, they would be told the name of the horse and they would also be told which bookmaker to use and the odds being offered by that bookmaker. The amount of the stake would vary from punter to punter. When an individual punter entered into a relationship with Mr Laughton, the amount of the stake which that punter would put on was one of the terms agreed. Each punter would therefore come away from the race day telephone call knowing the name of the horse, the odds he was to obtain and the amount he was to place. Mr Laughton would not then expect to hear anything further from the punter until after the race. If his horse had won, Mr Laughton would know the amount of the stake which that punter had put on and the odds which would have been offered to the punter. He would therefore calculate precisely what the winnings would be and he would phone the punter to confirm that that was what he was expecting the punter to account to him for. If the horse lost there would be no post-race phone call.

12. The timing of the arrangement and the placing of the bets inevitably meant that the punter would pay the stake which he was placing out of his own money. If the horse won, the punter would recoup his stake and keep it and would account to Mr Laughton for the winnings. If the horse lost, Mr Laughton would account to the punter for the lost stake. The punter was therefore never out of pocket or in profit. When a punter and Mr Laughton began a relationship, the financial arrangements were tight and Mr Laughton would account to the punter regularly for any lost stake and the punter would account after each race to Mr Laughton for the winnings. As the relationship developed and as trust grew between the parties, there was more latitude in the financial arrangements. The punter, instead of accounting after each race to Mr Laughton, would retain the winnings and he would pay future stakes, rather than out of his own money, out of the accumulated winnings. Periodically there would then be a balancing and the punter would account to Mr Laughton for the accumulated winnings, net of all stakes or if there had been a run of losses, Mr Laughton would account to the punter for his lost stakes. It did occasionally happen that the odds being offered had altered in the time between Mr Laughton giving his instructions to the punter and the punter carrying them out, in which event the winnings would be rather more or rather less than had originally been anticipated. Mr Laughton's evidence to us, which we accept, was that in such an event the amount he received

was the amount of the winnings, whatever they may be. He strongly refuted Mrs Tilling's suggestion that in such an event the punter was bound to pay Mr Laughton the amount calculated at the time of the instruction. Mr Laughton expected and did receive the exact amount of the winnings which his stake had earned. Mr Laughton was not in any way concerned with any additional bet which the punter might place for himself. Mr Laughton would never know whether any such bet had been placed and if so in what sum. It was quite simply of no interest to him. His only concern was to receive the winnings on the bets which he had placed through the punter.

13. Mr Blandford was one of Mr Laughton's punters. He had seen one of the advertisements in the Racing Post in approximately 2010. He had called the number given and spoken at length to Mr Laughton and an agreement was reached between them. Mr Blandford agreed that, on request, he would place a bet on a given horse on behalf of Mr Laughton at an agreed stake of £100, all winnings to be paid over to Mr Laughton. He placed an average of two bets per week, the arrangement being that he would retain the winnings until Mr Laughton requested they be paid over to him. There were times when unsuccessful bets had been placed and Mr Laughton owed Mr Blandford for the lost stakes but they each kept an ongoing account and always knew precisely where each stood. After about a year, Mr Laughton asked if Mr Blandford would increase the stakes to £500 which Mr Blandford agreed to.

14. Mr Blandford had always bet on horses but normally unsuccessfully. He readily volunteered that the sole reason he entered into this arrangement was so that he could bet on the same horses as Mr Laughton, hopefully with rather more success. He didn't always place his own bets but when he did they were totally separate from those of Mr Laughton and Mr Laughton would have no knowledge of any such bet.

The law

15. Section 4(1) VAT Act 1994 provides that:

> "VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course of furtherance of any business carried on by him."

Section 5(2) provides that:

> "(a) "Supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
>
> (b) Anything which is not a supply of goods but is done for a consideration … is a supply of services."

16. "Consideration" is not defined in the VAT Act and its meaning and scope has been the subject of a number of cases to which we were referred. What can be drawn from the cases was summarised by the Advocate General in paragraph 14 of his Opinion in the case of *TOLSMA v Inspecteur der omzetbelasting Leeuwarden* [1994] STC 509. There had to be a direct link between the service supplied and the consideration received. The link must be such that a relationship can be established

between the level of the benefits which the recipients obtain from the services provided and the amount of the consideration. The consideration must be capable of being expressed in money. It must be a subjective value since the taxable amount is a consideration actually received and not a value estimated according to objective criteria. Consequently a service for which no subjective consideration is received is not a service "for consideration".

The Respondents' submissions

17. It was the Respondents' case that throughout the period of the registration, the company had, albeit under a different guise, been continuing its original and previous business activity of supplying tipster information to its clients.

18. Mrs Tilling distinguished between what she saw as two totally separate transactions. First there was the agreement between Mr Laughton and his clients under which the clients were supplied with information and as a consequence of receiving that information clients placed a bet. Secondly there was a contractual arrangement between the client and bookmaker in which the Appellant had no part.

19. Mr Laughton and the client were in a legal relationship. Mr Laughton, in his phone call to the client, provided the client with information. In naming the horse to be backed he was providing the client with a tip. That was the supply to the client for which the client was to give Mr Laughton consideration. Two factors went into calculating the consideration for the supply – the agreed amount of the stake and the odds which Mr Laughton wished to be secured. At this point, submitted Mrs Tilling, the consideration is fixed and stipulated. In a successful bet, Mr Laughton would have provided the name of a horse and the client having placed the bet and collected the winnings would, in return, owe Mr Laughton, as consideration, the amount won. Mrs Tilling saw the consideration not as "winnings" as such because the money was only "winnings" in the hands of the client who had, with his own money, placed the bet. Once the client had collected or consumed the winnings, they merely represented the monetary payment due from the client to Mr Laughton.

20. Further, argued Mrs Tilling, this was not a one-off arrangement but an ongoing one. It was a continuous supply in that the transactions were multiple and ongoing, subject only to the client not reneging on the deal. If the client reneged that would be an end to the relationship and no further tips would be supplied to him. Otherwise it continued without break, the client retaining the winnings and then paying over the accumulated balance, net of further stakes, to Mr Laughton on request. The nature of the continuous supply was further demonstrated if the tipped horse lost. If there were for example three successive failures but the fourth horse won, Mrs Tilling submitted that the winnings on the fourth horse represented the consideration not only for that tip but for the three earlier failed ones. Mrs Tilling described the consideration as "the continuous winnings". In summary, she saw a direct link between the supply of the information and payment for that information. There was reciprocal performance when the client placed the based upon the information given and accounted to Mr Laughton.

The Appellant's submissions

21. Mr Gibbon contended that, contrary to that which is argued by the Respondents, the supply here is by the agent to the Appellant." The agent supplied the services of placing a bet on behalf of the Appellant and, on its behalf, collecting its winnings. The stake was always provided by Mr Laughton in that it was paid either out of accumulated winnings being held by the punter to Mr Laughton's account or, if paid out of the agent's own pocket, was reimbursed to him. Equally, the agent would collect or receive the winnings on behalf of Mr Laughton. He held them to Mr Laughton's account until they were handed over. Certainly the name of a horse was given to the agent but it had to be to enable the agent to place the bet and to perform his service. It was not given to the agent as a tip or a service to the agent.

22. A supply of services is effected "for consideration" only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. Here there is no agreement for reciprocal performance between the Appellant and the agent. The only agreement is for the agent to provide a service to the Appellant – that of placing a bet for and on its behalf. Mr Gibbon accepted that in receiving the information, the agent may well have received an advantage. Indeed it was accepted that he may well have been induced into supplying his services in the knowledge that the information he received would be valuable to him. This advantage obtained by the agent is however obtained in the course of his supplying the service to Mr Laughton and not in the course of a service from Mr Laughton to him.

Conclusions

23. The parties do not disagree over the law. The issue between them is one of interpretation of the facts. In effect, who supplied what to whom and in return for what? The Respondents contend that the Appellant is making the supply of tipster information to its clients, the punters, in return for a payment equivalent to the winnings. The Appellant's submission is that the punter, in his placing of bets on behalf of the Appellant and collecting and remitting its winnings, is performing a supply of services to the Appellant. The only oral evidence before us was that of Mr Laughton and Mr Blandford, both of which we accept in its entirety. In addition to the oral evidence we had certain documents which we have referred to above. Our task therefore is to carry out an analysis of the facts as brought out through the oral and documentary evidence.

24. We could find no evidence to contradict the oral evidence of Mr Laughton. We accept that he had abandoned his earlier business activities of providing tipster information and his current activity, the subject of the appeal before us, was that of gambling for himself, through his company. We accept that, for whatever reason, bookmakers had closed his accounts. He therefore had to bet through third parties. Hence his advertisements for punters to act on his behalf. We see nothing in the wording of the adverts or his letters that is inconsistent with this. All these documents merely stipulate and express beyond any doubt what Mr Laughton is expecting of the punter. It is made abundantly clear that all stakes will be provided by Mr Laughton;

the punter is to place the bet in his own name and collect the winnings. The winnings are to be remitted forthwith to Mr Laughton. If a punter were to renege on the arrangement, then that quite clearly, and justifiably, would be the end of the relationship. The punter ran no risks and would never be out of pocket because any losing stakes were refunded to him. It is quite immaterial that the punter might adopt the tip for his own purposes as well and the fact that this opportunity served as an inducement to the punter to enter into the relationship does not alter the nature of the relationship. Clearly Mr Laughton is providing information to his punter but he has to or the punter could not perform his service. The information which Mr Laughton provides is an integral part of the service to be provided by the punter.

25. It seems to us that the Respondents are reading into the facts an interpretation which is not borne out by them. This interpretation is also inherently illogical in two aspects. It was Mrs Tilling's contention that the consideration was fixed at the time of the initial race day telephone conversation. At that stage, she submitted, Mr Laughton provided his client with the name of the horse and fixed the amount of consideration for that information by specifying the odds which the punter was expected to obtain with their prearranged stake. This analysis would be logical, even if incorrect, if every horse was a winner but every horse was not a winner and Mrs Tilling went on to say that in the nature of the continuing supply, if out of four horses the first three lost then the winnings on the fourth would represent the consideration for the previous three as well as the fourth. In this analysis, what happens to the consideration which she maintained had been fixed in each of the first three phone conversations? This interpretation would mean that in fact the consideration was not fixed in the first phone call but if and when a horse won. In other words the punter would not know what he was paying for his tip when it was provided to him. The second difficulty in the Respondents' case is the value of the "consideration". Given the relatively high value of the stakes which were being placed, depending upon the odds, the winnings could be quite substantial. They could certainly run into hundreds of pounds, possibly thousands. As Mr Gibbon pointed out, it is just not sensible to suppose that a punter would pay that much money for a tip which is going to be nowhere near that amount of value to him. If Mr Blandford is typical of the average punter, his evidence was that he might place a bet but of a very small amount and sometimes he could not even afford to place one at all. No punter in his right mind is going to pay a substantial amount of money for a tip which he might well not even use.

26. For all these reasons, we reject the contentions of the Respondents that the Appellant Company was making a taxable supply of tipster information to its punters and that the winnings constituted some form of consideration for such a supply. We accept the evidence of Mr Laughton that he had long since ceased his tipster business and that he was merely using the punters to place bets for him. Any supply which there was, was from them to the Company. The appeal is allowed.

27. 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.

JUDGE LADY JUDITH MITTING
TRIBUNAL JUDGE

RELEASE DATE: 25 October 2013