



TC03044

Appeal number: TC/2011/00371

*BINGO DUTY – whether charges levied by operator of bingo clubs were
“bingo receipts” – deduction of a sum calculated to be in respect of
admission charges – s 19 of the Betting, Gaming and Duties Act 1981*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**THOMAS ESTATES LIMITED
t/a BEACON BINGO**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ROGER BERNER
PHILIP GILLET FCA**

Sitting in public at 45 Bedford Square, London WC1 on 4-5 November 2013

Tim Brown, instructed by Mazars LLP, for the Appellant

**Owain Thomas, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

1. The issue on this appeal is whether charges levied by the Appellant (which we shall refer to as “Beacon”) on bingo players at certain of its premises were properly accounted for by Beacon as bingo receipts within the scope of section 19 of the Betting and Gaming Duties Act 1981 (“BGDA”).

2. Bingo duty, which is an excise duty, is charged on the playing of bingo in the UK. The duty is computed as a percentage rate of a person’s bingo promotion profits for an accounting period. For the period relevant for this appeal (27 April 2009 to 27 June 2010) different rates of duty applied: for accounting periods (which are monthly) beginning on or after from 27 April 2009, the rate was 22%, and for accounting periods from 29 March 2010, the rate was 20% (see s 17 BGDA).

3. The question for this tribunal, therefore, is the extent of Beacon’s bingo promotion profits. Beacon says that certain sums it receives are admission charges for the right to enter its premises and hence outside the scope of bingo duty. HMRC contend that those amounts said to be admission charges were properly attributable to the playing of bingo, and were not admission charges. HMRC have raised an assessment on Beacon for under declared bingo duty in the sum of £541,413; it is against that assessment that Beacon now appeals.

Cosmo Leisure Limited

4. The assessment was notified to Beacon on 17 December 2010 and the appeal to the tribunal was made on 11 January 2011. The delay in this case coming to hearing can be explained by the fact that the proceedings were stood over pending determination of another appeal in this tribunal, namely *Cosmo Leisure Limited v Revenue and Customs Commissioners* [2012] UKFTT 733 (TC), which concerned a similar issue.

5. In *Cosmo*, the tribunal construed the relevant provisions of BGDA and found, on the facts of that case, that the admission charge in issue there was not an amount in respect of an entitlement or opportunity to participate in bingo.

6. Both Mr Brown and Mr Thomas invited us to compare and contrast the facts of this case with those in *Cosmo*. Mr Brown argued that this case was, in essence, on all fours with that of *Cosmo*. Mr Thomas, whilst putting as his primary argument that it was for this tribunal to determine this appeal according to its own facts and circumstances, highlighted what he submitted were crucial differences between the two.

7. In our view Mr Thomas’ primary submission is correct. *Cosmo* is a decision of this tribunal, and as such is not binding on us. It is a decision on its own facts. It does not, in our view, represent a benchmark against which other cases, which may give rise to similar issues for determination but which may have similar or different facts as the case may be, can properly be assessed. Each case must be considered in the

light of its own particular circumstances. We have derived no assistance from *Cosmo*, and we have not based our decision on any comparative analysis.

5 8. Furthermore, as we will describe, we have taken a different view from that adopted by the tribunal in *Cosmo* on certain aspects of the construction of the relevant provisions of BGDA.

The law

9. It is convenient, therefore, to start with the law. We have referred to s 17 BGDA, which is the charging section for bingo duty, and which provides for the measure of the duty to be related to the bingo promotion profits. That expression
10 means, according to s 17(3), the relevant person's bingo receipts minus the amount of his expenditure on bingo winnings. Bingo receipts are calculated in accordance with s 19, which provides:

15 “(1) A person has bingo receipts for an accounting period if payments fall due in the period in respect of an 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) –

20 (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,

...

25 (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 –

30 (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.”

35 10. Section 20C(5) elaborates on what is meant by an entitlement to participate in a game of bingo in s 19, amongst others:

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

11. Section 19, with the extended meaning provided by s 20C(5), must in our view be read as a whole. On its own, we can see force in the argument, which the tribunal in *Cosmo* accepted, that s 19(1) should be construed so that “in respect of” means “for”. In that case HMRC had argued, in a way that Mr Thomas did not repeat before us, that on the basis that the relevant amounts were not restricted to payments *for* playing bingo but included any payment in respect of an entitlement or opportunity to play bingo, admission charges were included in bingo receipts. The tribunal rejected that argument, and we consider they were right to do so, but we do not consider that they were right to do so on the footing that there should be a causal connection between the act of payment and the playing of bingo; which would be the consequence of construing “in respect of” as “for”.

12. In our view, s 19(1) should not be construed so as to require any causal connection. We consider that the words “in respect of” should be given their plain and unvarnished meaning, so as to require a relationship between the payment and the entitlement or opportunity to participate in bingo. That opportunity does not have to arise because of the payment; it may arise independently.

13. To apply a causal test in relation to s 19(1) would, in our view, fail to give proper effect to the circumstance envisaged by s 19(3)(e). It is clear from that provision that the draftsman had in mind both payments that could be identified as giving rise to the entitlement and payments that could not. Thus a payment, such as an admission charge, might not be regarded as having been made “for” the entitlement to play bingo, but would nevertheless, at least partly, be in respect of that entitlement along with something else, such as the right to be admitted and the right to enjoy the facilities of the club. If that were the case, then s 19(3)(e) would require an exercise to ascertain which part should be treated as attributable to the entitlement or opportunity to play bingo, and so would be bingo receipts. On the other hand, if the payment, whilst not itself for the entitlement or opportunity, is in respect of that entitlement or opportunity and cannot be regarded as in respect of something else, we see no reason why that should not fall within s 19(1).

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

(1) “Payments in respect of entitlement or opportunity to participate in bingo are construed as payments just for the playing of bingo” (*Cosmo*, para 42(4)).

In our view such an analysis fails to take account of s 19(3)(e), which expressly contemplates an attribution exercise in cases where a payment is not just for playing bingo, but is in respect of that and something else.

(2) “Section 19(3)(d) of the 1981 Act restricts bingo receipts to participation fees and stakes” (para 42(5)).

We do not consider that s 19(3)(d) has such an effect. It is merely clarifying that labels, such as fees for participation, and stakes, are not decisive. This cannot, in our view, be taken to have cut down the wording of s 19(1), having regard in particular to the fact that s 19(3)(e) can clearly encompass payments outside these descriptions.

(3) “Parliament ... chose to limit the scope of the tax to the money spent on cards for bingo, and the total amount spent playing mechanised cash and prize bingo (para 42(6)).

5 This finding was based, in part at least, on the tribunal’s review of the Government consultation, in 2002-2003, on the abolition of the bingo duty paid by bingo players and its replacement with a tax on bingo company profits, and the summary of responses published by the Government in April 2003. The tribunal considered itself able to refer to the extra-statutory material because it regarded it as arguable the legislation was ambiguous on the scope of bingo
10 receipts. We do not take the same view; in our judgment the statutory provisions are clear and unambiguous, and if the extra-statutory materials considered by the tribunal in *Cosmo* had been before us, we would not have derived any assistance from them.

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

20 16. Whilst we disagree with the tribunal in *Cosmo* on certain aspects, we agree with them in one important respect. In common with the tribunal, at para 27, we consider that the critical question in determining what the payment is in respect of is: what is the reality? That is the case whether one is considering s 19(1) or the proper attribution, under s 19(3)(e), of part of a composite payment.

25 **The facts**

17. There was little material dispute on the facts. We had a bundle of documents and received evidence from three witnesses: for Beacon, Nigel Davis, head of gaming machines at Casino Gaming Limited, and Christopher Crump, currently senior
30 internal audit officer at Praesepe Plc, who was group audit manager at Beacon for over 12 years; and for HMRC, Mrs Ruth Clough, a higher officer working in tax avoidance.

18. Despite some rather confusing evidence given by Mr Crump, which we were informed he had subsequently conceded had been mistaken, it was confirmed that the facts were applicable to each of the four clubs that were the subject of the assessment,
35 namely, Cricklewood, Loughborough, Brighton and Streatham. Two other clubs operated by Beacon, at Northampton and Lowestoft, operated differently, and are not within the assessment.

19. We find the following facts.

40 20. At the material time, Beacon was part of the Riva Gaming Group. It is in the business of operating bingo halls. The Group operated 13 such halls, six of which

were run by Beacon, including the four halls that are the subject of HMRC's assessment.

21. As there is accepted to be no material difference in relation to the four clubs in issue, the focus was on the Cricklewood club which, we understand, is the largest
5 bingo club in the UK, accommodating approximately 3,000 bingo players. Unless otherwise stated, our findings of fact relate directly to the Cricklewood club, but are equally applicable to the other clubs within the assessment.

22. The club operates as a members only club. Membership is free. To become a member it is necessary to complete an entry form, following which members are
10 issued with a swipe card. All customers who enter the club have to swipe their membership card prior to entry. Any non-members who wish to enter the club, for example as a guest of an existing member, also have to complete a membership form prior to entry.

23. The club's rules, or its terms and conditions, are displayed at the entrance to the club. The "Club Rules" make no reference to charges, and contain only the following
15 in relation to admission:

"8. Admission

Membership of the club does not entitle a member to admission to the club premises or any part of them being full, and admission shall
20 always be subject to such terms and conditions as the Proprietor shall from time to time determine."

We were shown the terms and conditions applicable from 10 February 2010. The only reference in those terms and conditions to charges is at para 3.3, under which it is
25 stated that "Beacon Bingo will determine the admission and such other charges to take part in gaming in accordance with the regulations within the Gaming Act 2005."

24. No charge for admission to the club is made at the entrance. There is at the entrance only a machine at which members swipe their cards in order to gain
30 entrance. Once members have swiped their cards they have access to the entire premises where, in addition to offering bingo, the club has approximately 200 gaming, amusement and SWP (slots with prizes) machines available.

25. Bingo games are organised into sessions. The Cricklewood club operates at least five bingo sessions per day. The doors to the club open at 10am, and the first
35 session (the lunchtime session) begins at 12 noon, finishing at 12.15 pm. The last session (the evening session), which is the longest, starts at 6 pm and finishes at 9.30 pm, and there is some flexibility as to the timing of the other sessions. The club closes at 1 am on Fridays, Saturdays and Sundays, and at 12 midnight on other days.

26. The games played during these sessions are termed "main session bingo". That is distinct from other types of bingo games available, including mechanised bingo and
40 prize bingo. Those games may be played at any time, and are not restricted to the bingo sessions.

27. The club does not simply offer bingo, but bingo in a social environment where members can take advantage of facilities and social opportunities. As well as the playing of bingo in its various forms we have mentioned, and the other gaming machines that can be played, the facilities of the club include a bar and a restaurant.

5 28. Within the foyer of the club, a short distance from the entrance, is the “book sales” desk. It is at that desk that members may pay to play the various bingo games on offer. A “charges to play” notice (which is to satisfy a regulatory requirement for a transparency notice) is displayed at this desk. That notice, which is headed
10 “Charges to Play”, sets out the charges, which vary according to whether it is a daytime or evening session, for each type of game. In relation to the charges for the games, the notice sets out both the costs per ticket and the maximum charge by the club. Thus, for main session bingo in the daytime session, the cost is expressed as 175p, and the maximum charge as 100p. The difference of 75p, as we understand it, effectively represents the prize fund.

15 29. The first item recorded in the charges notice, for each of the daytime and evening sessions, is Admission. For the daytime session this is set at 200p. As would be expected, that price is expressed both as the cost and the maximum charge. A note at the foot of the notice states: “Admission Charge is included in the Main Session Price”. The admission charge is set at the price of the first set of main session bingo
20 books. The difference between the stated 200p admission charge and the 175p cost of main session bingo is that the first main session bingo book is linked to something called a “link flyer”, for which there is an additional cost of 25p; a link flyer enables participation in a game linking a number of sites, which enables a greater prize fund to be generated.

25 30. The notice also includes a note stating: “All or part of the charges shown above may be waived at the discretion of the proprietor”. Beacon reserves the right to waive the admission fee.

30 31. Prior to 2005 the club charged an admission fee at the door. Between 2005 and 2008 the club operated without an admission charge. The reason for the change in admissions charging to that operated at the book sales desk was due to the high level of admissions, reducing staff levels, reducing the queuing required of members, and security.

35 32. In answer to a question raised by Mrs Clough in a letter to Beacon of 13 October 2009 as to whether any element of the admission charge was used to fund the cost of prizes, Beacon replied that, depending on the level of admissions and customer expectations as to the level of prize money to be offered, the manager may decide to support the prize board. They added that there was no direct correlation between the amount of added prize money and the admission charge. We had no evidence as to what the practice was in this regard. Mr Crump said that he was not aware of the
40 practice at all, but in view of his non-operative role, and his misunderstanding of the arrangements at certain of the clubs, we do not regard that as definitive. Whilst we can speculate that this must have been a common occurrence, given the fact that the maximum charge for admission equated to the whole of the cost of the first set of

main session books, we can make no finding in this respect. It is of no consequence, since, as we shall describe, the calculation of the admission charges is made by reference to the number of swipes of membership cards, and not by reference to the amount of the price for the first set of books that might be retained by Beacon.

5 33. Apart from the inclusion of the admission charge within the price for main
session bingo, there is no other charge for admission levied, whether directly or by
inclusion in any other price for playing bingo. Members who do not play main
session bingo are not charged. There is no requirement for members who enter the
club to buy books for main session bingo, or indeed to play any of the bingo games.
10 Members who arrive for the afternoon session can stay on afterwards to play on the
various entertainment machines or to use the refreshment facilities, and they are not
required to leave before the evening session begins. If, as happens on occasion,
Beacon offers promotions under which the first set of bingo books is supplied free, no
additional or separate admission charge is levied.

15 34. The element of receipts recorded by Beacon as “admission charge” is calculated
by reference to the total number of swipes of members’ cards recorded for each
playing session, up to 9pm. The total is recorded after the start of each session, and
the charge is calculated by multiplying the total number of swipes by the relevant fee
for that session. That amount is then deducted from the aggregate takings for all the
20 bingo games to arrive at a net figure for bingo receipts.

35. There was some dispute over the number of members who play main session
bingo. It had been asserted by Beacon in discussion with HMRC that 99.9% of
customers come to play bingo; this was said to have been from Beacon’s experience.
We had no evidence on which an accurate estimate could be reached. However, in
25 the absence of such evidence, we find that a not insignificant number of members
would enter the club and not pay for, or participate in main session bingo. We regard
the reference made by Beacon to 99.9% of its customers as simply a way of
describing, in unscientific terms, an impression that the vast majority of its customers
played bingo. But that says nothing of the percentage that plays main session bingo.
30 In our view, the layout of the club, its offer of other forms of bingo and prize
machines, and its leisure facilities, make it likely, in the absence of evidence that
would lead us to find to the contrary, that a not insignificant number of members
enjoy those facilities without playing main session bingo.

Discussion

35 36. As we have described in setting out our views on the law, the question is
whether the amounts claimed by Beacon to be admission charges are, in reality, not
admission charges as such, but are payments that are, or are properly attributable to,
entitlement or an opportunity to participate in a game of bingo.

40 37. Viewed in this way, the answer in this case is, in our view, straightforward. The
amounts calculated by Beacon to be admission charges are the product of a process
that is not based on reality. The reality is that no charge is made by Beacon for
members to enter the club. The reference to admission charges in the aptly named

“charges to play” notice cannot displace that fact. In reality there was no admission charge included in the price of the first book of main session bingo tickets; that price was for, or properly attributable to, the playing of that main session bingo. The method of calculating the amount to be deducted in arriving at bingo receipts had no realistic relationship with the charging structure.

38. Those members who played main session bingo cannot be regarded as paying a price for admission, when, by swiping their cards, they had already gained admission to the club. They were able to do everything in the club that did not require any purchase at the book sales desk; and the prices for bingo games other than main session bingo were not expressed to include any admission charge. In our view, therefore, taking a realistic view, the payment made by a member for the first book of tickets for main session bingo could not be for, or in respect of, anything other than the entitlement to participate in those main sessions of bingo. Viewed realistically, admission is free for the main session players, just as it is for all other members entering the club.

39. The allocation of the price of the first book of tickets for main session bingo was no more than an internal allocation by Beacon which did not reflect the substance of the payment, the reason it was made by the member, and what in reality the member received for the payment. The calculation of the admission price element of the overall bingo receipts, based as it was on the membership cards swiped up to 9pm, could not reflect any proper assessment of admission charges. Cards were swiped by all members. But not all members would play main session bingo, and there was no reliable evidence on the numbers of members who did. In our view, therefore, the figure for admission charges was wholly artificial and did not reflect the substance or reality of what took place, even on the most favourable analysis of Beacon’s charging structure.

40. In that connection Beacon has sought to justify the non-payment of an admission charge by those not playing main session bingo by reference to the fact that the club reserves the right to waive the admission price. But if that analysis were right, and payment of the admission price was in fact waived (we saw no evidence of such a waiver), it would clearly be wrong in principle for it to be effectively treated as having been charged, despite the waiver, by being counted in the numbers of swipes of the membership cards of those not playing main session bingo.

41. On that basis, we conclude that there is no realistic admission charge for any member, including those members who play main session bingo. In our judgment, there should be no deduction from the bingo receipts based on the result of applying a notional admissions charge to the number of membership cards swiped. The whole of the payments were in respect of entitlement or an opportunity to participate in a game of bingo, and are thus bingo receipts within s 19(1) BGDA. Beacon’s bingo promotion profits should therefore be calculated without any deduction in respect of admission charges.

42. Even if we had considered that the main session price could be treated as being both in respect of the playing of bingo and for admission, the proper application of s

19(3)(e) BGDA must in our view be to attribute the whole of the charge for the main session to an entitlement or opportunity to participate in a game of bingo. In the absence of a realistic admission charge applicable to all, we regard the inclusion of such a charge within that for playing main session bingo as an artificial construct, as artificial as the calculation based on the swiping of members' cards, including those who on any analysis, by virtue of having not played main session bingo, have not paid anything described as an admissions charge.

43. It was accepted by HMRC for the purposes of this appeal, and we agree, that admission charges do not fall within the scope of bingo duty provided that they are in reality admission charges. In this case, as we have found, the reality is very different.

Decision

44. For the reasons we have given, we dismiss this appeal.

Application for permission to appeal

45. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ROGER BERNER
TRIBUNAL JUDGE**

RELEASE DATE: 14 November 2013