



TC04690

Appeal number: TC/2013/7359

VAT – single or multiple supply – whether dabber/marker pens supplied by bingo hall owner and used to mark paper bingo books integral part of exempt supply of bingo- no – separate supply of goods – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CAVENBRIDGE LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE DEMACK
 RICHARD CROSLAND (Member)**

Sitting in public at Manchester on 4 August 2014

**Timothy Brown of counsel instructed by Lane Accountancy Services for the
Appellant**

Ms Susan Ellwood, an officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Cavenbridge Ltd (“Cavenbridge”), an owner and operator of bingo halls, against a decision on review of HMRC that its supplies of dabber/marker pens used by customers to mark their paper bingo tickets were separate from its supplies of facilities to play bingo. (Dabbers are felt-tipped pens with a circular felt tip designed to enable the user to “dab”, ie place over (as opposed to striking or making a mark) a number on a bingo ticket, the ink used being designed to ensure that although the number has been marked, it remains transparent and thus legible).
2. Cavenbridge claims the supplies concerned constituted part of a single exempt supply of the provision of facilities to play bingo.
3. In the decision appealed, HMRC rejected Cavenbridge’s claim to have overdeclared output tax of £8,434.77 on supplies of main stage bingo (“MSB”).
4. In order to put the facts into context, we find it helpful at this stage to set out the Oxford English Reference Dictionary of bingo, ie main stage bingo: “a game for any number of players, each having a card or squares with numbers [between 1 and 90], which are marked off [by the player] as numbers are randomly drawn by a caller, the winner being the player first covering all or a [prescribed] set of these. The game is presided over by the caller who calls out the numbers drawn and validates winning cards.”
5. HMRC’s decision followed a “*Fleming* claim” by Cavenbridge accepted by HMRC to the extent of £246,875 plus interest. The claim covered the period 9 February 1987 to 4 December 1996.
6. “*Fleming* claims” were established as a result of the decision of the House of Lords in *Fleming (t/a Bodycraft) v CEC* and *CEC v Conde Naste Publications Ltd* [2008] STC 324. Those cases, usually referred to solely by reference to the former, established that until an adequate transitional period was specified in the VAT legislation, the time limit for making claims of underpaid input tax was to be disapplied in the case of all input tax claims that had accrued before its introduction. Following the *Fleming* case, HMRC accepted that the time limit did not apply to input tax in respect of which the entitlement to deduct arose in accounting periods ending before 1 May 1997, and that the terms of the judgment also applied to claims to recover VAT overpaid or overdeclared in accounting periods ending before 4 December 1996. Legislation was enacted to reflect that situation.
7. Cavenbridge appealed on three grounds, namely that dabber/marker pens were “effectively a single exempt supply when grouped with the predominant exempt supply of bingo”; that “fiscal neutrality requires VAT treatment parity between the various ways to mark a bingo game (ie pen on paper, plastic marker on table top bingo, electronic indication via PET machine technology, etc.”; and that HMRC should have accepted that “the dabber/marker adjustment [to the *Fleming* calculation] could and should have been agreed by HMRC without troubling the FTT and

unnecessarily taxing the resources of both appellant and Treasury”. As the last of those claims was not pursued before us, we may ignore it.

5 8. Cavenbridge was represented by Mr Timothy Brown of counsel, and HMRC by Ms Susan Ellwood, one of their officers. They presented us with an agreed bundle of copy documents.

9. Mr Mark Armstrong, a club manager employed by Cavenbridge, provided a detailed witness statement with exhibits and gave oral evidence. Mr Neil Lofthouse, the officer of HMRC who rejected the company’s claim, also gave evidence.

10 10. The facts we go on to find, unless otherwise stated, apply to both the time to which the claim relates (VAT quarters 05/1987 to 10/1996) through to the present day.

11. We find that:

i) Cavenbridge operates a number of bingo halls in the Merseyside area operating under the style of the Carlton Bingo and Social Club.

15 ii) As is the industry norm, it provides both mechanised cash bingo (“MCB”) and MSB, both classes dividing into games solely played between “in-house” members and link games including the wider membership of participating clubs. Link games are presently provided by Meeron Ltd. Cavenbridge also participated in “the National Bingo Game” for a number
20 of years. (As we understand it, MCB is played on an 80-number plastic bingo board built into a table top. Each board contains 16 numbers split into four vertical columns, each column being a different colour. The board has a small window for each number which the player covers with a sliding shutter as the number is called. A customer wishing to participate
25 in an MCB game inserts a set charge per game into a slot in-built into the station. The MCB shutters on the electronic stations are provided as part of the slot fee. When a player has a winning combination of numbers, he or she presses a claim button to stop the game. It follows that MCB differs substantially from MSB, and dabber/marker pens play no part in it).

30 iii) All Cavenbridge’s clubs operate two separate daily bingo “sessions” one in the afternoon and another in the evening. Each session consists of:

35 Early session MSB;
Interval MCB;
First half MSB;
Second interval MCB
Second half MSB

iv) In order to take part in a bingo session, and use any of Cavenbridge’s facilities, an individual must, unless signed in as a guest of a member;

40 a) be over 18 years of age;

- b) have completed an application form for club membership;
 - c) have been made a club member;
 - d) hold a membership card; and
 - e) present the membership card at the entrance foyer on each visit to club premises to gain admission; and
 - f) act in accordance with Cavenbridge’s “rules of play”. Those rules are clearly displayed at each bingo hall. They require members to “mark their cards in such a way that the numbers are sufficiently legible to be checked beyond dispute.”
- 10 Historically, members also paid a small admission charge to use club facilities, but such charge was discontinued in 2010.
- v) Whilst members are free to use all club facilities most of them join a club mainly to take part in bingo sessions.
 - vi) Players participate in MSB games either by using tickets in multi-coloured specially manufactured paper books or portable hand-held electronic terminals (“PETs”) to mark off called numbers.
 - vii) On entering a club, a member buys the MSB bingo books or PETs he or she needs by paying the “all-in session charges” levied per Cavenbridge’s tariffs displayed at the main bingo counter. Such charges do not include the supply of a marker of any sort for use with a book of paper bingo tickets.
 - viii) Players mark off called numbers:
 - In the case of paper bingo tickets by way of a pen, pencil, bingo dabber/marker pen, or any other means the player chooses to mark numbers without obliterating them
 - Where a PET is used, by depressing numbers on an electronic key pad built into the equipment. Cavenbridge claims the depression process is quickened, and machine wear and tear minimised, by the use of specially designed PET “pens” which are pad tipped to avoid damage to the instrument when its numbers are depressed. PET pens are included in the all-in session charges, and remain the property of Cavenbridge, being returned to the company with the PET at the end of each session.
 - ix) On the introduction of the PET facility in 2007, Cavenbridge provided PET pens as included in the exempt all-in charge. That situation prevailed until relatively recently when it introduced a 5p separate charge which it has since increased to 10p.

- x) Cavenbridge has historically sold bingo dabber and marker pens over club buffet counters, which are separate from the main bingo counters and from which it serves refreshments. It has included monies raised from pen sales in buffet takings subjected to VAT.
- 5 xi) Cavenbridge claims that typically a player will have tickets covering all 90 ticket numbers (15 per ticket), so he or she will be marking six tickets each game. The player will have a few seconds after a number is called to identify it on one or more of the tickets being played and to mark it off on the ticket(s) on which it appears.
- 10 xii) As we said earlier, bingo ticket books are multi-coloured. Cavenbridge claims they are not well suited to their being marked by means of a single pen colour throughout a session. It maintains that more clarity, accuracy and speed in marking is obtained by using a pen colour best suited to page colour. It thus contends that members will typically use four or more
15 different coloured dabber/marker pens changing marking colour as considered appropriate. No evidence was adduced to support the claim and, in its absence, we do not accept the claim, at least in its entirety.
- xiii) Cavenbridge further claims it to be important that any pen used is specifically manufactured for marking bingo tickets, as amongst other
20 advantages it will ensure that the right balance between opacity and transparency is struck and that its rules of play are followed. It adds that dabber pens are particularly suited to players who prefer to cover the whole number on a ticket (say rather than encircle it), as they will consistently deliver a perfect filled circle of colour directly over the
25 number, showing it has been called but with the number fully visible below. The evidence adduced did not support that claim, and we do not accept it.
- xiv) The buffet counter at all Cavenbridge's premises is adjacent to the open plan seating area which runs from the buffet and flows through to the
30 main stage/main hall seating area. The buffet adjacent seating area and the main hall area it adjoins together make up the playing area for main stage/stage link sessions.
- xv) The dabber/marker pens are displayed for sale on display stands, the
35 stands being re-stocked as required. The display stands are located on the buffet counters alongside the buffet area seating.
- xvi) The display marketing is supported by small posters and/or price lists, again being prominently displayed close to the displays themselves.
- xvii) Cavenbridge also claims that the dabber/marker pens have a relatively
40 short life; they have a tendency to dry out and lose maximum effectiveness as a result of players leaving their caps off for long periods during and after game play. It further claims that a large number of

players discard dabber/marker pens and make a new purchase each session they attend, since they are readily available at modest cost. No evidence was adduced in support of either claim, and we accept neither of them.

5 xviii) There is nothing to prevent players bringing their own pens to the bingo halls. However, Cavenbridge claims that the vast majority of members use dabber/marker pens it supplies rather than bring their own. Again, in a total absence of evidence in support of the claim, we are not prepared to accept it.

10 12. Although we have rejected most of Cavenbridge's claims, since we have taken them into account in making our findings of fact, as a matter of courtesy we should record the reasons offered by Mr Armstrong in support of them:

15 (1) The dabber/marker pens supplied in house are "bingo optimised" and allow maximum enjoyment of their bingo. Members know that the pens are available for sale on the premises at extremely economic prices.

(2) "Bingo specific pens are required to best mark the paper tickets". They are only available through bingo specialist suppliers such as Edward Thompson Ltd.

20 (3) "Bingo optimised pens of the type Cavenbridge sells are not available in local or high street shops particularly so in relation to bingo dabbers, as the circular in-filled mark they make is not well suited to any other purpose except bingo, such that general retailers or stationers do not stock them as they have no market for them."

25 (4) Shops selling ordinary felt-tipped and marker pens situated near to bingo halls are not always open at hours convenient for purchase when measured against the opening /playing times of Cavenbridge's bingo halls, and in any event players cannot rely on them holding stocks to meet their requirements.

30 13. Item 1 of Group 4, Schedule 9 to the Value Added Tax Act 1994 exempts from VAT "The provision of any facilities for the placing of bets or for the playing of any games of chance for a prize." For many years HMRC did not accept that bingo fell within that exemption, but in the case of *HMRC v Rank Group plc* (Cases C-259/10 and 260/10) [2012] STC 23 the Court of Justice of the European Communities ("the ECJ") accepted that it did.

Submissions for HMRC

a) Separate supplies

35 14. Ms Ellwood accepts that the basic supplies of Cavenbridge qualify for exemption from VAT. However, she submits that it does not make a single supply including marker/dabber pens, but rather makes two separate supplies; an exempt supply of services (the playing of bingo) and a standard-rated supply of goods (the dabber/marker pens).

40 15. She observes that Cavenbridge charges for the two supplies entirely separately, indicating two distinct transactions. Furthermore HMRC understands that the

transactions are processed through different tills and that Cavenbridge issues two separate receipts. (We find those understandings as additional facts).

5 16. Cavenbridge does not advertise the charge to play bingo and the purchase of pens at a package price. It has provided no evidence to HMRC or to the tribunal to demonstrate that they are advertised as such.

10 17. The different components of the supplies are available entirely separately. Ms Elwood further notes that similarly no evidence has been provided to demonstrate that all or most customers playing bingo will purchase a dabber/marker pen each time they play bingo. Consequently, she submits that the purchase of a dabber/marker pen would appear to be optional, and not essential or compulsory to play bingo. No evidence has been provided to rebut the obvious fact that ordinary pens/pencils may be used to similar effect.

15 18. Whilst the supply of bingo services may contain an element of goods (the paper bingo tickets) Ms Ellwood further submits that there is no evidence to demonstrate that the pens are physically packaged with books of tickets; indeed they are not physically sold together. Furthermore, there is no reason to believe that Cavenbridge charges anything other than market prices for dabber/marker pens.

20 19. Customer perception of the transactions will necessarily be informed by the fact that there is no difference in purchasing a dabber/marker pen in the bingo hall as opposed to purchasing the same item elsewhere.

20. The elements are not integral to one overall supply on the basis that the purchase of one does not make purchase of the other compulsory.

25 21. Applying the principles established in the case of *Card Protection Plan*, Ms Ellwood notes that supplies should normally be distinct and independent wherever possible. (We shall shortly deal with those principles).

22. She submits that treating the two supplies as a single one is an artificial interpretation of the actual situation, and thus creates an artificial outcome to the treatment of the VAT liability of the supplies.

30 23. Ms Ellwood further contends that Parliament's intention was that only the participation fee be exempt, the purchase of a marker pen giving no right to play a game of bingo.

b) Fiscal Neutrality

35 20. The question laid down by the ECJ in the *Rank* case was whether differently taxed supplies are identical or similar from the point of view of a consumer, and whether they meet the same needs of the consumer. If they do, the ECJ decided that they should have the same VAT treatment.

24. Ms Ellwood observes that Cavenbridge's argument on the issue of fiscal neutrality relies upon the interpretation that the supply of dabber/marker pens on the one hand

are identical or similar to the supply of bingo on the other, either by use of PETs or use of shutters/counters when playing MCB. She submits that the supplies are not similar; in one you receive a dabber or marker (goods) in which there is a transfer of the ownership of the item whereas in the other you receive the supply of the right to play bingo using shutters etc in which ownership of the items used does not transfer.

25. She suggests that a typical consumer, from whose perspective the position must be viewed, would not consider the supplies in point to be identical, or even similar. The supplies under consideration in the instant case are the dabber/marker pens. Supplies that may be similar to those would be other pens, and those supplies are taxable at the standard-rate.

26. Ms Ellwood therefore further submits that there can be no breach of fiscal neutrality since the basic requirement for considering fiscal neutrality is not met.

27. She submits that, in all the circumstances, the appeal should be dismissed.

Submissions for Cavenbridge

1) Is there a single or multiple supply?

28. Mr Brown submits that the dabber/marker pens are purpose-made items purchased from specialist suppliers, and are sold specifically to mark off called numbers. He observes that the test to be applied is to identify the essential feature or features of the transaction in question in order to ascertain whether there is a single supply or several distinct supplies ie:

(a) Where two or more elements or acts supplied by a taxable person are so closely linked that they form objectively a single indivisible economic supply which it would be artificial to split, *Levob Verzekeringen BV v Staatssecretaris van Financien*(Case C-41/04 [2006] STC 766 (at para 22-25); or

(b) Where one or more supplies constitutes a single supply and the other or others constitute ancillary supplies which do not constitute a means in themselves of better enjoying the principal supply (*Card Protection Plan* at para 30);

based on the economic and social reality from the point of view of the recipient of the services (*Dr Beynon and partners v CCE* [2005] STC 55 at para 31).

28. Mr Brown maintains that HMRC, in the form of Mr Lofthouse, applied the wrong test in saying that there were two separate supplies, thus preventing the one being ancillary to the other. Mr Brown submits that in Cavenbridge's customers who make a "separate purchase" (or in the words of the ECJ in *Levob* above a separate "act" of purchasing) of the dabber, there is nevertheless a single supply. His two arguments to support the submission are:

a) there is no doubt that the predominant element is the exempt supply of facilities to play bingo; the dabber is supplied as a means of better enjoying that service (the ancillary argument); alternatively

5 b) equally, without the means of marking off called numbers it is impossible for the bingo player to take any meaningful part in the game; the elements are therefore so closely linked that they form a single supply. It would be artificial to split them because the dabber is specifically manufactured and sold for the purpose of participating in bingo; the pens are specifically sold to players to play bingo.

2) The Fiscal Neutrality Argument

10 (a) The principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes so that those goods or supplies must be subject to a uniform rate. Whether two supplies which are taxed differently are similar is for the national court to decide in the light of the circumstances of the case, and in particular from the point of view of the average consumer (*Purple Parking Ltd and another v Revenue and Customs Commissioners* [2012] STC 1680).

15 (b) Such considerations include whether the use of those types of bingo games ie paper or electronic, is comparable from the point of view of the average consumer and meets the same needs of that consumer (Rank Group).

20 (c) Mr Brown submits that an average customer would see no difference in the supply of a means to mark off called numbers on any method of playing bingo, so that he invites the tribunal to hold that supplies of marker/dabber pens form part of a single supply of bingo.

25 (d) In *Card Protection Plan*, the ECJ observed that regard must first be had to all the circumstances in which the transaction takes place (para 28), and that a supply which consists of a single service (including goods – see *Kimberley Clark v CEC* [2004] STC 473) from the economic point of view should not be artificially split; the essential features of the transaction must be ascertained to determine whether the taxable person is supplying the typical customer with several distinct principal goods or with a single supply of goods

30 (e) The supplies of dabber/marker pens form part of a single supply of bingo services, so that the appeal should be allowed.

Conclusion

35 29. In *Card Protection Plan*, the ECJ decided that the indicators as to “whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately” include (a) that regard must first be had to all the circumstances in which the transaction takes place (para 28); (b) a supply which consists of a single service [and this must apply to goods as adopted in *Kimberley Clark*] from the economic point of view should not be artificially split but the essential features of the transaction must be ascertained to determine whether the taxable person is supplying the typical customer with several distinct principal services or with a single supply of services (para 29); (c) there is a single supply in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded as ancillary services (para30);
40 (d) a supply of services is ancillary to a principal supply of services if it does not

constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (para 30); a single price is not decisive but may suggest a single supply; but if the circumstances indicate that the customer intends to purchase two distinct services an apportionment should be made (para 31).

5 30. In *Dr Beynon and Partners*, where the question was whether the administration of drugs formed part of the prescription of them, Lord Hoffman said at [31], in relation to the test summarised at (b) above, “In my opinion the level of generality which corresponds with social and economic reality is to regard the transaction as the patient’s visit to the doctor for treatment and not to split it into smaller units”.

10 31. *Levob* concerned the provision of customised software by the supplier to the customer’s requirements. There the ECJ said that it was not possible “without entering into the realms of the artificial” to take the view that the customer had purchased separately the pre-existing software and its customisation.

15 32. Warren J carried out a detailed review of the case law on the points before us in *Byrom and others (trading as Salon 24) v CEC* [2006] STC 992. In that case, against a factual background of the appellants providing facilities for masseuses including the provision of rooms in which they could entertain their clients, he held that where the nature of an overarching supply was obvious, it was a straightforward exercise to look at Schedule 9 to the 1994 Act and ascertain whether it attracted any of the
20 exemptions; the description which reflected economic and social reality was a supply of massage parlour services. He noted that the appellants had clearly supplied a number of services to the masseuses other than the licence to occupy the room, the services being made use of as practical and convenient. The case was one where the tax treatment of the supply was self-evident once it was established that the other
25 service elements were not ancillary to the provision of the licence.

33. Applying the various tests laid down by the courts is a matter of impression. Looking at the supply by Cavenbridge as a whole, we regard it as consisting of two elements - the exempt supply of the service of bingo on the one hand and the standard-rated supply of goods in the form of the dabber/marker pens on the other. As
30 Ms Ellwood correctly observes Cavenbridge prices and charges for the two supplies separately, processing them through two tills and issuing two separate receipts. Further, the different components of the supplies are available separately, there being no element of compulsion on the part of a club member participating in a game of bingo to purchase a dabber/marker pen. Nor are the pens packaged with books of
35 bingo tickets. We agree with her submission that the elements are not integral to one overall supply; the purchase of the one does not make the purchase of the other compulsory. We further agree with her claim that, in line with the principles laid down by the ECJ in the *Card Protection* case, supplies should be distinct and independent wherever possible. Finally, at this juncture, we accept that to treat the
40 two supplies as a single one would be an artificial interpretation of the actual situation.

34. We can deal with the question of fiscal neutrality very quickly, being satisfied that the two supplies in point in the appeal should not have the same VAT treatment.

35. In reaching our conclusion, we have taken all Mr Brown's submissions into account, but are unable to find in them anything to change the decision we have set out above.

36. We dismiss the appeal.

5 37. 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
10 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.

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**TRIBUNAL JUDGE
JUDGE DEMACK**

RELEASE DATE: 28 OCTOBER 2015

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