FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2021/11356

GENERAL BETTING DUTY – whether HMRC have power to amend quarterly accounting periods retrospectively – section 165(3) Finance Act 2014 – yes – decision of HMRC that they did not have such power one which they could not reasonably arrive at – HMRC required to review that decision in light of the Tribunal's conclusion – section 16(4)(b) Finance Act 1994

Heard on: 6 February 2024
Judgment date: 13 March 2024

Before

TRIBUNAL JUDGE MARK BALDWIN
MRS SHAMEEM AKHTAR

Between

BETINDEX LIMITED
(IN LIQUIDATION)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ben Elliot, of counsel, instructed by Kennedys Law LLP

For the Respondents: Joseph Millington, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant ("Betindex") appeals against a decision of the Respondents ("HMRC") to refuse to exercise their powers under section 165(3) of the Finance Act 2014 ("FA 2014") to agree retrospectively a non-standard accounting period for the purposes of General Betting Duty ("GBD") ("the Decision").

2. The Decision is contained in a letter dated 5 October 2021 and gives as the reason for refusing Betindex's request:

> "There is no provision to allow, the requested change, nor is there provision to apply non-standard accounting periods retrospectively."

3. By virtue of section 182(2)(d) and (3) FA 2014, a decision to refuse to agree a non-standard accounting period is an 'ancillary matter' for the purposes of the appeal provisions contained in sections 14 to 16 of the Finance Act 1994 ("FA 1994"). Accordingly, the Tribunal's powers on any appeal are limited to those contained in section 16(4) FA 1994, which are as follows:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

4. It was common ground that the jurisdiction of the Tribunal in an appeal under section 16 FA 1994 is, as summarised in *Revenue and Customs Commissioners v Ahmed (t/a Beehive Stores)* [2017] UKUT 359 (TCC) at [22]:

> "[22] Consequently, the FTT only has a supervisory rather than a full merits jurisdiction in relation to the decisions which are the subject of this appeal. The correct approach to determine the question as to whether the decision concerned could not reasonably have been arrived at is that set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663 which is to address the following questions:

(1) Did the officers reach decisions which no reasonable officer could have reached?

(2) Do the decisions betray an error of law material to the decision?

(3) Did the officers take into account all relevant considerations?

(4) Did the officers leave out of account all irrelevant considerations?"

5. The criticism made of the Decision by Betindex is that it betrays a material error of law in that HMRC say that they do not have power to agree to Betindex's request, whereas Betindex say that they do.

6. In his skeleton argument, Mr Elliott suggested that, if we agreed with his submission that the Decision was based on an error of law, we should direct HMRC to review the Decision and direct them that it would be proportionate for them to agree to Betindex's request. Mr Millington objected to the second of these suggestions, on the basis that a decision to agree a non-standard accounting period is a matter squarely within HMRC's administrative discretion. We do not need to come to a view on this point, as Mr Elliott abandoned the second of these suggestions and now only asks that, if we agree that the Decision contains an error of law, we should simply direct HMRC to review it.

7. For his part, Mr Millington does not suggest that, if we were to find that the Decision betrayed an error of law, we should go on to consider whether HMRC would have come to the same conclusion in any event, so that there would be no need to direct HMRC to review the Decision.

8. By the end of the hearing, it was agreed that the only issue we were being asked to decide was whether the Decision betrayed a material error of law when HMRC made the statement set out at [2] above, that they could not (rather than did not consider it appropriate to) agree to Betindex's request.

9. In part because of Mr Millington's initial anxiety about what Mr Elliott was asking of this Tribunal, some of the arguments pursued and evidence led before us (certainly Mr Millington's cross-examination of Mr Rabet) went far beyond what was needed to address this rather dry, technical point. We have tried to confine our summary of the evidence and arguments to those relevant to this narrow issue.

GENERAL BETTING DUTY

10. GBD is payable under section 127 of FA 2014 at a rate of 15% on "bookmaker's profits on general bets for an accounting period". "Bookmaker's profits" is defined in s.127(3) by reference to the ordinary profits and retained winnings in the period:

> "**Section 127 – General betting duty charge on general bets**
>
> (1) General betting duty is charged on a general bet made with a bookmaker.
>
> (2) It is charged at the rate of 15% of the bookmaker's profits on general bets for an accounting period.
>
> (3) The bookmaker's profits on general bets for an accounting period are the aggregate of—
>
> (a) the amount of the bookmaker's ordinary profits for the period in respect of general bets (calculated in accordance with section 131), and
>
> (b) the amount of the bookmaker's retained winnings profits for the period in respect of general bets (calculated in accordance with section 132).
>
> (4) Where the calculation for an accounting period under subsection (3) produces a negative amount—
>
> (a) the bookmaker's profits on general bets for the accounting period are treated as nil, and
>
> (b) the amount produced by the calculation may be carried forward in reduction of the bookmaker's profits on general bets for one or more later accounting periods."

11. Section 165 provides that an accounting period is a period of 3 consecutive months, but subsection (3)(a) provides that the HMRC may agree with a person to treat specified periods (whether longer or shorter than 3 months) as accounting periods:

> "**Section 165 – Accounting period**
>
> (1) For the purposes of this Part—
>
> (a) a period of 3 consecutive months is an accounting period, but
>
> (b) the Commissioners may by regulations provide for some other period specified in, or determined in accordance with, the regulations to be an accounting period.
>
> (2) The first day of an accounting period is such day as the Commissioners may direct.
>
> (3) The Commissioners may agree with a person to make either or both of the following changes for the purposes of that person's liability to general betting duty, pool betting duty or remote gaming duty—
>
> (a) to treat specified periods (whether longer or shorter than 3 months) as accounting periods;
>
> (b) to begin accounting periods on days other than those applying by virtue of subsection (2).
>
> (4) The Commissioners may by direction make transitional arrangements for periods (whether of 3 months or otherwise) to be treated as accounting periods where—
>
> (a) a person becomes or ceases to be registered, or
>
> (b) an agreement under subsection (3) begins or ends.
>
> (5) A direction under this section—
>
> (a) may apply generally or only to a particular case or class of case, and
>
> (b) must be published unless it applies only to a particular case."

12. HMRC have published their position on GBD accounting periods. In "Excise Notice 451a: General Betting Duty" they say:

> "**5. Accounting periods**
>
> Returns must be made after the end of each accounting period in respect of activity during that period. An accounting period is sometimes referred to as a 'return period'.
>
> A standard accounting period is 3 whole calendar months starting on the first day of the first month and ending on the last day of the third month.
>
> **The following direction has the force of law made under section 165(2) of the Act** HMRC direct that each standard accounting period starts on the first day of a calendar month. This doesn't preclude non-standard accounting period arrangements being agreed under section 165(3) of the Act.
>
> In the event of a person becoming registered for GBD part way through a calendar month, that person's first accounting period begins on the date of registration.
>
> **Non-standard accounting periods**
>
> Section 165(3) of the Act allows HMRC to agree with individual bookmakers that they may follow non-standard accounting periods.

> HMRC will only agree to non-standard accounting periods if the bookmaker:
>
> • first selects a pattern of accounting periods based on four 3 month periods in 12 months each ending on the last day of a month
>
> • then selects 8 non-standard period end dates (each period end date must be within 16 days before or after the date that would have been the standard end date)
>
> If the bookmaker wishes to continue with non-standard accounting periods after the end of the eighth period he should, during the seventh period, give HMRC a further 8 non-standard period end dates. Otherwise they'll automatically revert back to the standard accounting periods after the eighth non-standard period."

13. They also say this about losses:

> "**3.6 Losses**
>
> If you make a loss in an accounting period because you pay out more money for winning bets than you're due from bets made with you, then you'll have no duty to pay. You must show any loss in the relevant box on the GBD return.
>
> You can carry over any loss for each class of bets (financial spread bets, non-financial spread bets or other bets) from one accounting period into the next. This only applies within each class of bets. You can't offset duty payable on one class of bets, against any losses you've made on another class of bets, for example you can't transfer a loss on any fixed odds bets to any spread bets, or equally you can't transfer a loss on financial spread betting to other non-financial spread bets and vice versa.
>
> There is no provision to repay any 'unused' loss carried forward. This means that if your business ceases to trade and shows negative figures in its final accounting period, you can't claim any repayment or refund for that amount."

BACKGROUND

14. Betindex is a Jersey-based company. It was regulated by both the UK Gambling Commission and the Jersey Gambling Commission. It was best known for operating the online betting platform 'Football Index', which allowed players to trade virtual shares in professional football players.

15. Betindex started trading in 2015 and its business grew substantially over the next few years until the final quarter of 2020 when it ran into financial difficulty and began to suffer significant losses. Football Index was suspended on 11 March 2021 and Betindex sought an administration order, which was granted on 26 March 2021. It was initially hoped that Betindex could be rescued as a going concern through a company voluntary arrangement. That proved impossible, so the company went into liquidation on 5 November 2021.

16. Betindex is registered with the HMRC for GBD. It submits its GBD returns on a quarterly basis and accounts for GBD on the profits that it makes in each quarter at the prescribed rate of 15%.

17. Betindex accounted for GBD on profits during the consecutive accounting periods Q1-Q3 2020. The total profits in those 3 consecutive accounting periods were £32,225,324.13. GBD was accounted for at 15% on the profit in each accounting period. This amounted to £4,833,798.62.

18. No GBD was payable in Q4 2020 and Q1 2021 because Betindex suffered significant losses in those accounting periods.

19. On 30 April 2021, Betindex's then solicitors wrote to HMRC explaining Betindex's position and asking HMRC to agree to treat the period 1 January 2020 to 31 March 2021 as a single accounting period for GBD purposes. This would allow Betindex to recalculate the amount of GBD owed during that period. The letter explained that, during the period 1 January 2020 to 31 March 2021, Betindex had paid a total of £4,833,798.62 in GBD on taxable profits of £32,225,324.13. However, this was based solely on the profits Betindex made in the first three quarters of 2020, whereas it had reported significant losses in Q4 of 2020 and Q1 of 2021. Taking the losses sustained in Q4 of 2020 and Q1 of 2021 into account, Betindex's bookmaker's profits during the period 1 January 2020 to 31 March 2021 were only £20,594,676.08.

20. Betindex's position was that, in order to reflect the profits it made fairly, the period 1 January 2020 to 31 March 2021 should be treated as a single accounting period, so that the losses sustained in Q4 2020 and Q1 2021 can be taken into account in calculating its profits. On that basis, Betindex asked HMRC to exercise their power under section 165(3) to allow it to treat the period 1 January 2020 to 31 March 2021 as a single accounting period and recalculate GBD based on its taxable profits of £20,594,676.08. If that were done, Betindex would be due a GBD repayment of £1,744,597.21.

21. HMRC replied on 2 June 2021, making the following points:

> "Unfortunately, we are unable to grant your request to treat the five GBD quarterly return periods from 01/01/2020 to 31/03/2021 as one accounting period.
>
> HMRC have been given powers to amend accounting periods to allow for the smooth operation of the GBD regime. We don't believe those powers were ever intended to be applied retrospectively.
>
> We also don't believe it would be an appropriate use of HMRC's powers to enter an agreement for the purpose of reducing a tax liability that would otherwise be due in law.
>
> Our Public Notice, GBD 451a, and guidance on GOV.UK states:
>
> *Non-standard accounting periods*
>
> *Section 165(3) of the Act allows HMRC to agree with individual bookmakers that they may follow non-standard accounting periods.*
>
> *HMRC will only agree to non-standard accounting periods if the bookmaker:*
>
> • *first selects a pattern of accounting periods based on four 3 month periods in 12 months each ending on the last day of a month*
>
> • *then selects 8 non-standard period end dates (each period end date must be within 16 days before or after the date that would have been the standard end date)*
>
> Although the law allows an agreement to be made, our guidance sets out that any non-standard accounting period must still be based on the premise of 4 x 3 month periods in l2 months and the business must specify what those dates will be.
>
> In the particular case you have suggested, the request is not based on a three month period and the requirement to apply in advance has not been met.
>
> With regard to S.127(4), it is clear that any losses create a Nil return that can be carried forward to the next accounting period. There is no other alterative treatment of losses i.e. no retrospective treatment of the losses and no refund of duty for losses incurred.

> This is also included in our public notice:
>
> *3.6 - There is no provision to repay any unused' loss carried forward. This means that il your business ceases to trade and shows negative figures ln its final accounting period, you can't claim any repayment or refund for that amount*.
>
> In addition to this, your client has already submitted their returns for this period and the figures they provided cannot be changed. They can only account for the recent losses on their next returns."

22. Betindex's lawyers replied on 13 July 2021, noting their disagreement with HMRC's position but adding that they "would like to work collaboratively with HMRC and therefore we would be grateful if you could suggest an alternative method that HMRC considers to be fair and just in the circumstances that provides for the Company to pay the correct rate of GBD (15% as opposed to 23.47%) on the profits it made during the period 1 January 2020 to 31 March 2021."

23. On 5 October 2021 HMRC replied issuing the Decision.

THE EVIDENCE BEFORE US

24. We heard from Mr Adrian Rabet, one of the liquidators of Betindex, and from Mr John Waller, an officer in HMRC's Gambling Duties Policy Team. We found both witnesses to be straightforward people trying their best to help the Tribunal. We had no hesitation in accepting their evidence.

25. Mr Rabet's evidence was focussed on the trading history of Betindex and the reasons behind its failure. As such, some of his evidence might be of assistance to HMRC in deciding whether to agree to Betindex's request, but (and we mean no disrespect here at all) it is of no help to us in the task we face of deciding whether section 165(3) gives them power to do so. For that reason, and because we consider it important, if HMRC are to consider Betindex's request, that they do so uninfluenced by any views we might have formed on the evidence, we have not summarised his evidence.

26. Mr Waller's evidence as to HMRC's policy in this area and the drivers behind it come closer to the issue that confronts us, but again (and here too we mean no disrespect) Mr Waller's views on the policy issues at play here do not determine the meaning of section 165(3). Mr Waller notes that, for the purposes of GBD, section 165(1) FA 2014 provides that a period of 3 consecutive months is an accounting period, but HMRC may by regulations provide for some other period specified in, or determined in accordance with, the regulations to be an accounting period. Mr Waller says that he has consulted with policy colleagues and to their knowledge, no regulations specifying alternative accounting periods for GBD have been made.

27. Mr Waller explained the rationale for HMRC's policy on the length of non-standard accounting periods as being to allow businesses to align their GBD accounting periods with their accounting periods for other duties/ taxes, or for their own internal management accounting processes. For example, a business may wish to align its accounts over four blocks of thirteen weeks instead of calendar months. To allow for this, HMRC may provide for periods of longer or shorter than 3 months as a transitional period when moving from one set of accounting periods to another. For example, HMRC may allow for a one off 4-month period to allow for a new accounting period to be aligned.

28. However, HMRC's general policy is not to agree to other lengths of accounting period on a prolonged basis, for example, three 4-month accounting periods over 12 months or a 12-month accounting period. This would be inconsistent with other duties and unfair to other businesses. HMRC would not allow an accounting period which might give one person an

unfair advantage over another taxpayer or might allow a person to pay less duty than would ordinarily have been due. For example, permitting a business to have longer that the standard 3-month accounting period would give them a cash flow benefit through being able to pay the duty later than a business with the standard 3-month period.

29. Mr Waller says that he has consulted with policy colleagues and to their knowledge, HMRC have never agreed to a retrospective application of section 165(3).

BETINDEX'S SUBMISSIONS

30. Mr Elliott says that there is no authority on the scope of HMRC's power under section 165(3) FA 2014. However, the starting point in interpreting the provision is its plain wording: HMRC's power to treat specified periods as accounting periods is not stated to be a power that can only be applied prospectively (for example, to current or future periods) and the subsection contains no restriction against specifying periods which would cover past periods.

31. In the absence of any restriction on the power in section 165(3), he submits that it should be given its ordinary meaning and therefore can be applied to past, present and future periods. HMRC argue that the application of section 165(3) retrospectively would require express wording. However, the Court of Appeal's decision in *Hoey* illustrates that this is not correct and a statutory power which is not expressly limited to prospective application should also be capable of application to past periods and events.

32. He points to other cases where HMRC accept that they can agree to a non-standard accounting period after the period has ended. In relation to Insurance Premium Tax ("IPT") it is understood that HMRC accept that they can agree a non-standard accounting period after the period has concluded. IPT is also charged by reference to three-month accounting periods, but regulation 12(4)(a) of the Insurance Premium Tax Regulations 1994 allows HMRC to vary the length of any accounting period (but does not expressly limit this power to prospective application). HMRC's guidance (IPT10350) provides that the taxpayer should request the non-standard period before the end of the period, but there is no requirement that the variation be approved by HMRC prior to the end of the period – and therefore it is understood that non-standard periods may be varied retrospectively in relation to IPT.

33. HMRC have also raised several practical issues that might arise if the power in s165(3) were capable of retrospective application. However, Mr Elliott notes that, in relation to VAT accounting periods, which operate in a similar manner to GBD accounting periods, Parliament evidently considered that any such issues were not sufficiently problematic to prevent HMRC being empowered to amend periods retrospectively. This is provided for expressly in regulation 25(1)(c) of the Value Added Tax Regulations 1995. HMRC's own guidance in relation to GBD (at paragraphs 6.2-6.3) specifically provides for corrections/amendments to past returns and there is no reason that similar procedures could not be adapted for a situation in which an accounting period had been amended after its conclusion.

HMRC'S SUBMISSIONS

34. Mr Millington submits that the Decision was made on a correct basis, that section. 165(3) FA 1994 does not permit retrospective agreement to prescribed accounting periods that have passed, and in respect of which GBD has been properly calculated, accounted for, and paid.

35. The statutory scheme emphasises that certainty as to a trader's GBD accounting periods prior to trading is required to ensure that:

(1) a trader makes GBD returns. Failure to make returns in accordance with the Returns Regs is conduct attracting a penalty.

(2) a trader pays GBD. Failure to make payments in accordance with the Returns Regs is conduct attracting a penalty.

(3) a trader maintains GBD records. Failure to maintain appropriate records is conduct attracting a penalty.

36. If section 165(3) FA 2014 were construed as enabling HMRC retrospectively to agree any period as a non-standard accounting period (in a manner, as is suggested, most advantageous to the trader), the regulatory scheme would become unworkable, as a trader's GBD liabilities would potentially remain undetermined indefinitely.

37. The legislation acknowledges that a trader may suffer loss, and the mechanism by which that is to be corrected is to carry forward losses to future accounting periods. This is a backdoor attempt to do that.

38. A trader's accounting period must be determined prior to the relevant trade to make the statutory scheme function. No statutory provision referred to by the Appellant contains express or necessarily implied power to permit retrospective adoption of an accounting period.

39. The provisions contained in Part 3 FA 2014 provide the relevant context from which the words of section 165(3) FA 2014 derive their meaning. Section 165(3) FA 2014 falls within the 'Administration' provisions of Chapter 4, Part 3 FA 2014. It is purely an administrative provision to allow businesses to align their accounting periods with their accounting periods for other duties / taxes, or for their own internal management accounting processes if they wish.

DISCUSSION

40. We start with the plain words of section 165(3), which provide that HMRC "may agree with a person to make either or both of the following changes for the purposes of that person's liability to general betting duty". There is nothing in these words which explicitly explains or indicates how HMRC should exercise this power or at what stage they should do so.

41. Mr Elliott referred to the decision of the Court of Appeal in *Hoey v HMRC*, [2022] EWCA Civ 656, as supporting his submission that express wording is not required before a power can be exercised retrospectively. Taking the facts from the headnote at [2022] 1 WLR 4113, the taxpayer worked as an IT contractor in the UK for a variety of UK-based entities ("the end users") under arrangements with two offshore entities that employed him ("the employers"). Under those arrangements, the employers paid a significant part of the taxpayer's remuneration into employee benefit trusts ("the EBTs") and the trustees of the EBTs made regular interest free loans in an equivalent amount to him in respect of the services he provided to the end users. In practice it was not expected that the loans would have to be repaid. HMRC issued the taxpayer with two discovery assessments and a closure notice in relation to three tax years, on the basis that the payments to the EBTs were taxable as employment income under the Income Tax (Earnings and Pensions) Act 2003. HMRC proceeded on the basis that, since the employers were offshore entities, the effect of sections 689(2) and 710(2)(b) of the 2003 Act was that the end users were deemed to be the taxpayer's employers and liable to account for PAYE in respect of the payments, pursuant to the PAYE Regulations. However, HMRC made a decision under section 684(7A)(b) of the 2003 Act that it would be inappropriate for the end users to comply with the PAYE Regulations, with the consequence that the end users were relieved of such liability and the taxpayer lost his entitlement to PAYE credit under regulations 185 and 188 of the 2003 Regulations. The taxpayer challenged this decision. Looking at the provisions of the PAYE Regulations and how they operated in other circumstances, the Court of Appeal observed (at [84]):

> "For these reasons, to construe 7A as limited to prospective application only is inconsistent with the language and purpose of the PAYE Regulations. The

> plain language of the 7A power simply requires the officer to ask whether it is appropriate (knowing all that the officer knows) to expect the end user to comply with the PAYE Regulations by accounting for the employee's income tax. In a typical case, HMRC are likely only to become aware of the situation giving rise to the need to consider making transfer directions well after PAYE income has been paid. Moreover, to limit the exercise of the 7A power to a situation in which HMRC are aware of all the facts in advance and can only operate it with prospective effect would seriously curtail the scope of the power. In our judgment there is nothing in the language or purpose of this provision to warrant such a conclusion."

42. We agree with Mr Elliott that the Court of Appeal considered that there was nothing in the language or purpose of the legislation to limit it to having prospective application. In fact, quite the contrary, the overall purpose of the legislation pointed towards it being capable of having retrospective effect. In terms of its approach, the Court started with the language of the power and noted (at [72]-[73]):

> "Returning to the language of the 7A power, it could not have been expressed more plainly and clearly. There is no expressed limit to the circumstances in which an HMRC officer can decide that it is "inappropriate" for the payer to comply with obligations under the PAYE Regulations. The provision recognises that, despite the detail of the PAYE Regulations, HMRC may form the view in the circumstances of a particular case, that it is not appropriate to expect an end user (or other employer) to comply with the deduction and/or accounting obligations in the PAYE Regulations.
>
> …
>
> Given its broad terms, it was clearly intended to apply whenever it is considered appropriate to relieve an employer from PAYE requirements and is not limited to outlier situations as Mr Mullan contended. Its focus is inevitably on the payer, and neither subsection makes any reference to the payee. This is unsurprising in circumstances where exercise of the 7A power has no impact whatever on the underlying liability to tax of the payee recipient of the PAYE income, which remains undisturbed."

43. Having identified the breadth of the language, the Court turned to consider whether it would be unfair for the legislation to have retrospective effect. They concluded that it would not, observing (at [81]-[82]):

> "Returning to the question of retrospectivity, it is common ground that the underlying rationale for the presumption against retrospectivity is fairness. …
>
> Adopting that approach, we see nothing unfair or objectionable in the 7A power operating both prospectively and retrospectively. This is not a case in which new legislation enacted after the relevant events, has altered the legal consequences of those events. The PAYE Regulations do not impose liability to tax on employment income as we have already emphasised. That is done by primary legislation in ITEPA, and the obligation to pay the tax on his or her earnings if tax is not deducted at source, is on the employee, as sections 59A and 59B of TMA make clear. Nor can it be said that there is an unfair deprivation of a vested or accrued right to a credit at all. The PAYE credit is only ever a contingent credit when PAYE income is earned. It can be disapplied whenever a direction is made by an HMRC officer under any of regulations 72(5), 72F(1) or 81(4), including where an employer has not deducted the tax but has taken reasonable care to comply with the PAYE Regulations; or where the employer has not accounted for tax on notional payments."

44. Mr Millington submits that these passages in *Hoey* must be read in the light of the Court's acknowledgement (at [66]) that "The exercise of statutory construction is an objective search for the meaning of the words used by Parliament read in their particular context.". In this context he stresses that the Court was not looking at a mechanism that could affect the quantum of liability (which is the case here), just a provision which addressed whom that liability should be collected from. He says that *Hoey* is entirely different in its focus and does not give us much help in the task that confronts us.

45. We agree, of course, that we are trying to determine what Parliament meant by the words used here and that context is important. However, taking, as the Court of Appeal did in *Hoey*, the words of the statute as our starting point, we can see no limit in those words on the circumstances in which HMRC can agree to a non-standard accounting period.

46. As far as retrospective operation producing an unfair result is concerned, an accounting period can only be changed by agreement under section 165(3). There are public law constraints (essentially, the considerations identified in *Beehive Stores* and set out in [4] above) on HMRC's powers to withhold agreement, but there is nothing that would compel them to agree to a change that is unacceptable looking at that question on a rational basis. A bookmaker can always refuse its agreement if HMRC were to propose a non-standard period. So, there is no risk of a change under section 165(3) being imposed on either party (HMRC or the bookmaker) in a way that produces a capricious result.

47. Mr Millington points to the administrative difficulties which (he says) would flow from allowing retrospective changes to accounting periods. Section 163 FA 2014 provides that GBD is "to be accounted for by such persons, and accounted for and paid at such times and in such manner, as may be required by or under regulations made by [HMRC]" and gives HMRC power to "make regulations providing for any matter for which provision appears to them to be necessary for the administration or enforcement of, or for the protection of the revenue from, general betting duty…"

48. The General Betting, Pool Betting and Remote Gaming Duties (Registration, Records and Agents) Regulations 2014 provide that, having registered for GBD, a bookmaker "must prepare and retain such records as the Commissioners specify in a notice for a person of that class or description, and in the form and manner that they specify in the notice for records of that class or description" and must make a GBD return for each accounting period and pay GBD within 30 days of the end of an accounting period. Section 9 of Public Notice 451a sets out the records that must be kept to complete GBD returns. In essence, detailed records are required to be kept of all bets and winnings (on occasion on a daily basis). These requirements are not expressed to be kept by reference to GBD accounting periods, although they will clearly be used to calculate GBD liabilities, which is done by reference to accounting periods.

49. In relation to these administrative provisions, a bookmaker must comply with all the record-keeping and compliance requirements based on its existing accounting periods until there is an agreed change. At that point, the bookmaker will need to make whatever additional returns are needed based on the newly agreed period/s. Whilst that would almost inevitably involve cost, we cannot see why it would be inherently impossible to do. An inability on the part of a bookmaker to do this in a particular case might well be a reason for HMRC to refuse a request from that bookmaker for a particular non-standard period. Similarly, HMRC or a bookmaker are unlikely to agree to a non-standard accounting period if they are out of time to (or otherwise cannot) cannot assess (HMRC) or reclaim (in the case of the bookmaker) GBD under or overpaid in the past based on revised GBD calculations required by the new accounting periods.

50. Mr Millington says that the significant alterations Betindex seek will have a material impact on their GBD liability. However, it is clear from the wording of section 165(3) (in particular the phrase "for the purposes of that person's liability to general betting duty") that an agreement under section 165(3) can be reached in circumstances where the agreement affects a bookmaker's liability to GBD. Although section 165 is in a part of FA 2014 which contains administrative provisions for several gambling taxes, not just GBD, there seems no reason to read into that section a gloss that the power it confers cannot be used in circumstances where the quantum of liability would be affected; indeed, the plain words of section 165(3) would seem to militate against that.

51. Linked to this, Mr Millington points to the fact that the effect of agreeing to Betindex's request is that it will be able to sidestep the rules blocking the carry back of losses in exactly the circumstances discussed in paragraph 3.6 of Public Notice 451a. Effectively, he submits, Betindex are seeking to revisit their liability to GBD in a way which is contrary to the basic scheme of the legislation, which is that GBD is accounted for by reference to periods of 3 months and losses can be carried forwards but not backwards. That regime is simple and clear and Betindex is seeking to drive a coach and horses through it. In answer to a question from the Tribunal, Mr Millington said that he could not think of any reason why a bookmaker would want to adjust its GBD accounting periods retrospectively other than to achieve this end. The overall scheme of GBD is clearly a factor to be taken into account by HMRC when considering any request for a non-standard accounting period with retrospective application, but we do not consider that the integrity of the overall scheme of GBD requires that HMRC cannot ever agree to such a request.

52. Looking just at the narrow question before us,

(1) There is no limit in the language of section 165(3) on the circumstances in which HMRC can agree to a non-standard accounting period.

(2) *Hoey* indicates that there is no need for a provision such as section 165(3) to state expressly that an agreement under it can operate retrospectively before that is permitted.

(3) Section 165(3) allows HMRC and a bookmaker to agree a non-standard accounting period. Except for circumstances where HMRC's refusal to agree a non-standard accounting period could be subject to a successful challenge on public law grounds, such as those outlined in the quotation from *Beehive Stores* set out in [4] above, the provision does not allow one party to force a non-standard accounting period on the other. That is the safeguard of fairness for both parties.

53. On this basis, we can see no reason not to give the words of the statute their plain and ordinary meaning. This is sufficient for us to conclude that HMRC have power under section 165(3) FA 2014 to agree to a non-standard accounting period with retrospective application.

54. The Decision was made because HMRC considered that they did not have power under section 165(3) FA 2014 to agree to a non-standard accounting period with retrospective application. It, therefore, betrayed an error of law. As it was the only reason given for the Decision, that error of law was material.

55. All the other issues we have touched on in this decision (and possibly others too) may be factors to be considered in deciding whether it is appropriate to agree to a particular request for a non-standard accounting period. We have deliberately tried to avoid expressing any opinion on the relative importance (or not) of any of these issues, either generally or in this case. Parliament has given the task of identifying and evaluating the factors relevant to deciding whether to reach an agreement under section 165(3) to HMRC, not to us, and it is very important that we do not trespass on HMRC's territory.

DISPOSITION

56. For the reasons set out above, we are satisfied that the Decision betrays a material error of law on its face, and accordingly is one which HMRC could not reasonably have arrived at.

57. Accordingly, we direct that HMRC should review the Decision in the light of our determination that they have power under section 165(3) FA 2014 to agree to a non-standard accounting period with retrospective application.

58. We stress again that whether HMRC should exercise their power to agree to Betindex's request is an entirely separate question, which is for them alone to decide; we have simply concluded that it is open them to agree to such a course of action, if they consider that it is right to do so in all the circumstances of the case.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

59. 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.

MARK BALDWIN
TRIBUNAL JUDGE

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