

# Tax free gambling and Betfair's technical error

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There has been considerable press coverage over the recent Betfair technical error involving "Voler La Vedette". The whole episode has raised issues over the tax position of gambling.

**B**etting "exchanges", i.e. online gambling, involve significant turnover and the participation of a large proportion of the UK population. It is fair to say that the sophistication of online gambling, gamblers and online service providers has developed as quickly as the functional capabilities of smartphones, which are rapidly becoming the preferred medium of online gamblers. Furthermore, gambling is not restricted to horse racing – every sport is encompassed.

Despite the growth of the betting exchange industry there are many who do not understand exactly how exchanges work or indeed what it is to "lay" horses, sportsmen or teams on the exchanges, i.e. gambling on them losing. It is considered by many that bookmakers who take the bet to win from the punter are betting for a losing result with a controlled analysis of the outcome by determining and changing the odds to ensure that overall they will win. So it can be argued that the bookmaker is no different to the professional gambler operating through betting exchanges.

## I. Voler La Vedette (VLV) and the "Bot"

The horse involved in the technical betting error was *Voler La Vedette* who was running in the Christmas Hurdle at Leopardstown. The technical problem was apparently caused by bets placed by a customer trading by API or "Application Programming Interface" using an automated program. These are known as robots, hence the jargon, "bot", in the gambling world.

It is argued that there are actually two types of professional gamblers – the pure gambler who still uses a system (statistics, form etc), and the gamblers who use "bots" or API. It is argued further that once the "bot" is brought into the gambling operation by pro-

fessional gamblers, there is a taxable trade and the profits of the gambling operation should therefore be liable to tax.

Betfair is perceived to be a technology company more than a betting operator. It identified the cause of the VLV problem, assessing that it was the result of a complex combination of calculations that may happen once in x million times. Betfair process over six million transactions every day, so by the laws of probability it is always vulnerable to technology failure.

Betfair made the decision to void the in-running win market and the place market. By ex gratia payment, Betfair compensated those customers that had placed winning bets up to the time of the technology fault during the race. But if gamblers had placed a losing bet up to that time then they could still keep their money, meaning that Betfair are absorbing the financial cost of the error.

## II. The UK tax position of the professional gambler

Essentially betting is tax free in the UK, i.e. the professional gambler is outside the scope of tax. This principle is confirmed in HMRCs *Business Income Manual* (BIM) at para 22015. The basic position is that betting and gambling, as such, do not constitute trading. Rowlatt J said in *Graham v Green* (1925) 9 TC 309:

"A bet is merely an irrational agreement that one person should pay another person on the happening of an event."

This decision has stood the test of time. In an Australian case, *Evans v FCT* (1989) 20 ATC 4540, Hill J said:

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*"There has been no decision of a court in Australia nor, so far as I am aware, in the United Kingdom where it has been held that a mere punter was carrying on a business."*

So is a sophisticated online gambler working with "bots" a "mere punter"? An organised activity to make profits out of the gambling public will normally amount to trading. Although over time new forms of games of chance have evolved, these principles remain the same. The taxpayer placing a spread bet is not normally carrying on a trade (see BIM 22020 for exceptions). Currently the professional gambler is not taxable on the profits, nor does he or she receive tax relief for losses. But, the bookmaker organising the spread bet is taxable on his or her profits.

The bookmaker is taxable on profit from the trade of gambling and, as mentioned earlier, there are parallels with "layers" on the exchanges but perhaps there is less facility to control for the punter. So do these "bots" turn the professional gambler on the exchanges into a bookmaker because of the organised nature of his activity?

Betting by professional bookmakers is assessable even if carried on in an unlawful way (*Southern v AB* (1933) 18 TC 59). Profits from private betting, if any, are also exempt from capital gains tax (TCGA 1992, s 51(1)). Receipts from newspaper articles based on a betting system were, however, held to be assessable to income tax in *Graham v Arnott* (1941) 24 TC 157.

### III. UK HMRC Manuals

Further guidance on the tax position of betting and gambling is contained in the following HMRC manuals:

- What is a bet – BIM 22016
- The professional gambler – BIM 22017
- Organised activity – BIM 22018
- Element of existing trade – BIM 22019
- Spread betting – BIM 22020

Is an online professional gambler still just operating a system by habit or are they trading? The current view is that provided that the "pro-punter" is not carrying on an organised activity to make profits out of the gambling public, it is considered this will not amount to trading. Private betting is not assessable however habitual that betting is.

### IV. Australian Tax Office

A recent decision of the Australian Tax Office has cast doubt on whether the profits of spread betting are free from income tax.

Spread betting involves placing a bet with a licensed bookmaker that a stock or commodity will rise or fall in value. It does not involve the purchase of the stock or commodity but is a "wagering contract". The profits of spread betting (if any) are gambling winnings and are exempt from income tax.

On 12 March 2010 the Australian Tax Office ("ATO") published Interpretative Decision 2010/56, in which it

determined that the proceeds of spread betting w taxable income. The ATO emphasised that, in Australia, spread betting is governed by a separate statutory regime from other gambling activities. The ATO stated:

*"transacting with financial spread betting is closer to the skill end of the chance-to-skill spectrum and the commercial end of the private/recreation-to-commercial spectrum than a bet on horse racing. . . The winners tend to be rewards for skill and judgement rather than purely betting on chance."*

The taxpayer, the ATO found, was engaged in a taxable business.

### V. Irish Tax Position

The Irish Tax Office does not have the same "BIMs" as the UK tax authority. However, there is nothing on the Irish Revenue website stating that professional gamblers are taxable in Ireland and that it is generally assumed the tax position is the same as the UK.

### VI. Canadian Tax Position

There has been a recent Canadian case on the status of gambling – *Le Blanc v The Queen* 2006 TC

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680. The case concerned two brothers who engaged in playing sports lotteries on a massive scale from their living room. They moved house so they could participate in two lottery regions. They employed several people to place their bets for them. They placed a little over USD 50 million in high-risk bets over four years and made a profit of USD 5 million.

The Canadian court held that, despite the fact that the brothers employed a very systematic and methodical approach to their frequent gambling, there was no reasonable prospect of profiting from their venture and, therefore, it could not be regarded as a trade. The brothers were "compulsive gamblers who continually tried their luck at a game of chance".

The judge, Bowman CJ, pointed out that, if the proceeds of gambling are taxable, that would imply that losses should be deductible. The judge suggested that these matters were in the realm of Parliament and not for the courts to decide.

### VII. Future Legislation

Will there be future legislation that brings gambling profits into the scope of taxation? Will the bots that caused the Betfair technical problem become an aspect of professional gambling that Parliament

brings into the scope of tax? There has been nothing to indicate that the professional gambler's tax status is under review despite the advent of very sophisticated techniques for gamblers to make substantial profits from gambling online. At present HMRC remains firmly of the view that those who engage purely in a gambling activity are not taxable on the profits. It would be hard to draft legislation which applies only to those who are very successful in this field, but conceivably some defined categories could be brought into charge to tax. Will this be pursued by Parliament?

#### **VIII. Summary**

The professional gambler can currently earn or lose money outside the scope of tax, in simplistic terms,

tax free. There are areas of pro-punter activity connected to online gambling that could move the gambler into the domain of the taxable vocation – every case must be assessed on its merits and clearance obtained from HMRC as to the fact that there is no taxable business where there are concerns over tax status. It is also essential to consider the worldwide impact of the gambling operation and the tax treatment of each country and review worldwide tax cases.

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