

**RE: BRITISH HORSERACING AUTHORITY**

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**OPINION**

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**A. Introduction**

1. I am asked to advise the British Horseracing Authority on whether users of internet betting exchanges are within the scope of the horserace betting levy.
2. The levy is governed by sections 24 to 30 of the Betting, Gaming and Lotteries Act 1963 (“the 1963 Act”). These provisions continue to have effect despite the repeal of the 1963 Act by the Gambling Act 2005; and expressions used in those provisions have the meanings given to them by section 55(1) of the 1963 Act.

**B. The 1963 Act**

3. Section 24 provides that the Horserace Betting Levy Board shall be charged with the duty of assessing and collecting in accordance with the subsequent provisions of Part I of the Act monetary contributions from “bookmakers” and the Totalisator Board.
4. Section 55(1) defines a “bookmaker” as including any person other than the Totalisator Board who whether on his own account or as servant or agent to any other person, carries

on, whether occasionally or regularly, the business of receiving or negotiating bets; and provides that the expression “bookmaking” shall be construed accordingly.

5. Section 27(1) provides that the contributions to be made by bookmakers shall be paid by way of a levy in respect of each levy period of 12 months beginning with 1st April in any year in accordance with a scheme having effect for that period.
6. Section 27(2)(a) provides that any such scheme shall include provision for securing that the levy shall be payable only by a bookmaker who carries on on his own account a business which includes the effecting of betting transactions on horse races, and only in respect of so much of the business of the bookmaker as relates to such betting transactions.
7. Section 55(1) defines “betting transaction” as including the collection or payment of winnings on a bet and any transaction in which one or more of the parties is acting as a bookmaker.
8. Thus, the levy is payable only by a person (i) who carries on on his own account (ii) a business (iii) of receiving or negotiating bets, and (iv) which includes the effecting of betting transactions on horse races; and the levy is payable only in respect of so much of the person’s business as relates to betting transactions on horse races.
9. I shall consider these requirements in turn.
10. Before I do, I should mention that in my opinion the fact that only sections 24 to 30 and 55 of the 1963 Act continue to have effect, and that the rest of the Act has been repealed,

does not alter the interpretation of expressions used in sections 24 to 30 and 55. In particular, those expressions must have the meaning which they had before the rest of the Act was repealed. Thus, the interpretation of those expressions may be (indeed, as explained below, is) clarified when regard is had to the function which they performed in the (now repealed) rest of the Act.

### **C. Carries on on his own account**

11. The expression “bookmaker” is defined very widely to include a person who carries on business “as servant or agent to another person”, and the expression “bookmaking” is to be construed accordingly. The reason for this wide definition was to make it clear that employees and agents, as well as their employers and principals, could be guilty of offences of carrying on prohibited “bookmaking”: see for example sections 5 to 8 of the 1963 Act.

12. By contrast, the levy is payable only by a person who carries on a business “on his own account”. This serves to exclude from liability a “bookmaker” as defined who carries on his activity merely as employee or agent of another person.

### **D. A business**

13. The ordinary meaning of “business” includes any serious occupation which is carried on for profit rather than merely for pleasure or enjoyment: see for example Lord Fisher v IRC [1981] STC 238. According to that ordinary meaning, in my view a person who occupies his time seeking to make a profit by betting in a systematic and sophisticated way, in particular by using computer equipment so as to make a very large number of

bets so that the odds overall are in his favour, is carrying on “business”, and this is so even if he carries on that activity at home through a betting exchange.

14. It is settled law that a person who bets on horse races on odds offered by another is not carrying on a “trade” or “vocation” within the meaning of the income tax legislation merely because he does so systematically or in an organised way in order to make a profit: see Graham v Green [1925] 2 KB 37. This is because Parliament cannot have intended to charge income tax on profits and (more importantly) to give income tax relief for losses from such an activity.
15. However, a person who does not merely bet on horse races on odds offered by others, but who instead organises his affairs so that the odds are in his favour, whether by himself offering odds, or by making lay bets, or by hedging, may be carrying on a “trade” or “vocation” for income tax purposes.
16. Be that as it may, in my opinion the expression “business” in the definition of “bookmaker” has the ordinary, and not the narrower income tax, meaning. This is because the provisions of the 1963 Act which apply to a “bookmaker” are not concerned with giving relief for losses; instead they are concerned with imposing obligations on persons who carry out a betting activity by way of business, rather than on those who do so merely by way of pleasure or enjoyment.

#### **E. A business of receiving or negotiating bets**

17. In my opinion, a person “receives” a bet if he agrees to enter into a bet; and a person “negotiates” a bet if he arranges for a bet to be entered into with someone else. Thus, a

person who bets by way of business necessarily carries on a business of receiving bets.

This is so irrespective of the contract law analysis (that is, whether he makes or receives the offer), and also irrespective of whether his bets are “back” or “lay” bets.

18. In short, a business of receiving bets is a business of making bets, however the bets may be entered into. The provisions of the 1963 Act impose obligations, including to hold a bookmaker’s permit and a betting office licence, and to pay the levy, on persons who carry on a betting business, however they may choose to do so.

**F. Which includes the effecting of betting transactions on horse races.**

19. In my opinion, the purpose of this requirement is simply to restrict liability to the levy to bookmakers as defined who bet on horse races, and to that part of their business. The emphasis therefore is on the last part of the expression “on horse races”; the earlier words, “the effecting of betting transactions”, do not carry any special or narrow meaning.

20. On the contrary, to “effect a betting transaction” means to bring it about, in particular by entering into it. This is clear from sections 1, 9, 14, 16 and 21 of the 1963 Act, all of which use these words.

21. For example, section 1, which is headed “Restriction on use of premises for betting transactions with persons resorting thereto”, provides by subsection (1) that subject to section 9 (where a betting office licence is in force) (a) no person shall use any premises or permit them to be used as a place where persons resorting thereto may “effect pool betting transactions”; and (b) that no person shall use, or permit any other person to use,

any premises for the purpose of “the effecting of any other betting transactions” by that person, or that other person, with persons resorting to those premises.

22. These prohibitions clearly apply to premises which are used to make betting transactions.

It would be absurd if a bookmaker could lawfully operate premises for the purpose of making bets without obtaining a licence, simply by ensuring that the premises are used solely to make the bets, all prior arrangements (promotion, advertising etc) being made outside, whether in the street or elsewhere.

23. Therefore it would be quite wrong to suggest that the words “the effecting of betting transactions” refer only to making arrangements for bets to be made. On the contrary, those words refer to making bets, as well as to arranging to make bets.

24. This interpretation is supported by the decision in Stovell v Jameson [1939] 4 All ER 76, which concerned the meaning of “effect...betting transactions” in section 3(2) of the Betting and Lotteries Act 1934, a statutory predecessor of section 1 of the 1963 Act. Lord Hewart LCJ said that the mischief of the provision was a place where persons resorting thereto “may effect betting transactions, or, in plain and simple English, may bet”. He went on to say that “the draftsman had to use some verb if he were going to use a word like “transactions”, and perhaps an obvious verb was “effect””. He concluded that the mischief was, places where persons resorting thereto might come and bet, or make bets, and he thought it was only another way of saying what had been said again and again in various antecedent cases, “where a substantial part of the business of betting is done”, “where an essential part of the system of betting is carried out”, “where a material and

necessary step for the purpose is completed”. It necessarily follows from this that a betting transaction is “effected” if a bet is made or entered into.

25. This makes sense in terms of liability to pay the levy: a bookmaker as defined who carries on a business of betting on horse races is liable to the levy, in respect of his betting transactions, and this is so whether or not his business includes making arrangements for betting such as by advertising his business, or operating a shop which provides facilities for betting.
26. Indeed, such a person may carry on his business from home, merely taking advantage of arrangements for betting made by others, as by using an internet betting exchange, but he is still liable to pay the levy.
27. Such a person was also required by section 2 of the 1963 Act to hold a bookmakers’ permit. I do not consider this to be a surprising conclusion. One of the purposes of the Act was to regulate the carrying on of betting by way of business; I see no reason why a person should not be required to be regulated merely because he conducts his business from home over the internet by using a betting exchange.

## **G. Conclusion**

28. It follows in my opinion that a person who uses a betting exchange to make bets on horse races in the course of a business of betting on horse races is within the scope of liability to pay the levy.

29. I therefore respectfully disagree with Michael Fordham QC and Lord Pannick QC who have reached the conclusion that such a person is not within the scope of liability to pay the levy.
30. Mr Fordham relies upon the proposition that the expression “effecting betting transactions” means, and means only, arranging betting transactions. However, this cannot be right, if only because it would make a nonsense of the prohibitions in section 1 of the 1963 Act, as explained above.
31. Lord Pannick relies upon the necessity, as he sees it, to “read down” the expression “receiving or negotiating bets” in the definition of bookmaker in section 55, in order to avoid the conclusion that all customers of betting exchanges are liable to the levy. However, there is no question of all customers being liable to the levy: only those who are in business are liable, in my opinion.

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