TC04326

Appeal number: TC/2013/04517

VAT - whether a supply by an unincorporated association to its members is a taxable supply by a taxable person – yes - whether an unincorporated association is distinguishable from its members when making supplies –yes – whether supplies are non-taxable because consumed by members of an unincorporated association in a private capacity – no. Article 2.1 VAT Directive 2006/112/EC and Section 94 (2) Value Added Tax Act 1994. Appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROYAL TROON GOLF CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE RUTHVEN GEMMELL, WS
MR R L H CRAWFORD BA, CA, CTA

Sitting in public at George House, 126 George Street, Edinburgh on 26 January 2015

Philip Simpson QC, for the Appellant

Iain Artis, Advocate, instructed by the Office of the Advocate General for Scotland, for the Respondents

DECISION

1. This is an appeal by Royal Troon Golf Club ("RT") against a decision by the Commissioners for HM Revenue and Customs ("HMRC") dated 10 June 2013 to refuse a claim for repayment of £614,514 in respect of output VAT on food and drink consumed by members of RT for the period from April 1973 to January 2013, a period of nearly 40 years.

2. Skeleton arguments were submitted to the Tribunal by RT and HMRC covering a range of issues, including what was referred to as the "substantive issue".

3. At the hearing RT and HMRC restricted their pleadings to the substantive issue which was whether members' clubs, who buy food and drink for the private needs of their own members, act in a private capacity as the final consumers of their purchases. If this is a correct analysis the members' clubs would fall outwith the scope of VAT. If, as Counsel for RT argues, RT as an unincorporated association is indistinguishable from its members it was not acting as a taxable person when making supplies to its members.

4. RT relies on the direct effect of EU law to assert that the application of UK law is incompatible with the Principal VAT Directive, 2006/112/EC, ("PVD") and is in contravention of the correct application of Article 2(1) of PVD.

5. The Tribunal had before them three bundles of productions, the said Skeleton Arguments and, at the hearing, a Statement of Agreed Facts, which also showed facts that were not agreed, the most significant of which related to whether or not RT was "non-profit making", in the sense that any annual or other surplus from its activities was not distributed to its members but instead used to fund capital and revenue expenditure RT incurred in subsequent periods. Also submitted at the hearing, was an extract from HMRC Manual VGROUPS 09350, Divisional Registration: Interdivisional Supplies.

Legislation

6. See Appendix 1.

Cases

7. See Appendix 2.

The Facts

8. RT is an unincorporated association being a golf members' club founded in 1878, providing golfing facilities and food and drink to members and non-members.

9. RT has been registered for VAT since 1973 and is still so registered.

10. When RT provides food and drink, both members and non-members pay for them. There is no difference between the actual amounts paid by members and non-members for food and drink. VAT has been charged on those amounts payable by members and non-members, much of which is the subject of RT's repayment claim.

11. RT is governed by its club constitution, and since April 1973 has accounted for VAT on all sales of food and drink to members and non-members at the standard VAT rate, where applicable, and recovered input VAT incurred in relation to those supplies, where applicable.

12. RT does not distinguish between stocks of food and drink purchased and stored for provision to members and purchased and stored for non-members.

13. RT's Articles of Constitution submitted at the hearing provides *inter alia*:

> "4 (a) The property effects and moneys of the club should belong equally to the members from time to time but the right and interest of every member shall be personal and limited to himself, shall expire with his membership and shall not be assignable or arrestable, nor passed to his heirs and executors."
>
> "28. Members of the club may include:
>
> (a) Ordinary members
>
> (b) Life members
>
> ……..
>
> (j) Temporary (or visiting) Members provided for in Article 41."

14. Accordingly, most visitors to the club, which accounted for a sizeable proportion of the club's income, are treated as Temporary Members.

15. RT's annual accounts for the years 30 April 2010 to 30 April 2013 show consistent losses on bar and catering of, on average, approximately £49,000 per annum, but an overall surplus was recorded in the annual accounts.

RT's Submissions on the Substantive Issue

16. RT says that food and drink is not an economic activity as it is provided by RT in its private capacity because, as an unincorporated association, it is its members themselves who are providing the supplies to themselves and, therefore, RT is not acting as a taxable person. Insofar as it provides food and drink to non-members, RT accepts that they are taxable supplies and do constitute economic activity and are subject to VAT. Thus, RT argues that consumption by members is private and non-vatable, and consumption by non-members is use in the course of business and vatable.

17. RT say the relevant distinction is the capacity in which a taxable person carries out a transaction and referred to *Finanzamt Uelzen v Dieter Armbrecht ("DA")* which concerned a guest house and other premises, part of which was used as a private dwelling on which DA sought not to pay tax in terms of the meaning of Article 2(1) of the Sixth Directive.

18. The judgement in DA stated:

> "It is clear from Article 2(1) that a taxable person must act 'as such' for a transaction to be subject to VAT. A taxable person performing a transaction in a private capacity does not act as a taxable person. A transaction performed by a taxable person in a private capacity is not, therefore, subject to VAT nor is there provision in the Directive which precludes a taxable person who wishes to retain part of an item of property amongst his private assets from excluding it from the VAT system".

19. RT say this distinction is repeated in other European court cases, raises the question of how to draw the line between private use and use in the course of business and referred to the case of *Staatssecretarias Van Financiën v Heerma ("Heerma")* reported in 2002.

20. This case from The Netherlands involved a partner letting a cattle shed to a partnership of which he was a member and the partnership was itself a taxable person. Under domestic Netherlands law the partnership was not a legal person in its own right but had *de facto* independence, so it, rather than the individual partners was considered to be the taxable person. The tax authorities refused a request for tax exemption, usually due to the lessors of property, because of the connection between the lessor and the lessee. The question before the Court was whether there was "independent economic activity" as required under Article 4(1) of the Sixth VAT Directive 77/388.

21. The Judgement in *Heerma* stated:

> "First, under Article 4(1) of the Sixth Directive, a taxable person is 'any person' who independently carries out economic activities, specified in that Article. Secondly, in accordance with the aim of the Sixth Directive of ensuring greater fiscal neutrality by means of a broad definition of the term 'taxable person', the Court of Justice has repeatedly maintained in its case law that Article 4 of the Directive has a very wide scope.
>
> Where, under national law, an association of persons lacking legal personality can, in practice, carry out economic activities which are subject to VAT in accordance with the provisions of Article 4 of the Sixth Directive, it may, from the point of view of the VAT system, be deemed to be a 'taxable person' in exactly the same way as any person possessing legal personality.
>
> The lease was not introduced in the form of a contribution to the partnership but instead 'for the purposes of obtaining a continuing income from it'.

It was held that where a partner let property to a partnership of which he was a member and which itself was a taxable person, he acted independently within the meaning of Article 4(1) of the Sixth Directive as 'the partner acts in his own name on his own behalf and under his own responsibility, even if he is, at the same time, manager of the lessee partnership'."

Covering Costs

22. RT say that all that happens when members pay for food and drink is that they are covering the cost of the operations that provide or produce the food and drink. Consequently, what exists is not a "consideration" but an agreement that costs will be covered.

23. In *Heerma,* "letting" was an economic activity (he granted a lease of the cattle shed for the purposes of obtaining an income). RT say the fact that an English partnership or an unincorporated association is not a legal entity does not mean it cannot be independent but in UK law and, but for the deeming provisions of Section 94(4) of VATA 1994, there would be no taxable person.

24. RT say that if RT is neither a profit distributing nor profit making body, all that is happening is that the costs incurred by the club are being met by an agreement to "club together" for the benefit of the members to provide food and drink. RT say that some costs may be met by fixed contributions, for example, a joining or an annual fee, but some costs are allocated by usage including the provision of food and drink.

25. RT say there is no distinction in economic terms between golf course fees and supplies from the bar or the kitchen; that there is no intervening goal of the club seeking to make a profit, and this contrasts with clubs that do set out to make a profit (proprietary clubs). Thus, when the club is acting in a non-profit making way, the supply is to its members by its members for their own private use.

26. RT referred to the domestic law provision in *Murray v Johnstone,* which was an 1896 Court of Session case concerning whether a silver cup, as joint property of a Scottish curling club, could by the decision of some, but not all, of its members be given or alienated to one particular member of the curling club.

27. The Lord Justice Clerk said "…the subject in question (the cup) is not their property to dispose of but it is only their property along with others, in respect of membership of the club, and there is nothing in the constitution of the club giving that power" to dispose of the cup to a particular member.

28. Lord Traynor continued "no one can be deprived of his property except by his consent or by the action of law and, consequently, the majority of members of this club cannot deprive the minority of what belongs to them. Had it been a question of administration of the property or assets of the club it would have been a different matter. But it is not administration, it is alienation."

29. RT say it is necessary to consider the EU cases which relate to indirect taxes and compare them against relevant cases relating to direct taxes in the UK. They refer to

Carlisle and Silloth Golf Club v Smith, a 1913 case, concerning the UK income tax liability by the golf club for green fees for visitors, fixed by the lessors from whom the golf club leased its course.

30. The Master of the Rolls drew a distinction as follows: "it seems to me that there is a real difference between monies received from members and applied for the benefit of members and monies received from strangers". The judgement also stated that the excess of income over expenditure for a club "goes into the pocket of the club" and "saves the pocket of the member by reducing in his favour the current expenditure which otherwise he would have had to bear".

Closed Community

31. RT say there is no trade carried on within an unincorporated association in its actions with its members, and refer to *Styles v New York Life Assurance Company (NYLAC)*. This House of Lords 1888 case concluded that the surplus from excess contributions of participating policy holders of a mutual life assurance company were not assessable to income tax.

32. Lord Watson in *NYLAC* referred to the mutual status of the company, noting the different relationship between the holders of participating and non-participating policyholders. The former had a voice in its administration, were entitled to a share of its assets and were liable for all losses and expenses incurred and the latter were merely creditors. He said "any surpluses received by contributors should not be considered as trading or as receiving profits and so, at least for income tax, a surplus contribution to the fund for a common purpose and did not amount to a trade".

33. Lord McNaughton in *NYLAC,* in relation to the tax treatment of any excess received each year of the amount really required, said "I do not understand how persons contributing to a common fund in pursuance of a scheme for their mutual benefit having no dealings or relations with any outside body can be said to have made a profit".

34. RT say that an economic activity starts only with those outwith the "closed community".

35. RT say that the timing of surpluses is irrelevant and refer to *NALGO v Watkins (NALGO),* a 1934 King's Bench case, which concerned the provision of cheap facilities at holiday camps for members, their wives, family and friends, but when the camp started up it accepted bookings from non-members. It was held that the liability to income tax was limited to the profits realised from non-members.

36. Mr Justice Finlay said in *NALGO* "it is a fallacy that where a member orders dinner and consumes it there is any sale to him. There is not a sale. The fundamental thing is that the whole property is vested in the members". He continued "there is, I think, no trade among the members. They cannot trade with themselves. An assessment should be made between members and non-members but it is not possible to isolate different facilities".

37. In *The Commissioners of Inland Revenue v The Stonehaven Recreation Ground*, an Inner House case in the Court of Session in 1929, the issue was whether the trustees were carrying on a trade in relation to a recreation ground. Admission was daily, fortnightly, monthly or by season ticket. The trustees held the grounds for the benefit of subscribers, with profits reverting to the subscribers. The trustees were held to be liable to income tax as there was, in the Court's view, no element of mutuality and they repeated the principle in *Styles* and *Carlisle and Silloth Golf Club* relating to trade with members.

38. In summary, RT say that UK domestic law on unincorporated, voluntary associations, where they do not seek to make a profit, constitutes a "closed circle" in which the members contribute money one way or another, to fund the cost of obtaining the food and drink they consume.

39. The "closed circle" is the primary consumer and within it, there is no trading, no economic activity and, in that respect, it is similar to the divisions within a company which can register for VAT but there is no trading for VAT purposes within the company. RT referred the Tribunal to Section 46(1) of VATA and the HMRC Manual VGROUPS 0950.

40. RT drew attention to the case which they consider to be unhelpful to their submissions, *Carlton Lodge Club v CEC (Carlton)*, a 1974 Queen's Bench Decision. This concerned an unincorporated members' drinking club which did not seek to make a profit. The club applied to cancel its VAT registration as it felt it did not make "a supply of goods or services for VAT purposes" as liquor was already the property of the club members and the payment made by a member for a drink merely constituted the consideration for the release by other members of their share in the drink. It was held that "supply" meant furnishing or serving goods or services and was not limited to the supply by way of sale. RT say the case has now to give way to EU law.

41. The *Carlton* case referred to Section 45 of the Finance Act 1972 whose provisions are repeated at Section 94(2) of VATA. The Court held that what was happening was that the purchasing member was merely obtaining, through the machinery of the club, a drink of which he was already a part owner. Lord Hoffman stated "the word supply in my judgement is clearly wide enough to cover what occurred in that case".

42. RT referred to *Eastbourne Town Radio Cars Association v CEC (Eastbourne)*, a House of Lords case in 2001. This also concerned a proposed cancellation of VAT registration when the association changed its constitution in 1994 as they claimed that members were not paying a consideration but were collectively funding services.

43. Lord Slyn of Hadley in *Carlton* considered whether the association made "taxable supplies". He said, referring to Section 94(2) (a), that the association is "deemed to be carrying on a business. The intention of the 1994 Act is plainly that the activities of an association should not be excluded from VAT merely because it was unincorporated and not a legal person".

44. Lord Hoffman in *Carlton* drew a distinction between members using the club to buy wine as part of the club's next order, undertaking to reimburse the cost where there was no supply to the members so the club were simply acting as a purchasing agent. If, on the other hand, it supplied the wine out of its own stock in return for payment into the funds of the club, that was a supply by the club to the member and "when I say 'out of its own stock' I mean out of wine which is held for the purposes of the club in accordance with its rules".

45. RT say *Heerma* postdates this case and is the leading case and that the final consumer is the "closed circle".

46. RT refer to *CEC v Yarborough Children's Trust*, a Chancery Division case in 2001. The case concerned a VAT claim by a children's trust for a village hall built and leased to a playgroup by the trust for charitable purposes and on which zero rating was claimed. Customs and Excise said this was a business activity and the Court considered whether it was an "economic activity". Mr Justice Patten stated "it is necessary to concentrate on the nature of the operation rather than its purpose in order to determine whether it constituted an economic activity". He referred to the "badges", so to speak, of an unincorporated association and said "I do not accept Section 94(2) should be treated as capable of converting into an economic activity a supply of services which would not otherwise be so treated. It seems to me that the legislative purpose of Section 94(2) was to ensure that the activities of an association or other organisation which is not a legal person should not be excluded from the VAT regime for that reason alone. Such an association could therefore be treated as a taxable person and be capable of making a taxable supply within the meanings of Sections 4 and 5(2) of the 1994 Acts".

47. He continued "support for this view can be found in the speech by Lord Slyn of Hadley in the *Eastbourne* Case, see [2001] STC606 [18], [2001] 1 WLR 794). As Lord Hoffman observed in that case, "although an unincorporated association can be 'a person', it can only be a taxable person if it is registered for VAT and the basis of registration is the making of taxable supplies (see para 1 of Schedule 1). An association can only make a taxable supply if it is treated as separate from its members to whom the supplies are made. The deeming provision in Section 94(2), although couched in the terms of carrying on a business, seems to me to be no more than a legislative shorthand for saying the services provided by an association to its members on an essentially commercial basis should be treated as part of a business, notwithstanding that the association has no legal existence beyond the contractual relationship between its members. It does not require a supply of services which is not inherently commercial to be treated as such. I do not, therefore, accept Section 94(2) has the effect of making the operation of the playgroup an economic activity".

48. RT say that some of HMRC's submissions assume their own truth and they cite *Rank Group v Revenue & Customs Commissioners.* RT claim there are not two supplies in relation to their activities with members and non-members, as there is only one taxable supply which is to non-members.

49. RT say the intention, or not, of making a profit is of relevance, notwithstanding that, in fact, RT incurs a loss on food and drink, as recorded in their accounts. In an English partnership if there is an intention to make a profit and there is an intermediate stage in entering into transactions with third parties who are the final consumer, there is a taxable supply. In relation to the supply to RT's members there is no intermediation as RT itself is the final consumer.

HMRC'S Submissions

50. HMRC say that the proposition that members' clubs that buy food and drink for private consumption or private needs of their own members and, in so doing, act in a private capacity as non-taxable and final consumers, is wholly misconceived.

51. To accept that proposition would mean that no supplies by members' clubs to their members could ever be taxed and would apply to other unincorporated associations such as English partnerships which are generally recognised as trading entities.

52. HMRC say that RT are acting as a taxable person and that RT are looking at this issue from "the wrong end of the telescope" in saying that because they acquire goods for private purposes, it follows that a supply to a member is not acting in a taxable manner. HMRC say that this is a most radical proposition as the only difference between an English Partnership which is generally recognised as a trading entity, and a club, is that the former aims to make a profit (distributable or distributed) and a club does not.

53. HMRC say that supplies of golfing services by RT benefit from the sporting exemption for non-profit making bodies at Schedule 9 Group 10 of VATA. This is an acceptance that RT is a non-profit making and, if as RT now claim, it is out of the scope for tax, HMRC question why there needs to be any exemption for sporting activities at all. To this extent, HMRC say the claim by RT goes against the principles of VAT.

Contracts by Members' Clubs

54. HMRC refer to *Murray v Johnstone*, the 1876 case, and, say that, if the principle of that case is applied to a glass of whisky rather than a silver cup, then the glass of whisky could not be sold or alienated without the consent of all the members of the club. Consequently, most clubs provide for a management committee or equivalent who can represent the whole membership and who can empower others to act on their behalf, for example a bar person to sell a glass of whisky. In RT, no distinction is made at the point of supply between members and non-members so that the terms on which a member deals with the bar person in this example are on exactly the same terms as non-members deal with the bar person.

55. Consequently, in contracts made by the club, because it lacks legal capacity, it has no capacity to contract and the individual member's contractual liability depends on the extent of the authority conferred by the members on those acting on their behalf.

56. There is still a contract when dealing with the club (McBryde, Law of Contracts of Scotland at 3-102) but the question with whom the contract is made is a function of the rules and authority held by those persons so empowered, whether the contract is made by or on behalf of the membership, by particular individuals or by office bearers or by some or all of the members.

57. HMRC cite Lord Pearson in *Thomson and Gillespie v Victoria Eighty Club (1905)* as authority that a club is "not a legal entity capable of contracting or of being sued….The liability must rest either with the members as such or with the committee men….acting as agents".

58. HMRC say that the members, as a body, are completely separate from the individual member who is liable only to the extent that that member has authorised a particular transaction. Accordingly, the "private" interest of a club member in consumption, or his "private" needs should not be conflated with the club's activities, because, on any view, those interests are personal to the individual members. The club exists to serve the purposes laid down by its constitution or rules and is not the embodiment of the individual member or his interest or needs.

59. RT's committee, or a particular individual can be empowered by RT to contract or do so on behalf of the whole membership ie the club. It is thus the whole membership, or the club, which supplies goods and services of food and drink. The club's consumption is different from the club's aims. When a member has a drink, HMRC say, the club as a whole does not swallow it.

Members' Clubs as Businesses for VAT Purposes

60. Although members' clubs have no legal personality, HMRC say they are taxable persons and like RT are VAT registered.

61. Section 94(2) VATA says "the following are deemed to be carrying on a business":-

> (a) the provision by a club, association or organisation (for subscription or other consideration) of the facilities or advantages available to its members;
>
> and
>
> (b) the admission, for a consideration, of persons to any premises.

62. HMRC say the deeming provision of carrying on a business is based on the provision of facilities to members and non-members and, in RT's case for a consideration, being the payment given for the supply of the food and drink.

63. HMRC say it is not businesses which are entitled to be registered for VAT but taxable "persons". Section 3(1) VATA provides that, "A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act."

64. In *CEC v Evans*, (1982) STC 342 it was held that an English partnership was not liable for VAT because it was not a separate person but that the individual partners were so liable. HMRC say that a similar approach must apply to clubs in terms of Section 94(2) of VATA. HMRC refer to Section 4(1) VATA which states that "VAT shall be charged on any supply of goods or services made in the UK, where it is a taxable supply made by a taxable person in the course of furtherance of any business carried on by him".

65. Section 4(2) states "A taxable supply is a supply of goods or services made in the UK other than an exempt supply".

66. Sections 46(3) VATA states "The registration under this Act of any such club or association or organisation may be in the name of the club, association or organisation; and in determining where goods or services are supplied to or by such a club, association or organisation or whether goods are acquired by such a club, association or organisation from another member State, no account shall be taken of any change in its members". HMRC refer to Regulation 8 of the VAT Regulations 1995 (SI1995/2518):- "Anything required to be done by or under the Act…by or on behalf of a club, association … the affairs of which are managed by its members or a committee…shall be the joint and severally responsibility of:-

(a) every member holding office as president chairman….; or in default of any thereof,

(b) every member holding office as a member of the committee…; or in default of any thereof,

(c) every member,"

67. HMRC say that RT's liabilities are due first by their officers, failing which the committee, failing which its members.

68. HMRC say that Section 94(2) of VATA does not convert a non-taxable transaction into a taxable one. They refer to the *Yarborough* case and say that the limits of dealing are that taxable transactions carried out by the club are taxable even although it has no legal capacity. HMRC say that a supply of goods and services in the course of furtherance of any business includes the supply of food and drink to members.

Supplies to Members

69. HMRC say that a member can contract with his fellow members for their interest in joint property. They refer to Section 2(2) of the Sale of Goods Act 1979 which provides that there may be a contract of sale between one part owner and another and refer to Mr Justice Milmo who said in the *Carlton Club Lodge,* "Selling is not necessary. What was happening was that the purchasing member was merely obtaining through the machinery of the club a drink of which he was already a part owner. The word 'supply' in my judgement is clearly wide enough to cover what

occurred in this case". HMRC say that whether or not there is a sale is irrelevant; what is relevant is whether or not there was a "supply".

70. HMRC say that this is consistent with Mr Justice Law in *CEC v Reed Personal Services Limited (1995)* where he said "the concept of 'supply' for the purposes of VAT is not identical with that of contractual obligation" and "the incidence of VAT is obviously not by definition regulated by private agreement".

71. HMRC say that VATA 1994 translates EU law correctly and at Section 1 states "VAT shall be charged on the supply of goods or services in the UK" and at Section 2 "VAT is the liability of the person making the supply". They refer to Schedule 1 of the Interpretation Act 1978 which provides that "person" includes a body of persons, corporate or unincorporated; save to the extent that contrary intention appears and say that there is no such contrary intention in Section 94 VATA.

72. HMRC refer to *Eastbourne Radio Cars Association v CEC* 2001, a House of Lords case, where it was confirmed that a supply by a club to its members was taxable, notwithstanding it had no legal persona, and that a supply of service by a club would arise, if there was a direct link between the service it provided to its members under its rules and the consideration it received from them for it.

73. HMRC refer to Lord Hoffman's distinction, set out a paragraph 44 *supra*, and say that RT does not supply its members from specific stock acquired for and held as agents of those specific members. RT supplies members and non-members from its ordinary stock which is within Lord Hoffman's example of supply. The supply is in pursuit of the business carried on by and from stock owned by the membership in common. Were it otherwise, consent would be needed from all the members for a specific supply to a specific member, where, for example, stock has been alienated in return for a payment. The property in that part which is not owned by the member buying it, is acquired by him for his consumption as the final consumer. In regard to the interest in the common property which is already his by payment of his membership fees, he obtains the service of having it supplied to him for consumption in the club's facilities. Paying for a drink at the bar provides the clearest and most direct link between consideration and the supply, whether of goods or services, but the link would be equally clear if the consideration was charged to his member's account. Clubs do not act in a private capacity, they do not have private needs, only club purposes and it is wrong to conflate them.

74. HMRC say that as a matter of domestic law, therefore, a club which supplies food and drink to its members for a consideration is thereby a (collective) "person" making a taxable supply which is deemed to be in the course of a business and which is the liability of its officers, whom failing each member of the committee, failing which, each member. There is simply no such thing as the club acting in a private capacity making such supplies for a consideration.

European Law

75. HMRC say that there is nothing in EU law that overrides UK law so there is no direct effect and that UK law can be interpreted in accordance with EU Law. The issue is one of the chargeability of transactions under EU law.

76. HMRC say that RT do not point to any specific provision of UK law in relation to which the chargeability to tax is not in conformity with EU law and if RT are correct, it is surprising that transactions by a club with its members was not noticed in the *Eastbourne Radio Cars Association* case, in which there was a discussion of the applicable EU law.

77. HMRC say that EU law makes no distinction between natural persons and corporate entities on the one hand, and collective bodies which are in national law not separate legal persons such as UK members' clubs, on the other. Under EU law whether a person or body is a taxable person is simply a question of whether or not it carries out an economic activity.

78. HMRC refer to Article 9 of the PVD:- "Taxable person shall mean any person who, independently, carries out in any place any economic activity whatever the purpose or results of that activity".

79. HMRC say that "taxable person" is of very wide scope as stated in *Heerma* which considered the issue of whether a farmer could opt to tax a letting to the farming partnership of which he was a partner. The question was whether there was an independent economic activity by virtue of the letting. The letting was a supply effected for a consideration within Article 2, PVD.

80. It was held in *Heerma*:-

> "8. Partnerships governed by Dutch law are not legal persons in their own right. However, they do have the *de facto* independence of companies, which are legal persons and may carry on economic activities, independently, with the result that it is the partnership, and not the partners running the business…..that is to be considered as the taxable person. Accordingly the farmer was acting independently.
>
> 18. Insofar as the activity at issue is concerned, there is between the partnership and the partner, no relationship of employer and employee… On the contrary, the partner in letting tangible property to the partnership acts in his own name, on his own behalf and under his own responsibility, even if he is at the same time, manager of the lessee partnership. The lease in question was granted neither by the management nor by the representatives of the partnership.
>
> 19. In those circumstances, contrary to what the Dutch Government claims, it is irrelevant that the partner confines his activity to letting an item of tangible property to the partnership of which he is a member. That circumstance is of no consequence for the purpose of determining whether the partner is acting independently."

81. HMRC say that the form of legal persona in domestic law is not an issue as what is important is whether there is a taxable person and there is, therefore, no lack of clarity about EU law.

82. RT said it is the existence of "economic activity" which establishes the status of a taxable person. Transactions between an unincorporated association and a member are thus between separate persons for VAT purposes. A taxable person is one who carries out economic activity, even if that person is in law a body of individuals.

83. The supply of food and drink for a consideration is an economic activity which gives rise to a chargeable event by the following Articles of PVD:-

> "Article 4(1) - Supply of goods shall mean the transfer of the right to dispose of tangible property as owner".
>
> "Article 9 - Any activity of producers, traders, persons supplying services including…such being regarded as economic activity".
>
> "Article 63 - The chargeable event shall occur and VAT shall become chargeable when the goods and services are supplied".

84. Reference was made to the *University of Huddersfield v CEC,* 2006 where it was held at paragraph 47 that "economic activity is very wide and that term is subjective in character, in the sense that the activity is considered *per se* and without regard to its purpose or results".

85. And at paragraph 49 "…an obligation on the tax authorities to carry out enquiries to determine the intention of the taxable person would be contrary to the common system of VAT of ensuring legal certainty and facilitating application of VAT". Consequently, HMRC say that the supply of food and drink to a member by which the interests of the club are alienated to an individual member for a price constitutes economic activity.

86. Reference was made to *ADV All Round Vermittlungs AG v Finanzamt Hamburg – Bergedorf* 2012 which concerned the supply of staff. The case stated that there was no need to enquire as to the legal nature of the relationship between the supply and the staff being supplied and that Article 9(2)(e) of the Sixth Directive (77/388) has rules, the purpose of which is to avoid conflicts concerning jurisdiction which may result in double taxation or, secondly, non-taxation.

87. "Whereas, it would be administratively possible to have staff asking whether a buyer is a member or a non-member, this is not necessary if the interpretation is that this implies a supply of goods."

88. HMRC say that the profit motive is irrelevant. It is economic activity objectively assessed that is of importance. The club is taxable to the extent that it is no different to a supermarket where employees get a staff discount which could be seen as a "contribution to costs" but where the supply is exactly the same as one to a non-staff consumer.

89. HMRC say the club has no private activity, it has instead economic activity. It supplies its members food and drink in return for a consideration and meets the terms of Article 1(a) and (c) of PVD. RT has only the purposes defined by its constitution and an unincorporated association cannot physically use or consume food and drink. Its activity is in supplying it to members and it consumes food and drink only in the economic sense of using them for supplying them to members and guests for a consideration. That, HMRC say, is clearly economic activity.

90. HMRC argues that RT is a "taxable person" within Article 9 and states that RT is not relieved in the case of the club which has, at the time of buying the stock to make its supplies, the sole intention of using that stock to make supplies to specific members for whom that stock was specifically acquired.

91. HMRC say that RT's submission that food and drink were required for supply to members for that member's private consumption ignores the fact that the consumption is by the individual member after supply to him for a consideration. The stock was thus acquired and used in RT's economic activities. HMRC say that it is not significant if a member's consumption is a non-taxable activity.

92. HMRC say that it is the whole essence of VAT that it is borne in its entirety by the final consumer who is the member who receives and pays for the supply and not the club. The supply to the club and the supply by the club to its members are two separate supplies and both are chargeable to VAT in accordance with the nature of the separate supplies.

Fiscal Neutrality

93. HMRC refer to the case of *Rank Group plc v Revenue and Customs Commissioners*, an ECJ case in 2011. Here it was held that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services, identical or similar from the point of view of the consumer or meeting the same needs as the consumer, is sufficient to establish an infringement of that principle. "Such an infringement thus does not additionally require the actual existence of competition between the services in question, or distortion of competition, because of such difference in treatment to be established." *Finanzamt Bergisch Gladbach v HE ("HE")* involved a house constructed for a married couple, one of whom, used one room for business purposes and where it was held that a co-owner who was purchasing partly for business purposes was entitled to deduct input tax. HMRC say this is authority for the proposition that where a married couple (a marital community) which does not have legal personality and does not carry out an economic activity, the co-owners joining the community are to be regarded as recipients of the transaction. Given that the community is not a taxable person and on that account cannot deduct input tax, any such entitlement must in accordance with the principles of neutrality be granted to the spouses individually insofar as they have the status of taxable persons.

94. In RT's case, HMRC say the opposite is true. The club has the economic activity and the member does not, as opposed to *HE* where the business co-owner has

economic activity and the couple did not. Consequently, HMRC say that legal personality is not an issue and is therefore of no importance.

Summary of HMRC's position

95. Because the supply to members is for a consideration it is an economic activity which the club carries out as a taxable person. HMRC say it is absurd to suggest that the club and the member supplied, can be relieved of tax by virtue of having had the subjective intention when acquiring the goods or services used in making that supply of making that supply to the member, and to do so offends the principle that economic activities are to be established by objective criteria.

96. HMRC say that this also offends the principle of neutrality because supplies of this nature by the same person will be taxed differently according to how they receive them (member or non-members) and, accordingly, to whether the supplier had in domestic law a separate legal person or not.

97. It also offends the principles of non-taxation and distortion because the proposition involves a supply by RT to the member that is not taxed.

98. HMRC refer to *Revenue and Customs Commissioners v IDT Card Services Ireland Limited* 2006 STC1252 where at [95] Lady Justice Arden said "the principles of avoidance of non taxation, avoidance of double taxation and the prevention of distortion of competition are general principles of the Sixth Directive".

99. HMRC say that taxable supplies by taxable persons are transactions, such as those undertaken by RT, in relation to food and drink to members, are intended by the Directive to be taxed. HMRC say there is nothing to be gained by looking at interdivisional supplies between groups of companies because the divisions are part of the same legal entity and because the club is not a single legal entity.

The Decision

100. In considering whether RT are liable to tax on the provision of food and drink to its members, for a consideration, the Tribunal considered Article 2.1 which says "the following transaction are subject to VAT:-

> "The supply of goods for consideration within the territory of a member state by a taxable person acting as such."

Is There a Supply of Goods?

101. There is a supply of goods by RT through the mechanism of the committee who have the power under RT's Articles to appoint and remove employees and who can make regulations for "general comfort and accommodation of members as regards both the courses and the club house". Article 5 of RT's Constitution states that "the business and affairs of the clubs shall be under the management of a committee". Article 6 says "the committee shall have the power from time to time to make rules governing and running the club…".

102. This is further evidenced by Article 51 which provides "No member of the Committee or any manager or servant employed by the club shall have any personal interest in the sale of alcohol liquor in the club house or in the profits arising from such sale". Article 10 states that "the committee must be comprised of members".

103. The members do not help themselves to RT's property, they are served and charged for it for a consideration. The supply is for a consideration being the money paid by the member at the same rate as non-members and it was not part of their membership fee; it was not an "all inclusive" membership fee.

Taxable Person

104. The supply was by a taxable person, the club.

105. RT say that the club is indistinguishable from its members and refers to the judgement of *Murray v Johnstone* where it was held that some members could not alienate a silver cup because it was said to be "common property", Lord Traynor said the matter "would be different if there were a committee/matter of administration". As Professor Kenneth Reid states in the Property section of The Stair Encyclopaedia of the Law of Scotland [para 34], this case was "decided in 1896, before the modern distinction between joint and common property was properly established. It is now recognised that the assets of an unincorporated association are held by it members in the highly restrictive form of joint property. This means there are no severable *pro indiviso* shares rather a single title held jointly by all co-proprietors and there is no entitlement to division and sale. Joint ownership comes to an end only when the property is alienated or destroyed or when the membership of an association is reduced to one or in the winding up of the association".

Acting as Taxable Person

106. Article 9.1 states that "taxable person" shall mean any person who, independently, carries out in any place any economic activity whatever the purposes or results of that activity. Any activity by persons supplying services, shall be regarded as economic activity. The exploitation of tangible…property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as economic activity".

107. The Tribunal found that the imposition of a committee and its employees between RT and its members amounts to an intermediate stage and, given the nature of joint property are acting independently from the members *per se*. There is, therefore, a supply between two distinct entities, RT on the one hand and its members on the other.

108. This is reinforced at least in the case of the members of the committee who are, under Article 51, unable to have a personal interest in any sale, and so, they cannot in terms of this Article be agreeing to meet a cost as they would then have a personal interest which is prohibited by that Article.

109. The Tribunal considered whether the intention to make a profit or not affected the interpretation of whether the economic activity was carried out independently. This is not relevant in terms of EU law which is concerned with the carrying out of economic activity which means any activity of supplying services.

110. The definition of "supply" was considered in *Carlton Lodge Club* when interpreting the words "supply of goods or services" in Section 1(1) of the Finance Act 1972. It was held that a sale was not necessary where the club did not aim to, and did not make, a profit. Mr Justice Milmo said "the steward was authorised from time to time by the wine committee of the club to make purchases of liquor which he did out of club funds. The purchases were duly supplied to members on demand when they asked for a drink…A member going into the bar was not required to have a drink. There is an express finding that the club was run in a business-like manner".

111. In that case, all those supplied were members whereas, in addition, in RT's case, there were also non-members supplied in an identical manner. The same structure and processes were in place at RT as they were in *Carlton Lodge Club* and the supply to non-members, in the Tribunal's opinion, reinforces the "business-like manner", even if the supply was not intended to produce profits.

112. The Tribunal do not consider that RT supplied services to themselves as the committee and/or their employees order in supplies of food and drink, process them and sell them in the same way to members as they do to non-members.

113. RT say that EU law and the decision in the *Heerma* case "trumps" EU law and the *Carlton Club Lodge* decision.

114. *Heerma* drew a distinction between "private use" and "in the course of business". The ECJ considered whether there was "independent economic activity" and held that a broad definition had to be given to the words "taxable person" because of fiscal neutrality. Consequently, it decided that where a taxpayer had no legal persona, under national law, that taxpayer could carry out economic activities as a "taxable person" as if it did have legal capacity.

115. *Heerma* did not involve the imposition of a committee or employees of the committee in making a supply. It was a supply by "A" to "B" where "A" was a partner in "B" and so, as in *DA*, there was a direct link to private use/capacity.

116. In *Heerma* the taxpayer was successful in establishing that there was independent economic activity because there were held to be two taxable persons, Mr Heerma and Mr Heerma's partnership.

117. The Tribunal consider that similarly there are two taxable persons, namely RT on the one hand and its members on the other so that there is economic activity, by a supply of services which is carried out independently, and so RT is liable to VAT.

118. In *Eastbourne Town Radio Cars* the supply of services by the association was held to be within the scope of VAT as "carrying on a business" if it constituted "an

association" and "if the facility and service in question was provided in accordance with the association's rules" and that "the payment of subscriptions.. on the basis of simply dividing the expenses of the association amongst the members did not alter the character of the transaction as a supply by the association to the members".

119. Lord Hoffman said "what matters is that as between the members, the provision of services to members is governed by the rules and byelaws of the association…What matters is that the consideration for the member's entitlement to services, under the rules, is a payment into the funds of the association in accordance with the rules".

120. The Tribunal consider this is directly applicable to RT in relation to independently engaging in economic activity and the supply of services.

UK Law

121. In terms of EU law, the Tribunal consider, for the reasons given, that the supplies to RT to its members are taxable and liable to VAT.

122. The Tribunal consider that the deeming provisions of Section 94(2) of VATA apply as there is a supply, for a consideration, in the course or furtherance of any business which is deemed to include the provision by a club of the facilities or advantages available to its members.

123. Accordingly, the Tribunal consider that RT acts as a taxable person when they acquire food and drink for their own members and accordingly, that Article 2(1) of PVD has been correctly implemented and applied in UK law.

124. In considering RT's claim to assert the direct effect of EU law, the Tribunal does not accept that within the association (RT) and its members there are private assets privately consumed by members primarily because of the rules of RT which provide the business like mechanism for making supplies to non-members which are replicated for members.

125. The Tribunal note that at least in financial terms, the number of non-members must, in any event, be comparatively small under the terms of the Constitution in force during all or most of the period under appeal as non-members are restricted to the guests of all members, excluding temporary members and where all visitors to the club are, albeit for a day, treated as temporary members but still nonetheless members in terms of RT's Articles.

126. In relation to the members of the committee, they are furthermore prohibited from having any personal interest in the sale of liquor and so the members of the committee would still be unable to be considered as acquiring the shares in any property which they do not own.

127. The Tribunal also noted that RT takes advantage of the exemption from VAT for certain sporting services, namely golf, in respect of that particular supply and supply this benefit to visitors whom they classify as temporary members which was

motivated in large part to allow those visitors to consume alcohol under the relevant licensing laws.

128. It does not seem credible that visitors treated as temporary members in terms of RT's Articles but nonetheless members for the purposes of VAT exempt green fees and for alcoholic drinks but then as non-members for the purposes of the consumption of food and non-alcoholic drink.

129. Section 94 5(2)(a) states "supply in the Act includes all forms of supply but not anything done otherwise than for a consideration" and at subsection 4(2) states "a taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply", and subsection 3(1) states that "a person is a taxable person for the purposes of this Act where he or she is required to be registered under this Act".

130. The Tribunal consider that there was a supply of food and drink and that the supply of these goods or services was not an exempt supply for the reasons given above.

Is the supply made by a taxable person in UK Law?

131. RT is a taxable person as it is registered under the Act for VAT in terms of Section 3 VATA "(1) A person is a taxable person for the purposes of this Act, unless he is, or required to be, registered under this Act".

Section 94(2) VATA

132. Section 94(2) of VATA states that "without prejudice to the generality of anything else in this Act, the following are deemed to be carrying on a business:-

> (a) "the provision by a club, association or other organisation (for a subscription or other consideration) of the facilities or advantages available to its members and…".

133. The case of *DA* referred to where a taxpayer sold property part of which he had chosen to reserve for his private use and it was held that a taxable person performing a transaction in a private capacity does not act as a taxable person.

134. In RT there is no intention to reserve any part of RT's property for private use as there is no distinction when buying stock of any difference between stock purchased for the members, who might in those circumstances in the words of Lord Hoffman "have had goods specifically bought for them in that capacity and on the other hand goods bought by the club for onward supply to non-members and members on the same terms".

135. Similarly, there is no distinction made at the point of sale between members and non-members as referred to in *Carlisle* and *Styles*.

136. In the case of RT there is no reservation for private use. What RT claims is that there is consumption for private use but this comes from the same stock as for supply to non members and members.

137. The *Stonehaven Recreation Ground* and *NALGO* cases concerned the carrying on of a trade/assessable profits whereas VAT concerns the supply of goods and services [Section 4 VATA] and the supply of goods [Art 2.1 PVD] and in view of the *Carlton Club Lodge* and *Reed Personnel Services* judgement are of limited application.

138. The Tribunal accepts HMRC's submissions in relation to -

(a) the separate needs, purposes and interests of RT on the one hand and its members on the other and accepts that these cannot be conflated for the purposes of assessing independence and supply;

(b) the liability in relation to its responsibility under VATA, and the resulting consequences in relation to supply and carrying on of a business, where, as is the case, it is managed by a committee, in terms of Regulation 8 of VAT Regulations 1995

and

(c) a consideration having been made for supplies made by RT to its members, which amounted to economic activity and not private activity.

139. The Appeal is dismissed.

140. 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.

RUTHVEN GEMMELL

TRIBUNAL JUDGE

RELEASE DATE: 17 March 2015

Appendix 1

Legislation

Value Added Tax Act ("VATA") 1994 –

Section 3 VAT

"(1) A person is a taxable person for the purpose of the Act, while he is, or is required to be, registered under the Act.

(2) ….."

Section 4 VATA

"(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply".

Section 5 VATA

"….

(2) Subject to any provision made by [Schedule 4] and to Treasury orders under subsections (3) to (6) below –

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for consideration;

(b)…..".

Section 94 VATA

"(1) In this Act 'business includes any trade, profession or vocation'.

(2) Without prejudice to the generality of anything else in this Act, the following are deemed or be the carrying on of a business –

(a) the provision by a club, association or organisation (for a subscription or other consideration) of the facilities or advantages available to its members;

and

(b) the admission, for a consideration, of persons to any premises.

(3) …..".

Principal VAT Directive 2006/112/EC ("PVD")

Article 2.1

"The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

(b) …...".

Article 9.1

"1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity".

Article 10

"The condition in Article 9(1) that the economic activity be conducted 'independently' shall exclude employed or other persons from VAT insofar as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability."

Article 16

"The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.

….".

Article 167

"A right of deduction shall arise at the time the deductible tax becomes chargeable".

Article 168

"In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which

he carried out these transactions, to deduct the following from VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

(b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) the VAT due on transactions treated as intra-community acquisitions in accordance with Articles 21 and 22;

(e) the VAT due or paid in respect of the importation of goods into that Member State."

Appendix 2

Cases

1. *Murray v Johnstone* [1896] 23R 981
2. *Styles v New York Life Insurance Company* [1889] 2 TC 460
3. *Thomson & Gillespie v Victoria Eighty Club* [1905] 13 SLT 399
4. *Carlisle and Silloth Golf Club v Smith* [1913] 6 TC 48 and [1913] 6 TC 198
5. *Commissioners of Inland Revenue v Stonehaven Recreation Ground Trustees* (1929) 15 TC 419
6. *The National Association of Local Government Officers v Watkins* [1934] 18 TC 499
7. *Carlton Lodge Club v Customs and Excise Commissioners* [1974] STC 507
8. *Customs & Excise Commissioners v Evans* [1982] STC 342
9. *Finanzamt Uelzen v Dieter Armbrecht* [1995] Case C-291/2
10. *Customs & Excise Commissioners v Reed Personal Services Ltd* [1995} STC 588
11. *Eastbourne Town Radio Cars Association v Commissioners of Customs & Excise* [2001] STC 606
12. *Customs & Excise Commissioners v Yarborough Children's Trust* [2002] STC 207
13. *Staatssecretaris Van Financiën v Heerma* [2002] 1 CMLR 33 (Case C-23/98)
14. *University of Huddersfield Higher Education Corporation v Customs & Excise Commissioners* [2006] 2 CMLR 38 (Case C-223/03)
15. *Revenue and Customs Commissioners v IDT Card Services Ireland Ltd* [2206] STC 1251
16. *Finanzamt Bergisch Gladback v HE* [2007] Case C-25/03
17. *Rank Group plc v Revenue and Customs Commissioners* [2001] (Joined Case C-259/10 and C-260/10)
18. *ADV Allround Vermittlungs AG v Finanzamt Hamburgh-Bergdorf* [2012} Case C-218/10