[2020] UKFTT 438 (TC)

TC07915

VAT – VATA s31(1), Schedule 9, Group 1 Item 1(m), Note 16. Whether organisation of football and netball leagues and pitch hire amounted to the "grant of any interest in or right over land or of any licence to occupy land" and satisfied Note 16. Held: yes. Sinclair Collis Ltd-v-Commissioner of Customs & Excise [2003] 2 CMLR and *Regie Communale Autonome du Stade Luc Varenne-v-Etat Belge, EU Case C-55/14 (2015) applied. Goals Soccer Centre PLC v HMRC [20012] UKFTT 576 (TC) considered.*

FIRST-TIER TRIBUNAL **Appeal number: TC/2018/05959**
TAX CHAMBER **TC/2019/00214**

BETWEEN

NETBUSTERS (UK) LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE ASIF MALEK
IAN MALCOLM

The hearing took place on 14 & 15 October 2020. With the consent of the parties, the form of the hearing was video. The remote platform used was Tribunal Video Platform. The documents before us were all in electronic form and consisted of a Trial Bundle ("TB"), Authorities Bundle ("AB"), Supplementary Authorities Bundle ("SAB"), Appellant's Skeleton Argument ("ASA") and Respondent's Skeleton Argument ("RSA"). Reference in this decision to these documents will be made in square brackets identifying the document and then followed by the page or paragraph number.

We directed that the hearing should be in private on the basis that it was not in the public interest during the pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely which by necessity meant it must be in private.

Mr. Michael Firth for the Appellant

Ms. Kate Selway QC, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

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DECISION

INTRODUCTION

1. This appeal concerns the proper classification for VAT purposes the supplies made by the Appellant. The activities in question are the organisation by the Appellant of various competitive football and netball leagues and the supply of pitches for these league matches to be played upon. There is a dispute as to the proper description of these activities so this paragraph should not be taken as indicative of our views.

PROCEDURAL MATTERS

2. There are two appeals before us. Firstly, the Appellant appeals against the Respondents' refusals to repay VAT that the Appellant contends was overdeclared output VAT for the periods 04/13 – 10/16 in the total sum of £414,622. Secondly, the Appellant appeals against assessments raised by the Respondents for the periods 01/17 – 07/18 totalling £218,542.

3. The Respondents issued further assessments relating to the periods 10/18 – 10/19 totalling £185,021. According to the Appellant these assessments were appealed to this Chamber on 9 March 2020 and it seeks that this appeal be consolidated with the two that are before us on the basis that the issues and facts in all three appeals are substantially the same. The Respondents do not oppose such consolidation in principle but point out that the latter appeal appears not to have been acknowledged by the Tax Tribunal and no hardship application has been made.

4. Given the practical considerations, namely that no one can provide us with an appeal number for the appeal notified on 9 March 2020 or confirm that an application for hardship has been made, we are not minded to order the consolidation of the appeals as sought by the Appellant. However, we fully expect that the parties will give effect to our decision in the appeals before us by seeking to agree the matters relating to the appeal notified on 9 March 2020.

THE LAW

5. The burden is, of course, upon the Appellant to satisfy this tribunal that it should succeed in its appeals. The standard is that of the balance of probabilities.

The legislative framework

6. Article 135 of the Principal VAT Directive, Council Directive 2006/112 ("the PVD"), upon which the UK exemption (below) is based, sets out that:

> "Member States shall exempt the following transactions: … (l) the leasing or letting of immovable property … Member States may apply further exclusions to the scope of the exemption referred to in point (l) …".

7. Section 31(1) VATA 1994 provides that:

> "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9."

8. VATA 1994, Sch 9, Group 1 exempts:

> "The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right, other than
>
> […]
>
> (m) the grant of facilities for playing any sport or participating in any physical recreation;"

9. However, Note 16 provides that:

> "(16) Paragraph (m) shall not apply where the grant of the facilities is for
>
> (a) a continuous period of use exceeding 24 hours; or
>
> (b) a series of 10 or more periods, whether or not exceeding 24 hours in total, where the following conditions are satisfied—
>
> (i) each period is in respect of the same activity carried on at the same place;
>
> (ii) the interval between each period is not less than one day and not more than 14 days;
>
> (iii) consideration is payable by reference to the whole series and is evidenced by written agreement;
>
> (iv) the grantee has exclusive use of the facilities; and
>
> (v) the grantee is a school, a club, an association or an organisation representing affiliated clubs or constituent associations."

10. The legislation is multi-layered, but the overall affect is that where there has been the grant of facilities for playing of any sport or participation in physical recreation then provided that such grant falls within the definition contained in Note 16 it remains within the Schedule 9 exemption provided that such grant represents, in England[1], the "*grant of any interest in or right over land or of any licence to occupy land*". Put another way there are two hurdles to overcome if the grant of facilities for the playing of any sport or participation in physical recreation is to be treated as an exempt supply. The grant must satisfy Note 16 and must satisfy the overall Schedule 9 exemption (interest in, right over or license to occupy land). If these two hurdles are overcome the supply will be exempt. If not then the supply will be standard rated and subject to VAT.

Case law

11. A number of cases where referred to by the parties as a means of interpreting the above legislation. We have attempted to extract the salient principles to aid our interpretation and decision below. We were also referred to a number of cases which were presented as examples of the application of the relevant legislation. These we found to be less helpful so, although we read them and have had regard to them, we do not set out the details here.

12. In *Sinclair Collis Ltd-v-Commissioner of Customs & Excise [2003] 2 CMLR* the ECJ held:

> "22. It is settled case law, first of all, that the exemptions provided for by Art.13 of the Sixth Directive have their own independent meaning in Community law and that they must therefore be given a Community definition.
>
> 23. Secondly, the terms used to specify the exemptions provided for by Art.13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.
>
> 24. With regard to the exemptions in Art.13B(b) of the Sixth Directive, the provision does not define "letting", nor does it refer to relevant definitions adopted in the legal orders of the Member States.

[1] We were not addressed upon and nor did we consider the law other than as it applied in England

> 25. However, it is also settled that the fundamental characteristic of a letting of immovable property for the purposes of Art.13B(b) of the Sixth Directive lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right.
>
> 26. Moreover, in order to determine the nature of a taxable transaction, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features."

13. In *Regie Communale Autonome du Stade Luc Varenne-v-Etat Belge, EU Case C-55/14 (2015)* the court held that:

> "According to settled case-law, the fundamental characteristic of the concept of 'letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive lies in conferring on the other party to the contract, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right. In order to determine whether a contract falls within that definition, account should be taken of all the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties. (para. 21)
>
> As regards, more specifically, the classification of the use of sporting facilities, the Court has previously stated that services linked to the practice of sport or physical education must, so far as is possible, be considered as a whole (judgment in Stockholm Lindöpark, C-150/99, EU:C:2001:34, paragraph 26) (para. 25)
>
> Accordingly, with regard to the letting of a golf course, the Court has stated that since the activity of running a golf course entails not only the passive activity of making the course available but also a large number of commercial activities, such as supervision, management and continuing maintenance by the service-provider and the provision of other facilities, letting out a golf course cannot, in the absence of quite exceptional circumstances, constitute the main service supplied (the judgment in Stockholm Lindöpark, EU:C:2001:34, paragraph 26)" (para. 26)"

THE EVIDENCE AND FACTUAL FINDINGS

14. In addition to being referred to the documents contained within the bundle we heard evidence from Mr Jaume Mascaro, a director of the Appellant. He gave evidence remotely and affirmed his oral evidence in line with the current practice of the Tax Chamber for hearings conducted remotely. He adopted his witness statement [HB 119]. There was an opportunity for the Respondent and this tribunal to put questions to him. We found Mr. Mascaro to be a compelling witness who gave his evidence in a clear and straightforward manner. We did not experience any difficulty in assessing his evidence by reason of the fact that the hearing was conducted remotely.

15. No evidence was called on behalf of the Respondents.

16. Our findings of fact, in so far as they are relevant to our decision, are as follows:

(1) The Appellant was registered for VAT on 15 February 2012.

(2) The Appellant enters into binding agreements with third parties, such as local authorities and schools, to hire venues belonging to these third parties for set periods of time. It then hires these venues to its customers. The Appellant also organises competitive football and netball leagues and the majority of the pitches are hired by

teams participating in one of its leagues - either as a block booking for the season or one-off bookings.

(3) The venues hired are 5/6/7-a-side artificial football pitches and netball courts. There is no one overseeing the use of pitches during the period of hire. Usually, but not always, the venue comes with toilet and changing room facilities. There are no other facilities provided and people tend to turn up to the games and leave straight after. No parking facilities are provided at any of the grounds.

(4) Where the pitches have floodlighting this is sometimes turned on by the Appellants, but it is usually turned on and off automatically.

(5) There is minimal equipment supplied by the third party school or local authority consisting usually of goal posts which the Appellant puts up. The Appellant has purchased around 3-4 sets of goals which it supplies for one of its venues.

(6) On rare occasion when one team fails to attend a fixture the other team's hire of the pitch goes ahead in their pre-allocated slot resulting, often, in a friendly match supervised by the referee (or not) depending on the preference of the players.

(7) The Appellant's league/tournament management services are, in principle, available independently of pitch hire, but in practice rarely are.

(8) A team who wishes to participate in a league and make a block booking will register online. Once on the site the participants are asked to supply a team name, captain's details, to choose a league and agree with the terms and conditions.

(9) The cost to each team of entering a league is between £350-£779 per season of around 10 matches. There is a single price to pay for both pitch hire and league management services. The Appellant allocates 87.5% of the fee to pitch hire and 12.5% to league management services which, absence any other evidence, we accept at face value.

(10) It is possible for individuals who do not have sufficient numbers to form a team to register, choose the venue and pay an individual price. The Appellant will then try to form a team from these individuals. This accounts for between 2-3% of the teams.

(11) Once a team has registered it will receive a fixtures notification at the beginning of the season. After that the teams check their fixture times on the website. The teams play ten or more matches at the same venue and at the same time slot every week. The teams know in advance when the pitch will be theirs to play the match.

(12) The Appellant provides a referee and a ball as part of the league organisation and occasionally bibs (but not kits).

(13) First aid kits are usually brought by the referee although the Appellant supplies ice packs.

(14) The Appellant gives a plastic trophy (costing £5) to the team that wins the league.

SUBMISSIONS

17. Counsel for both parties provided very detailed and helpful skeleton arguments. What follows is a summary of those skeleton arguments and the submissions made during closing on behalf of the parties.

Respondents submissions

18. The Respondents submission can be summarised as follows:

(1) The supplies that the Appellant makes to its customers need to be put into their factual context. The Appellant is reliant upon the rights that it has been granted by the various third parties (schools and local authorities) in order to make its supplies. It cannot confer a right that it does not have onto another. The nature of the supplies received by the Appellant is properly categorised as permission to use sporting facilities, sometimes with the possibility of additional services provided. The Respondents point to the agreements entered into by the parties and argue that these documents clearly set out that there is no intention to create a tenancy and the agreements do not provide for exclusive use of the premises.

(2) The supplies that the Appellant makes to its customers are not properly categorised as conferring "*the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right*", but as the use of sporting facilities with associated league administration services. This is evident when one takes into account all the "*characteristics of the transaction and the circumstances in which it took place*". These include the way in which the supply of services by the Appellant was regarded by its customers, the fact that the "core business" activities of the Appellant was the organisation of netball and football leagues, the fact that the Appellant provides additional services such as league administration, umpire, balls and league prizes and one-off pitch hire forms a tiny part of the Appellant's business. The Appellant sought to draw particular attention to the *Luc Varenne* case by way of analogy.

(3) The case of *Goals Soccer Centre PLC v HMRC [20012] UKFTT 576 (TC)* was distinguishable from the present case because in that case the appellant held long leases from local authorities, had spent considerable sums on creating a venue on each site, its pitch hire and league entry contracts were separate, and its business model was strikingly different from that of the Appellant's.

(4) The Appellant does not satisfy conditions (iv) and (v) of the Note 16 conditions. The agreements make clear that the Appellant does not have exclusive use of the hire facilities. Further, the Appellant is not a "*school, a club, an association or an organisation representing affiliated clubs or constituent associations*" and neither are its customers – the latter are individuals and/or teams formed for the purpose of playing in the Appellant's leagues.

Appellants submissions

19. The Appellant's submissions can be summarised as follows:

(1) The supplies to the Appellant are properly categorised as supplies of land. Schedule 9 confirms that the granting of facilities for playing any sport or participating in any physical recreation is, or at least, can be a supply of land, but would be an exception under item 1(m). The Appellant notes the direct contradiction between HMRC's argument in this case, and its express position in the Brief: "*HMRC accepts that the decision of the FTT is applicable to all traders who operate in circumstances akin to Goals Soccer Centres plc. This includes traders who hire the pitches from third parties such as local authorities, schools and clubs*."

(2) The Appellant has a right to occupy rather than a right to use. The respondent's reliance upon paragraph 77 of the decision in *CEC v. Sinclair Collis [2001] UKHL 30* is misconceived. Paragraph 77 provides: "*So how is the right to install and maintain a vending machine under the terms of such an agreement as this case involves to be regarded? A "licence to occupy" is something to be enjoyed by persons, whether natural or corporate. It is people or companies who must be in possession or exercise*

control, not inanimate objects like tables, kiosks, cars or vending machines. A right, for example, to use a safe deposit box at a bank does not grant the customer a "licence to occupy" the safe deposit box. It is the bank that is in possession and control of the whole of its premises, including the space taken up by the box. The customer has no more than a right to put things in the box and is not, in any meaningful sense, in occupation of the space taken up by the box." The Appellant's rights are enjoyed by persons occupying and not by placing inanimate objects on the land.

(3) VAT law requires one to characterise what the Appellant supplies. How the Appellant puts itself in the position to be able to make such supplies is irrelevant.

(4) The supplies are separate.

(5) Even if the supplies are not distinct then the principle element of the supply is the exempt supply of the pitch.

(6) The Respondent's analysis of Note 16 (iv) and (v) is misconceived because it seeks to apply the conditions to the Appellant, who is not the grantee.

(7) The conditions of Note (iv) and (v) are satisfied in any event.

(8) The Respondent is precluded from raising Note 16(v) as an issue. It apparently conceded the point (by not raising it at the review stage) and then failed to raise it in its State of Case or amended Combined Statement of Case. The Appellant could and would have adduced evidence in support of its position if it knew that the point was properly in issue.

(9) The EU law principle of equal treatment requires that similar situations are not treated differently unless the differentiation can be objectively justified [*Marks & Spencer plc v. HMRC C-309/06 – par 51*]. In considering whether situations are similar, the criteria relied upon to differentiate the situation must be relevant to determining the treatment in question [*Lindorfer C-227/04, AG Opinion, par 24*]. EU law requires the national courts to confer on the disadvantaged category the advantages enjoyed by persons in the favoured category [*Rodríguez Caballero C-442/00, par 42*]. The Appellant falls directly within the scope of the Brief and HMRC manuals and is in the same position as *Goals Soccer* and *Football Mundial Ltd v HMRC [2016 UKFTT 736 (TC).*

THE ISSUES BEFORE US

20. The issues that are before us can be summarised as follows:

(1) Do the Appellant's supplies amount to the "*grant of any interest in or right over land or of any licence to occupy land*"?

(2) If so, do the Appellant's grants of facilities satisfy all the conditions set out in Note 16?

(3) Even if the Appellant fails to succeed on issue (1) and (2) above should its appeals be allowed because the Respondents have failed to treat it in the same way as others in similar situations without objective justification?

21. The parties specifically confirmed that "unjust enrichment" was not an issue before us.

DISCUSSION

22. We take each of the issues in turn below.

Are the Appellant's supplies "grants of interests in or rights over land or licences to occupy land"?

23. The way in which we must come to our task in determining the nature of the supplies made by the Appellant is clear. We should:

(1) Construe the exemption narrowly (but not artificially) giving it its independent EU law meaning.

(2) Consider a fundamental characteristic of letting immovable property to be the conferring on the person, for an agreed period and for payment, the right to occupy as if that person were the owner and to exclude any other person from enjoyment of such a right.

(3) Take into account all of the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties.

(4) Where the classification of the use of sports facilities is concerned, we must consider the services linked to the practice of sport or physical education, so far as possible, as a whole.

24. As set out earlier in this decision the Respondents submit that the Appellant cannot confer rights to its customers that it does not itself possess. The Appellant's counter argument is that we should look at the supply in question and not at how the Appellant came into the position to be able to make the supply. Whilst it is, obviously, correct to say that we should concentrate on the supply made by the Appellant we must take into account the circumstances which include, in this instance, the relevant supply to the Appellant. This is because when reading the national legislation we note that it couches the exemption in terms of "the grant of any interest…". For an interest to be granted it must, in the first place, be in the gift of the grantor. It is difficult to see how it would be possible for the grantor to magic something out of nothing. So, it seems to us, a trespasser who purported to grant an interest over property in which he himself had no interest could not argue that he had granted an interest in land which entitled him to an exemption for VAT purposes. He was not in a position to be able to make the grant and has granted nothing; accordingly, he is not entitled to any exemption. We do, therefore, need to examine the nature of the supply to the Appellant as well as the supply made by the Appellant. We cannot consider the latter in isolation.

Nature of supplies made to the Appellant

25. In coming to our conclusion under this head we have regard to the written agreements entered into by parties. We were referred to an example of such an agreement during submissions [TB page 581]. Other agreements between the Appellant and third parties are couched in similar terms. The agreement is expressed to be between "King Solomon Academy" and "Netbusters". The hire charge is expressed to be "£50 per hour for the sports hall". The "Premises" is defined as "King Solomon Academy", the "Hire Period" is "15 weeks" and the total number of hire hours is said to be 41.25 hours. Paragraph 5 of the special conditions provides "*The use of premises is restricted to the use, time and accommodation specified in the hire agreement. The Hirer shall have non-exclusive use of the Premises and shall have access to the toilet facilities. The Hirer is not permitted access to any other parts of King Solomon Academy*". At paragraph 18 the agreement confirms that

there is no intention to create a tenancy and that the academy staff shall be given free access to the hired premises for the purpose of inspection.

26. Reading the agreement as a whole, and with the assistance given by the evidence that we heard, it is clear to us that the parties intended for the sports hall to be hired and that the hirer would have uninterrupted use of the hall for the period of hire. In addition the hirer would have shared use of the toilet facilities, but was not entitled to access any other parts of King Solomon Academy.

27. This agreement, in our view, cannot and does not purport to confer a lease. In fact it specifically sets out the fact that there is no intention to create a tenancy. Neither does it give the Appellant exclusive use of the "Premises" (where the "Premises" are defined as King Solomon Academy). However, the agreement does in our judgment give the Appellant exclusive use of the sports hall during the hire period together with a right to access the toilet facilities.

28. This, in our view, is sufficient to enable the Appellant to exclude any other person from using the sports hall during the hire period subject to the retained rights of inspection. As such it is properly categorised as the grant of right over, interest in, or license to occupy the sports hall for the relevant period(s). We are fortified in our view by the manner in which the domestic legislation is set out. Section 31 of the *VATA 1994* provides that a supply is exempt if it is of a description specified in Schedule 9. Paragraph 1 of Schedule 9 sets out the general exemption to include the "*grant of…any license to occupy land…other than*". There then follow a number of exemptions including at paragraph (m) the "*grant of facilities for playing any sport or participating in physical recreation…*". The point being that there would not have been any need for paragraph (m) if the grant of facilities to play sport were not or could not be grants of any license to occupy land.

Supplies made by the Appellant - single or two separate supplies

29. We turn our attention next to the supplies that the Appellant makes to its customers. Our findings of fact in relation to the supplies are set out above. The starting point for our analysis under this head is to consider the Appellant's submission that there are two separate supplies – namely that of pitch hire and league management services. The Appellant invites us to conclude, as the Tribunal did in *Goals Soccer* in similar circumstances, that there were two separate supplies.

30. In *Goals Soccer* the Tribunal was concerned with the argument whether a League Entry Agreement when entered into with a League pitch Hire Agreement was a single contract with one supply or had been artificially split into pitch hire on the one hand and league management services on the other. At paragraph 94 the Tribunal in *Goals Soccer* says

> "We start from the basis that every supply should normally be regarded as distinct and independent, and that separate supplies should not be artificially combined to create a single composite supply when to do so would not reflect the economic reality of the situation."

31. We can find little to quibble about within that statement. The decision in *Luc Varenne* makes clear that we are concerned with the objective character of the transaction and not how the parties choose to classify the transaction.

32. In *Goals Soccer* the Tribunal went on to say at paragraph 95:

> "The facts as we have found them to be, show that a consumer (here a team organiser on behalf of his team) may enjoy the Appellant's facilities in a number of different ways. In particular, the consumer may (i) use the Appellant's pitches to play league games in the Appellant's leagues (ii) use

> the Appellant's pitches to play league games in a third party league, (iii) play in the Appellant's leagues but use third party pitches to play those league games and (iv) use the Appellant's pitches to play non- league games. Within these four categories, pitches may be booked and paid for on a block booking basis, or may be paid for on a casual basis. At first blush, it is wholly unsurprising that the Appellant has separate contracts for non-league pitch hire, league pitch hire, and league management services. The various combinations of supplies make it sensible to have different contracts to cater for the different arrangements that can be made with the typical consumer, although the most common will be (i) and (iv)."

33. The facts, as we have found them, in this case are rather different. The evidence before us is that the Appellant gives priority to block bookings for the league because it made more money that way. We are not told what percentage of the Appellant's business comprises block bookings for the league, but assume it to be the vast majority. Further, Mr. Mascaro confirmed in evidence that although the Appellant's league management services are, in principle, available independently of pitch hire, this was rare. Indeed he could only cite a handful of examples of the Appellant ever having hired pitches outwith the league structure. The overall impression given is that pitch hire goes hand in hand with participation in one of the leagues organised by the Appellant.

34. We are also, naturally, mindful of the ECJ decision in *Lindöpark* where, at paragraph 26, the court held that services linked to the practice of sport or physical education must, so far is possible, be considered as a whole. It is not clear whether this decision was brought to the attention of the Tribunal in *Goals Soccer*, but in any event the latter decision is not (unlike the former) binding upon us.

35. Taking the matter in the round we come to the conclusion that the economic reality or objective character of the transaction is that the Appellant provides a single supply to its customers. It could provide two separate and distinct supplies, but the fact of the matter is that it does not do so.

Supplies made by the Appellant - all the characteristics, circumstances and objective character

36. Having concluded that the supply made by the Appellant is one composite supply we next consider the objective character of that supply. In order to come to a conclusion on this issue we take into account the following:

(1) Exclusion: can some of the Appellant's customers properly exclude others from the pitch or facility during the duration of the hire? Whilst not explicitly set out in the terms and conditions [HB 907] there must, in our judgment be implied (in order to give the agreement business efficacy) a right to exclude others from the pitch / facility during the duration of the hire. The Appellant's customer must be able to say to anyone else on the pitch during their allotted time "*we have paid to play here for the next 45 minutes and you must not come on the pitch during this time*". It is no argument, in our judgment, to say that there are two teams on the pitch at the same time and one cannot exclude the other. The answer to that is that the teams, together, are jointly entitled to exclude any other individual or team - subject to any retained rights of inspection.

(2) Perception of the parties is irrelevant: the Respondents argue that Appellant's customers would describe the purchase of the Appellant's service as a right to play netball or football in a league organised by the Appellant at a designated venue and not that they had been granted an interest in property for the duration of the match. The Respondents took us to the Trustpilot reviews [TB 828 – 872] to demonstrate that many of the Appellant's customers enthused about the league and, accordingly, that this was

the most important element to them. Mr Firth was equally able to take us to many reviews where the customers complimented the pitches. In addition Ms Selway took us to the annual directors reports and financial statements filed by the Appellant [TB 416 to 510] to show that the Appellant considered its principal activity to be "*the arrangement of football [and netball] tournaments and other related services*." In our view the Trustpilot evidence is not, by itself, conclusive of the view that the customers had about the supplies that they were receiving. In any event we are not concerned with how the parties choose to categorise the transaction.

(3) Additional services: In addition to the hire of the pitch the Appellant provides league administration services- including referees, balls, bibs and awards a league prize. The Respondents rely upon the decision in *Luc Varenne* to illustrate how a transaction that might otherwise be capable of involving the letting of immovable property can be taken out of the land exemption by the provision of other services. The additional services in that case represented 80% of the total charge. In the present case only 12.5% is allocated by the Appellant to additional or league management services.

(4) The business that the Appellant is engaged in or the business model it has chosen to adopt: The Respondents argue that the core activity that the Appellant is engaged in is the organisation of football and netball leagues. Its business model does not involve acquiring long leases and then spending significant sums in creating a venue as was the case in *Goals Soccer*. The Appellant argues that the pitch hire is plainly the more valuable of the two supplies (87.5%) and league participation enables the pitch hire to be better enjoyed.

37. In our judgment, taking the above matters into account, we are led to the conclusion that the objective character of the supplies made by the Appellant is such that they are properly categorised as the granting of interests in, rights over or licenses to occupy land. In coming to this conclusion we were not referred to and nor did we considered any aspect of English property law for the obvious reason that the terms used must be given a Community meaning, as set out earlier in this decision. We placed significant weight upon the ability of the Appellant's customers to exclude others from the pitches during the period of the matches. Additionally, the league management services, in our view, are integral to the pitch hire service and vice versa. The attraction of the business to its customers lies in the bundle of services that it can provide. One enhances the enjoyment of the other. Good pitches and good league administration make for an optimal experience. The additional (league management) services in the present case are, based upon the evidence available to us, of modest value. The additional services do not, therefore, change the fundamental nature of the more valuable service of pitch hire.

Does the Appellant's grant of facilities satisfy all the conditions set out in Note 16?

38. The Respondents join issue with the Appellant by virtue of Paragraph 31 of their updated statement of case dated 31 May 2019 as follows:

> "The Appellant's supply cannot be said to fall within the exception to the exception to the exemption under Note 16(b) (iv) and (v) of Group 1. The Appellant does not have exclusive use of the facilities and the Appellant is a limited company and therefore not a school, a club or an association/organisation representing affiliated clubs or constituent association. The Respondents are unable to say whether Note 16(b)(iii) is satisfied, however, in order to qualify as an exception to the exception to the exemption, each of the five criteria in Note 16(b) must be satisfied."

39. We agree with the Appellant when it is said on its behalf that this argument made by the Respondents is misconceived. In the current case we are dealing with the supplies **made**

(not received) by the Appellant. In those circumstances the Appellant can only be the grantor (and not grantee) for the purposes of Note 16(b) (iv) and (v).

40. The Respondents make a slightly different point in relation to Note 16(b)(v) in their skeleton argument [RSA 22] and in oral closing argument. They say that the Appellant's customers are individuals and / or teams formed for the purpose of playing in the Appellant's leagues and are not schools, clubs, associations or organisations representing affiliated bodies. The Appellant says it is unacceptable of the Respondents to raise this point at this late stage. It is to ambush the Appellant when the point has not been raised in the amended statement of case and the Appellant has not had the opportunity to adduce evidence which it might otherwise have led if it knew that the point was in issue.

41. Rule 25 of the Tribunal's Rules (Tribunal Procedure (FTT) (Tax Chamber) Rules 2020 (2009/273) (the "Rules") sets out that the Respondent must send or deliver a statement of case to the Tribunal and the parties before providing in sub-paragraph (2) that:

> "A statement of case must—
>
> (a) in an appeal, state the legislative provision under which the decision under appeal was made; and
>
> (b) set out the respondent's position in relation to the case."

42. Mr Firth referred us to this Tribunal's decision in *Allpay Ltd v The Commissioners for HMRC [2018] UKFTT 273TC* in which Judge Mosedale (reciting one of her earlier decisions) opined that there is clear prejudice to the Appellant in not knowing HMRC's case, litigation should not be conducted by ambush and that the Appellants have a right to be put in a position where they can properly prepare their cases. She also referred to the Civil Procedure Rules and the decision of Lord Woolf MR in *McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775, 792J-793A* in support of her judgment.

43. We would endorse all that Judge Mosedale has said and add the following. It is an important principle of natural justice that every party must have reasonable notice of the case that he has to meet. That is to say there should be no "trial by ambush". The function of the statement of case in this Tribunal, as it is in civil proceedings, is to concisely set out a party's case. This enables the parties to know, in advance, each other's case and to understand the positions adopted. The purpose is to encourage a "cards on the table" approach to litigation. This allows parties to prepare effectively and at proportionate cost.

44. It is a peculiar feature of this Tribunal that the Rules specifically require the Respondents to provide a statement of case without imposing a similar duty on the Appellant. This is not only because the Appellant has already filed a notice of appeal but is tacit acknowledgement of the unique position the Respondents enjoy. They have the all the might, resource and experience of the state at their disposals and should, on the whole, be in a position to clearly set out their position in relation to the case before this Tribunal. That the Respondents position might change or become more refined (on for example instructing counsel or upon further disclosure) is to be anticipated. In such an event the proper course for the Respondents to take is to seek to amend their statement of case – as was done in these proceedings. It is not to simply change tack on the eve of the hearing.

45. In this case the Respondents originally argued that the Appellant did not satisfy the condition of Note 16(b) (v) because the Appellant was not a school, a club or an association/organisation representing affiliated clubs or constituent association. The argument made at the hearing was that, in addition, the Appellant's customers were not schools, clubs etc. This is not the original case set out by the Respondents and not one that the Appellant could have been properly prepared to meet. In particular there was no opportunity for the

Appellant to garner further evidence from its customers. Further, it cannot be said that the argument was a mere adjunct or a different way of putting the same case. The effect, if we chose to consider this argument, would be to ambush the Appellant and render the hearing unfair. We, therefore, do not give any consideration to this argument and say no more about it.

CONCLUSION

46. For the reasons set out above we allow the appeal. The parties will have noticed that we have not dealt with the issue of equal treatment (the third issue identified by us at paragraph 20 above) or considered Business Brief 8. In the circumstances where we have concluded that the Appellant succeeds on its primary case there was no need for us to do so. We, accordingly, express no views on this issue.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

ASIF MALEK

TRIBUNAL JUDGE

RELEASE DATE: 2 NOVEMBER 2020