[2012] UKUT 377 (TCC)
Appeal number FTC/36/2011

VAT – Exempt services – Item 1(d) of Group 9 of Schedule 9 VATA 1994 – Whether membership subscriptions of a trade association constitute exempt supplies – Case remitted to First-tier Tribunal for further findings of fact – Appeal allowed to that extent

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

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

- and -

EUROPEAN TOUR OPERATORS' ASSOCIATION **Respondent**

TRIBUNAL: MR JUSTICE HENDERSON

Sitting in public at The Rolls Building, London EC4A 1NL on 17 May 2012

Mr James Puzey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Mr Timothy Brown, instructed by Charcroft Baker, Chartered Accountants, for the Respondent

Introduction

1. The issue on this appeal by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") from the Tax Chamber of the First-tier Tribunal ("the FTT") is whether membership subscriptions paid to the European Tour Operators' Association ("the Association") between 1991, when it was first registered for VAT, and 31 May 2008 are subject to VAT at the standard rate, as HMRC have determined, or whether, as the FTT has now held, they were exempted from VAT by Item 1(d) of Group 9 in Schedule 9 to the Value Added Tax Act 1994 ("VATA 1994") on the basis that the Association is a non-profit making organisation "the primary purpose of which is to make representations to the Government on legislation and other public matters which affect the business or professional interests of its members".

2. The Association was founded as an unincorporated association in 1989. From the beginning, it had two categories of members: tour operator members and associate members. According to the undated Constitution and Rules of the Association in evidence before the FTT, the tour operator members (formerly called "full members") were tour operators who relied primarily on the international marketplace for their passenger base, and those who operated tours within Europe to more than one European country. Associate members were suppliers to the tour industry in the following categories:

> "(i) Shops and stores, tourist attractions and services and restaurants.
>
> (ii) Airlines, coach operators, cruise lines, ground handlers and hotels.
>
> (iii) Tourism related organisations such as national inbound Tour Operators associations, and persons and organisations to whom Honorary membership is granted."

3. Paragraph 2 of the Constitution and Rules stated the objectives of the Association in these terms:

> "The specific and primary objectives for which the Association is formed are:
>
> > (i) To establish relations with the European Institutions (The Commission, the Parliament and the Committees).

> (ii) To act as a forum for the international inbound Tour Operators based in Europe.
>
> (iii) To maintain good relations with the suppliers to the industry.
>
> (iv) To act as a self-regulatory body.
>
> (v) To monitor the operating standards of its members to ensure the highest standard of service.
>
> (vi) To establish good relations with other trade associations and government regulatory bodies.
>
> (vii) To promote Europe as a tourist destination in all non-European markets.
>
> (viii) To be aware of the impact of tourism on the environment and to encourage members to focus on improving environmental practices."

4. The rules provided for the affairs of the Association to be managed by a steering committee of between five and eighteen annually elected members, a majority of whom had to be tour operator members and not more than three of whom were to be associate members. The officers of the Association, including the chairman and treasurer, were also elected annually from the members of the steering committee. A subscription was to be paid annually by all members, of an amount determined by the steering committee and approved by the members at the annual general meeting. All monies raised by or on behalf of the Association were to be applied to further its objectives and for no other purpose.

5. Although the Association was registered for VAT in 1991, it accounted for VAT on its membership subscription income and did not seek to argue that the goods and services which it supplied to members were exempt. It is therefore of some interest to note that on a form completed by an officer of Her Majesty's Customs and Excise on 1 December 1992 in the course of a VAT compliance visit, the structure and organisation of the business was described in the following terms:

> "Trade association for tour operators and suppliers to tour operators (in-bound to Europe). They represent trade by

> lobbying the EC Parliament regarding European legislation that affects tour operators. Clients pay annual subscriptions for which they receive the aforementioned service and consultation via meetings and newsletters. A conference is held once a year for which receipt of payment."

It seems reasonable to infer that this description reflected what the officer was told about the activities of the Association, and (since no exemption was sought at the time) that the prominence given to political lobbying of the European Parliament was not prompted by any considerations of self-interest, but was rather an accurate reflection of a main, if not the main, activity of the Association in these early years.

6. In November 2003 the Association was incorporated as a company limited by guarantee and not having a share capital. Clause 3 of the memorandum of association restated its objects in terms which were largely derived from the previous constitution and rules, but with some amplification, as follows:

> "3. The objects for which the Company is established are:
>
> a) To acquire and take over all or any part of the assets and liabilities of the present unincorporated body known as the "European Tour Operators' Association".
>
> b) To establish relations with the European Institutions (the European Commission, the European Parliament, Council of the European Union and the Committees).
>
> c) To act as a forum for the international inbound tour operators based in Europe.
>
> d) To provide advice, technical training and marketing services to members seeking advice and assistance.
>
> e) To maintain good relations with the suppliers to the tour operators industry.
>
> f) To act as a self regulatory body.
>
> g) To monitor and establish operating standards of its members to ensure the highest standards of service.

h) To co-ordinate, represent and promote both nationally and internationally and locally, the interests of members with those of other interested parties, to Government, national and regional bodies, and others concerned with any aspect of members' businesses.

i) To promote Europe as a tourist destination. To effectively communicate and promote the benefits of products and services offered to clients, customers and consumers by members.

j) To be aware of the impact of tourism on the environment and to encourage members to focus on improving environmental practices.

k) To carry on any other trade or business which may seem to be capable of being carried on in connection with the objects of the Company or capable of enhancing the value of any of the Company's assets."

7. It can be seen that, apart from the new paragraph (a) which reflected the proposed incorporation of the Association, paragraphs (b), (c), (e), (f), (g), (i) and (j) were either identical or very similar to the previous paragraphs (i), (ii), (iii), (iv), (v), (vii) and (viii), while paragraph (h) expanded substantially on the previous paragraph (vi), but covered essentially the same general ground, and paragraph (k) was new, but of an ancillary nature.

8. It was not until June 2008 that, acting on professional advice, the Association submitted a voluntary disclosure of VAT overpaid from 1 March 2005 to 31 May 2008, claiming that membership subscriptions were exempt under Item 1(d) of Group 9 of Schedule 9. In their letter of 27 June 2008 to HMRC the accountants acting for the Association, Charcroft Baker, encapsulated the basis of the claim:

> "[The Association] is an organisation whose primary purpose is to make representations to the UK and other European Governments on legislation or other public matters, which affect the business or professional interests of its members. It is a representational body whose membership is made up of corporate bodies whose business or professional interests are directly connected with the purposes of the Association. As such, subscriptions are exempt from VAT …"

9. The claim was then investigated by HMRC, who rejected it in a letter dated 22 January 2009. The writer expressed the view, based (among other matters) on an examination of the Association's website, the benefits made available to members, and the activities and events which had taken place, that:

> "it would appear that the primary purpose of the [A]ssociation is to provide an avenue for networking, whereby buyers and sellers in the travel industry are brought together. Whilst [the Association] may make representations to government … we do not consider this to be its main purpose. On this basis, its membership income is not exempt."

10. Further correspondence ensued, and in due course HMRC were asked to, and did, reconsider their decision, while the temporal scope of the claim was extended back to 1991; but the parties adhered to their original positions, and the matter therefore came before the FTT which was asked by both sides to make a decision in principle on the question whether the exemption applied.

11. It is convenient to note at this point that, despite the length of the period in issue, both sides have been content to proceed on the footing that the position remained essentially unchanged throughout, with the result that the exemption is either available for the whole of the period or none of it.

The law

12. For most of the period in dispute, the underlying European legislation was contained in Article 13(A)(1)(l) of the Sixth VAT Directive, which provided as follows:

> "**Article 13 Exemptions within the territory of the country**
>
> A. Exemptions for certain activities in the public interest
>
> 1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:
>
> …

(l) supply of services and goods closely linked thereto for the benefit of their members in return for a subscription fixed in accordance with their rules by non-profit-making organisations with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civic nature, provided that this exemption is not likely to cause distortion of competition;

…

2(b) The supply of services or goods shall not be granted exemption as provided for in (1) … (l) … above if:

- it is not essential to the transactions exempted,

- its basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax."

13. With effect from 1 January 2007 the above provisions were replaced with similarly worded provisions in Articles 131, 132(1)(l), 133(d) and 134 of the current Principal VAT Directive, Council Directive of 28 November 2006 on the common system of value added tax. In particular, Article 132(1)(l) reproduces the wording of the previous Article 13(A)(1)(l), but substituting the words "to their members in their common interest" for "for the benefit of their members". Neither side suggested that this change made any material difference.

14. The exemption was transposed into UK domestic legislation as Group 9 of Schedule 9 to VATA 1994, replacing similar provisions in VATA 1983 Schedule 6 Group 9. As amended in 1999, Group 9 provides as follows:

"GROUP 9 – SUBSCRIPTIONS TO TRADE UNIONS, PROFESSIONAL AND OTHER PUBLIC INTEREST BODIES

Item No. 1

The supply to its members of such services and, in connection with those services, of such goods as are both referable only to its aims and available without payment other than a membership subscription by any of the following non-profit-making organisations –

a) a trade union or other organisation of persons having as its main object the negotiation on behalf of its members of the terms and conditions of their employment;

b) a professional association, membership of which is wholly or mainly restricted to individuals who have or are seeking a qualification appropriate to the practice of the profession concerned;

c) an association, the primary purpose of which is the advancement of a particular branch of knowledge, or the fostering of professional expertise, connected with the past or present professions or employments of its members;

d) an association, the primary purpose of which is to make representations to the government on legislation and other public matters which affect the business or professional interests of its members;

e) a body which has objects which are in the public domain and are of a political, religious, patriotic, philosophical, philanthropic or civic nature.

Notes:

…

(5) Paragraph (d) does not apply unless the association restricts its membership wholly or mainly to individuals or corporate bodies whose business or professional interests are directly connected with the purposes of the association."

The argument in the present case has focused on Item 1(d) and Note 5, but I have quoted the whole of Item 1 because paragraph (d) needs to be read in its context. In particular, it can be seen that Parliament has split up the single exemption contained in Article 13(A)(1)(l) of the Sixth Directive into separate paragraphs, and that paragraph (d) is clearly intended to give effect to the exemption for organisations "with aims of a political … nature".

15. Subject to one point, the parties have been content to accept that Item 1(d) of Group 9 validly transposes the relevant part of Article 13(A)(1)(l), and the appeal has been argued, as it was before the FTT, on the basis of the wording of VATA 1994 rather than the directly effective provisions of the Sixth Directive. The one qualification concerns the proper interpretation of the words "make representations to the government" in Item 1(d). According to published guidance issued by HMRC in Notice 701/05, this means representations "to the UK Government". The FTT commented on this interpretation as follows:

> "15. Given the European context of Article 13, which requires the exemption granted by Item 1 of Group 9, the Tribunal finds surprising HMRC's interpretation that only representations to the UK Government qualify. At the hearing both parties invited the Tribunal to adopt an interpretation agreed between the parties, that the words "make representations to the Government on legislation and other public matters" in item 1(d) should:
>
> > (1) Include representations to the UK government on UK issues;
> >
> > (2) Include representations to the UK government on EU issues;
> >
> > (3) Include representations to EU institutions in relation to matters that will have effect in the UK; but
> >
> > (4) Exclude representations to EU institutions in relation to matters that will have effect in countries outside the UK but not the UK; and
> >
> > (5) Exclude representations to non-UK national governments.
>
> "16. We consider that we are able to determine the dispute in this matter fairly and justly by adopting that definition, but we do express reservations as to whether it is sufficiently wide given the European origins of the domestic legislation."

16. I respectfully share the reservations expressed by the FTT, and speaking for myself see no reason, as at present advised, why the wording should not be interpreted in the light of the broadly phrased reference to "aims of a political … nature" in the governing EU legislation so as to include, at least, representations to EU institutions in relation to matters that will have effect in other Member States as well as the UK, and representations to the national governments of other Member States. However, I heard no argument on the

question, and, as it is unnecessary for me to resolve it, I will proceed on the same basis as the FTT.

17. I was told that there is no jurisprudence of the Court of Justice of the European Union (formerly the European Court of Justice) on the interpretation of the words "aims of a political … nature", but the Court has given important guidance on the general approach that should be adopted to the interpretation of the "public interest" exemptions contained in Article 13 of the Sixth Directive. The relevant principles are not in dispute, and it will be sufficient to quote the following passage from the judgment of the CJEU in Case C-445/05 Haderer v Finanzamt Wilmersdorf [2008] STC 2171 at paragraphs 17 to 19, omitting the references to the case law:

> "17. According to the case law of the court, the exemptions provided for in Art 13 of the Sixth Directive constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another …
>
> 18. The terms used to specify those exemptions 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 … Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT … Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Art 13 should be construed in such a way as to deprive the exemptions of their intended effect …
>
> 19. The same must also be true of the specific conditions laid down for those exemptions to apply, and in particular of those concerning the status or identity of the economic agent performing the services covered by the exemption …"

18. In British Association for Shooting and Conservation Ltd v Revenue and Customs Commissioners [2009] EWHC 399 (Ch), [2009] STC 1421, Lewison J (as he then was) had to consider an appeal from the VAT Tribunal which had rejected claims by BASC that the residual part of its subscription income from members (after deduction of parts which were agreed to be attributable to zero-rated or exempt supplies) qualified for exemption under either or both of Article 13A(1)(l) and (m) of the Sixth Directive, the latter of which provided exemption for certain services closely linked to sport. BASC was a representative national body for all sporting shooting, and its aims included the protection and promotion of shooting and the well-being of the

countryside. Lewison J allowed BASC's appeal in relation to Article 13A(1)(m) and remitted the case to the Tribunal for further consideration: see paragraph [37]. He then dealt, more briefly, with the claim to exemption under Article 13A(1)(l). I should observe at this point that, in contra-distinction to the present case, the argument before Lewison J was based solely on the wording of the relevant EU exemptions rather than their implementation in domestic law: see paragraph [10].

19. Under the heading "Civic or political aims", Lewison J began his analysis at paragraph [38] as follows:

> "38. … In order to come within the political or civic purposes exception the taxable person must show:
>
> (i) That it is a non-profit-making organisation;
>
> (ii) That it makes supplies of services;
>
> (iii) That the services are supplied for the benefit of its members;
>
> (iv) That the services are supplied in return for a fixed subscription;
>
> (v) That the aims of the organisation are of a political, trade-union, religious, patriotic, philosophical, philanthropic or civic nature.
>
> 39. It is not in dispute that the first, second and fourth of these conditions are satisfied. The main debate was over the last of the conditions. In effect this debate boiled down to two questions:
>
> (i) How are you to ascertain the "aims" of an organisation and
>
> (ii) Are the aims of BASC "civic" or "political" in nature?
>
> 40. In Institute of Motor Industry v Customs and Excise Commissioners (Case C-149/97) [1998] STC 1219, [1998]

ECR I-7053 the ECJ considered an organisation said to have aims of a trade union nature. It held:

> "19. In the light of those considerations, it must be held that a non-profit-making organisation which aims to promote the interests of its members cannot, where that object is not put into practice by defending and representing the collective interests of its members vis-à-vis the relevant decision-makers, be regarded as having objects of a trade-union nature within the meaning of Art 13A(1)(l) of the Sixth Directive.
>
> 20.The expression "trade-union" in that provision means specifically an organisation whose main object is to defend the collective interests of its members – whether they are workers, employers, independent professionals or traders carrying on a particular economic activity – and to represent them vis-à-vis the appropriate third parties, including the public authorities.
>
> 21.Thus, a non-profit-making organisation whose main object is to defend and represent the collective interests of its members satisfies the criterion of exercising an activity in the public interest, which is the basis of the exemptions set out in Art 13A(1)(l) of the Sixth Directive, in so far as it provides its members with a representative voice and strength in negotiations with third parties."

41. I derive two things from this extract:

(i) That the professed aims of an organisation must be tested against what happens in reality (para 19);

(ii) Where an organisation has multiple aims, then it is its "main object" that counts (paras 20 and 21)."

20. Lewison J then referred to the consideration by the Court of Appeal of the meaning of "civic" in Expert Witness Institute v Customs and Excise Commissioners [2001] EWCA Civ 1882, [2002] 1 WLR 1674, and said at paragraph [43]:

"I derive from this case that:

(i)The aims of an organisation are (at least prima facie) to be found in its constitutional documents, tested against the reality of what it does;

> (ii)It is permissible to approach the activities of an organisation on the basis that it has a main or primary aim which characterises its fiscal treatment;
>
> (iii)An organisation will not have aims of a civic nature if its objectives are solely (or perhaps mainly) for the benefit of its members."

21. No criticism was made before me of any of the guidance given by Lewison J in the BASC case, and I adopt it with gratitude.

The Decision of the FTT

22. The FTT (Judge Peter Kempster and Mrs Caroline de Albuqueque) heard oral evidence from Mr Thomas Jenkins, who had been the executive director of the Association since November 1997. In his witness statement dated 18 March 2010, he said that the aims of the Association were to influence European tourism legislation, to keep members informed of the latest developments affecting their business, to create commercial opportunities between buyers and sellers in the travel industry and to act as a forum for co-operation between members. He described the process of representation of members as typically involving either European, national or local government, and as a two-way process with the Association acting as the conduit between members and government. He said that in Europe the Association had formed part of an umbrella group of lobbying associations called "NET", and as such had been involved in many projects to reduce restrictions on travel guides, to change the nature of VAT imposition on tours, and to secure more freedom for drivers under the drivers' hours legislation. These activities had involved meetings with four separate EU Directorates (Taxation, Foreign Affairs, Employment and the Tourism Unit of Enterprise).

23. Mr Jenkins continued:

> "We also have had a series of meetings with member[s] of the Council of ministers on indirect taxation with a view to see an alteration to the tour operators' margin scheme. We have also been advising the Commission on "Agenda 21" "green" tourism. In addition to these direct attempts to influence government, we also issue press releases, attend round table meetings and engage in position papers. The research we have commissioned on origin markets is a direct attempt to influence decision makers in the Commission to understand the importance of incoming tourism. We did lead a forum on "China as an incoming market" in the Commission in Brussels

to facilitate greater government help in promoting that area (particularly in easing Visa restrictions)."

24. Mr Jenkins then described the political lobbying activities of the Association in the UK, and challenges made to local by-laws affecting members throughout Europe. He continued:

> "10. The Association organises three main events a year plus the Global European Marketplace event, which incorporates the AGM. There is a charge for all events and non members can attend any event except the AGM. The Association also runs other smaller scale social events during the year and these are a critical part of keeping in touch with the issues that concern our members.
>
> 11. Membership of the Association is broad based. Full members include leading International Tour Operators, Online Travel Agents and Wholesalers whose business is to bring passengers into Europe. Associate Members include individual hotels, hotel groups, tourist attractions, ground handlers, technology systems and services, transport providers, tourism boards and other tourism services. All members are directly concerned with and affected by changes within the tourism sector. All types of membership are represented on the steering committee and have a right to representation on the Board so every member has the ability to influence policy.
>
> 12. The Association sees the representation of its members to Government at all levels as its primary function. As a membership association it has to be pro-active and offer a range of benefits in order to attract members because the more members an Association has, the louder is its voice and the more effective it can be in representing its members."

25. Mr Jenkins was cross-examined by Mr Puzey on behalf of HMRC, but as I understand it no challenge was made to the factual accuracy of his written evidence as opposed to the conclusions to be drawn from it. In the section of the Decision headed "Witness evidence", the FTT said this:

> "22. Mr Jenkins' evidence was that the Association was formed in 1989 as a small body, with eight tour operators and one or two other members. Its purpose was to give the tour operator trade sector a unified voice in Brussels. By 2008 its membership was much larger. There were then around 112 full (i.e. tour operator) members – half based in the UK, one quarter based in the EU and one quarter outside the EU (including USA, India and Japan). Also, around 330 associate members –

approximately 100 UK – based, 200 EU based and the remainder outside the UK (mostly Switzerland).

23. Over that period of time the Association had extended the services it provided to members. For example, before 1997 the Association introduced a "tax hotline" to assist members in relation to the VAT rules governing the tour operators margin scheme.

24. As well as the detailed evidence of Mr Jenkins, the Tribunal was provided with extracts from the Yearbooks which the Association published until 2005, and extracts from the Association's website for subsequent years. In cross-examination Mr Puzey put it to Mr Jenkins that the extracts of material were highly selective; did not give a representative picture of the activities of the Association; and had in large part been provided only shortly before the hearing. Mr Jenkins accepted the materials provided were selected to illustrate the political aims of the Association because he understood that to be the point in dispute, but denied that these had been made on an unrepresentative basis. Copies of the Yearbooks for several years were handed up so that the Tribunal could consider those documents in full.

25. Mr Jenkins gave several examples of the Association lobbying for change in the legislation governing tour operators in Europe. [*Examples are then given, including a discussion paper on the Olympic games and their effect on tourism released in 2005; a report produced in 2010 concerning visa policy; and another report in 2010 concerning Olympic hotel demand*].

26. Some activities were referable to issues of direct importance to the UK; for example, representations on vehicle emission regulations … Another example was the driving time regulations, which affected coach operators and others in the UK.

27. Mr Jenkins accepted that some activities of the Association were directed to attempting to influence the legislation of non-UK EU countries – for example lobbying the Italian government concerning Italian domestic legislative provisions restricting tour guide qualifications – but emphasised that this would be a matter which affected the European tour operators industry. Similarly, issues relating to the Schengen agreement, to which the UK was not a party.

…

> 29. The website of the Association invites interested persons to become members and states the Association offers its members numerous benefits aimed at the four key areas of (i) representation; (ii) intelligence and information; (iii) events; and (iv) publicity. Mr Jenkins stated that the areas of activity were not ranked in any particular order of importance, and the order was probably determined by marketing considerations. His aim as executive director was primarily achieving a better regulatory environment for the tour operator business, and that reflected the aims of the Association. He found it difficult to distinguish between advice to members and influencing government as this was a two-way process.
>
> 30. In relation to the associate members of the Association, Mr Jenkins explained these are people who sell services to tour operators, and so identify with the commercial interests of the tour operators. Associate members cover a wide range of businesses connected to that of tour operators; for example, hoteliers and professional services firms.
>
> 31. In response to a question from the Tribunal Mr Jenkins identified the activities of the Association apart from its representational work as mainly holding events which permitted networking and business discussion, and providing information and advice to members. Those were discrete from the representational activities and the Association charged most people for participation in those events. Also the Association held seminars on regulatory problems. Press campaigns formed part of the lobbying activities."

26. The FTT then directed itself in paragraph 32 of the Decision as follows:

> "32. We have approached our consideration and conclusions on the following bases:
>
> > (1) We must ascertain the "primary purpose" of the Association. If it has multiple aims then it is its main object that counts … Its primary purpose is what its directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions (*Bookmakers' Protection Association* – paragraph 11 above). The Association's professed purposes must be tested against what happens in reality …
> >
> > (2) The burden of proof lies on the Association … and the standard of proof is the normal civil standard of balance of probabilities.

> (3) We must be satisfied that the primary purpose of the Association satisfies Item 1(d) of Group 9.
>
> (4) We must be satisfied that Note 5 does not disapply the exemption otherwise available under Item 1(d)."

27. Apart from the reference to Bookmakers' Protection Association, the authority relied on for the propositions in sub-paragraphs (1) and (2) above was the judgment of Lewison J in BASC. The former case was a decision of the VAT Tribunal (Bookmakers' Protection Association (Southern Area) Ltd v Customs and Excise Commissioners [1979] VATTR 215), in which the Chairman had expressed the view that in order to determine the primary purpose of the taxpayer:

> "we must have regard to the objects set out in its Memorandum and its various activities to determine what its directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions. The words "primary purpose" indicate to us that the test is subjective and not purely objective."

28. In my judgment it is wrong to regard the "primary purpose" test as a subjective one, and the FTT erred in law when it directed itself that the primary purpose of the Association was "what its directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions". The relevant enquiry is an objective one, to be answered primarily by an examination of the stated objects and the actual activities of the body in question. The subjective views of the members or officers may throw some light on this enquiry, but they cannot be elevated into a diagnostic test. That this is the correct approach is in my judgment clear, both as a matter of principle (the aims or purposes of an organisation are an objective concept, and may be quite distinct from the subjective views or motives for joining of individual members), and on the authority of BASC where at [47] Lewison J commented as follows on the Tribunal's approach in that case:

> "I see no legal error in this conclusion. The tribunal has looked at BASC's constitutional document, supplemented it by reference to other materials from which, objectively, conclusions about its objectives can be drawn, and tested that against the reality of what it does."

29. It is also worth noting, as Lewison J pointed out in BASC at [45], that an organisation may have multiple objects no single one of which could be said to be predominant. There is no legal necessity for an organisation to have a single predominant purpose. It is not altogether clear to me that the FTT in the

present case had this possibility in mind, because sub-paragraph 32(1) of the Decision could be read as implying that the Association must have had a single primary purpose.

30. Having directed itself in this way, the FTT then stated its conclusions as follows:

> "*The primary purpose of the Association*
>
> 33. The constitutional documents of the Association set out a number of aims of the Association. These include and give prominence to that of making political representations on behalf of the tour operators industry.
>
> 34. In practice the Association clearly has a number of activities. Having carefully considered all the evidence presented to us, our conclusion is that, like any membership organisation, the Association is eager to access funds to enable it to undertake its activities. It runs networking and marketing events and charges fees to some for attendance at those events in order to raise such funds. We do not consider that such ancillary activities have overtaken or supplanted the original, primary aim of the Association: "to establish relations with the European Institutions". Thus we find that is the primary purpose of the Association.
>
> 35. Turning to the geographical limitation on Item 1(d) as agreed between the parties (paragraph 15 above), the tour operator industry is one which by its very nature crosses national borders. It is unsurprising that the representational activities of the Association extend beyond UK domestic concerns to those of other European countries; also, that the members concerned with such issues are not restricted to the UK or even other UK countries. We accept the evidence of several examples of representational work involving lobbying or influencing UK government and/or EU institutions in relation to matters affecting the tour operator industry in the UK (for example, that concerning tourism and the Olympic games). Adopting the parties' interpretation of "the Government" in Item 1(d) we conclude the representational activities of the Association do satisfy that part of the test in Item 1(d).
>
> 36. Accordingly, we find that the primary purpose of the Association meets the test in Item (d) of Group 9.
>
> *Note 5*

> 37. We take particular note of the specific wording of Note 5, which requires membership to be restricted wholly or mainly to persons whose business interests are directly connected with "the purposes" of the Association. The reference is to "the purposes" rather than "the primary purpose" as used in Item 1(d). Both counsel agreed that there was a distinction to be drawn in the wording used in Item 1(d) and that in Note 5. We observe that this distinction is not confined to Item 1(d) because the draftsman has followed the same formula in relation to Item 1(c) and Note 4 relating to learned bodies.
>
> 38. Had Note 5 followed the wording of Item 1(d) and required direct connection with the *primary purpose* of the Association then the Association would not have passed that test. We find that most of the members of the Association are associate members who join the Association not because of the lobbying activities of the Association but instead for the networking and marketing opportunities it provides to the associate members. However, taking the purposes of the Association as a whole, we find all the members, both full and associate, do have business interests that are directly connected with the *purposes* (albeit not the *primary purpose*) of the Association.
>
> 39. Accordingly, we find that Note 5 does not operate to exclude the exemption provided by Item 1(d)."

Grounds of appeal: (1) primary purpose

31. The argument advanced by Mr Puzey for HMRC centres on the finding by the FTT in paragraph 38 of the Decision that "most of the members of the Association are associate members who join the Association not because of the lobbying activities of the Association but instead for the networking and marketing opportunities it provides to the associate members". Mr Puzey submits that if, as the FTT has found, this was the reason why the majority of the members (albeit associate members) joined the Association, the previous finding in paragraph 34 that its principal purpose was "to establish relations with the European Institutions" cannot stand. In support of this argument, Mr Puzey relies on the test which the FTT derived from the VAT Tribunal decision in the Bookmakers' Protection Association case, cited above, that account must be taken of what the members considered to be the most important services being provided in return for their subscriptions, and that the test is of a subjective character.

32. Mr Puzey also submitted that the Decision contains very little analysis or weighing up of the political activities of the Association (in the form of

making representations to the UK and EU governments) on the one hand, and all its other activities on the other hand. In oral argument, Mr Puzey adopted a suggestion from the Bench to the effect that there appears to be an unexplained jump in paragraph 34 of the Decision from the proposition that the Association's fund-raising activities were of an ancillary nature to the conclusion that the primary aim of the Association at all material times had been to establish relations with the European Institutions. The word "thus" in the final sentence of paragraph 34 suggests that the FTT regarded this as a necessary conclusion once the former proposition was established, but this ignores the fact that the Association carried on several activities apart from running networking and marketing events and political lobbying. No separate consideration appears to have been given to the question whether such other activities might have constituted aims or purposes of the Association which were at least on a par with its lobbying activities.

33. To the extent that Mr Puzey's argument is based on the FTT's finding in paragraph 38 of the Decision, and the principles derived by the FTT from the Bookmakers' Protection Association case, I would reject it. As I have already explained, I consider that the relevant test is essentially objective in nature, and that the FTT erred in law in following the guidance in the latter case (which was not binding on it). Accordingly, there is in my judgment no necessary inconsistency between the finding of primary purpose in paragraph 34 of the Decision and the finding in paragraph 38 that the subjective reason why most associate members joined was to take advantage of the networking and marketing opportunities afforded by membership.

34. I am more concerned, however, about the apparent logical gap in the reasoning of the FTT in paragraph 34, to which I drew attention in the course of the hearing. Furthermore, since the FTT is the sole tribunal of fact, I cannot be sure that it would have reached the same conclusion had it not misdirected itself in law about the nature of the test to be applied, and had it clearly taken into account the possibility that the Association might have "multiple objects no single one of which could be said to be predominant" (BASC at paragraph [45]). This is a case that depended on a careful evaluation of all the evidence, both written and oral, in the light of a correct appreciation of the relevant legal test. In my view it is clearly not a case where it can be said that only one conclusion was reasonably open to the FTT, on the basis of its primary findings of fact, if it had correctly directed itself in law. It follows, in my judgment, that the case must be remitted to the FTT for it to reconsider and amplify its reasoning and conclusions about the primary purpose of the Association. I will therefore make such an order, unless it appears from consideration of HMRC's second ground of appeal that HMRC's appeal is in any event bound to succeed.

Grounds of appeal: (2) Note 5

35. The central issue here is one of construction of Note 5 to Group 9. For convenience, I will repeat the wording of the Note:

> "Paragraph (d) does not apply unless the association restricts its membership wholly or mainly to individuals or corporate bodies whose business or professional interests are directly connected with the purposes of the association."

The question, in the context of the present case, is whether "the purposes" of the Association with which the business or professional interests of the associate members must be directly connected are confined to the primary purpose of the Association which (it must be assumed at this stage in the argument) prima facie qualifies for exemption under Item 1(d), or whether a direct connection with any of the ancillary purposes of the Association will suffice. If the former interpretation is correct, the exemption will not be available in view of the findings of fact by the FTT in paragraph 38 of the Decision. The associate members form a majority of the total membership, and in recent years have outnumbered the tour operator members by approximately 3 to 1: see the figures in paragraph 22 of the Decision. The finding by the FTT that associate members "join the Association not because of the lobbying activities of the Association but instead for the networking and marketing opportunities it provides to [them]" would appear to negate any direct link between the business interests of associate members and the (assumed) primary purpose of the Association.

36. If, on the other hand, a direct link with an ancillary purpose will suffice, the FTT has found (again in paragraph 38) that such a link exists, and no challenge to that finding is made by HMRC.

37. HMRC's argument in favour of the former interpretation faces an obvious initial difficulty. Whereas Item 1(d) refers to the primary purpose of the organisation, and it is that primary purpose which prima facie qualifies it for exemption, Note 5 merely refers to "the purposes of the Association", without expressly limiting those purposes to the primary purpose referred to in Item 1(d). Mr Puzey sought to deal with this difficulty by arguing that a purposive construction should be adopted, because if such a restriction were not implied Note 5 would be capable of satisfaction in every case and would thus be effectively meaningless. Mr Puzey also prayed in aid the principle of EU law that the public interest body exemptions in Article 13 of the Sixth Directive should be strictly interpreted.

38. Mr Puzey was able to find persuasive support for his argument in a decision of the FTT (Sir Stephen Oliver QC) in a case which was heard after the present one, and where the FTT held that the second construction was correct. That case concerned membership subscriptions received by the British Association of Leisure Parks, Piers and Attractions, and had a considerable generic similarity to the present case. As here, the principal issue was whether exemption was available under Item 1(d), on the strength of the association's lobbying activities, and the secondary issue was whether, assuming the exemption to be otherwise available, it was disapplied by Note 5. As in the present case, there were operating members, defined in the rules as comprising "proprietors and officers of companies engaged in the running of parks, piers, amusement arcades, zoos and attractions", and trade associate members, who were primarily suppliers to the leisure industry. The operating members were, however, in the majority, out-numbering the trade associate members by approximately 2 to 1.

39. Sir Stephen Oliver QC held that lobbying was not the association's primary purpose, so the claim fell at the first hurdle. He went on to consider the second issue, however, and stated his views on the question of construction with which I am now concerned in paragraph 37 of his decision (see Appeal number TC/2009/14060, <u>The British Association of Leisure Parks, Piers & Attractions Ltd v HMRC</u>):

> "37. I acknowledge that Note 5 can be read literally. It was read by the Tribunal in [*the present case*] as if the expression "the purpose of an association covered any purposes albeit not the primary purpose". See paragraphs 37 and 38 of that Decision. I do not think that that is the right meaning here. Note 5 engages once the association in question has satisfied the requirements set out in Group 9 paragraph (d). The Association will, one must assume for this purpose, be one whose primary purpose is lobbying. The question, for Note 5 purposes, will be whether an association with lobbying as its primary purpose will have restricted its membership to persons whose business or professional interests are directly connected with its purposes. Reverting to the example of the interests of the fast food outlet, these have no connection with the Association's lobbying purpose, thus there will be insufficient connection with the Association's purposes. Connection with one subsidiary ingredient in the objects of the Association in question cannot establish a relevant connection between the business interests of the member and "the purposes" of the "association, the primary of which is" (as here) lobbying."

40. With the greatest respect to Sir Stephen Oliver QC, I have to say that I do not find his reasoning in paragraph 37 particularly persuasive. It appears to me to

run the risk of assuming that which needs to be established, namely that connection with a subsidiary purpose of the association in question cannot satisfy the requirement of Note 5. In my view weight must be given to the clear difference in wording between Item 1(d) and Note 5, and I can see no good reason to restrict the generality of the reference to "the purposes of the association" in the latter context. Nor do I accept Mr Puzey's submission that to read "the purposes" in this way would deprive the Note of any meaning. The requirement of a *direct* connection with those purposes would still have to be satisfied, so a mere indirect financial or other connection would not be enough.

41. It is of course true, as Mr Puzey reminded me, that the underlying exemption in Article 13(A)(1)(l) of the Sixth Directive needs to be strictly interpreted; but as Lewison J observed in BASC at paragraph [12], summarising the relevant EU case law, a "strict" construction is not to be equated, in this context, with a restricted construction:

> "The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question …"

42. In my view, on a fair interpretation of Note 5, a direct connection with all the purposes of the Association taken together will satisfy the requirement; and that is precisely what the FTT found the position to be in the final sentence of paragraph 38 of the Decision. Whether a direct connection with just one of the ancillary purposes, viewed in isolation, would also suffice is far less clear. It may well be that, in such a case, the connection with "the purposes" of the Association, viewed as a whole, would be too tenuous to qualify. But the FTT expressly looked at "the purposes of the Association as a whole", and I am unable to detect any error of law in their approach.

43. I would add one further point. Although I heard no argument on the question, it seems to me, as at present advised, that a substantial protection for HMRC may be available in Article 13(A)(2)(b) of the Sixth Directive (now Article 134(a) of the Principal VAT Directive), which provides that the supply of services or goods shall not be granted exemption under, inter alia, paragraph (1)(l) if "it is not essential to the transactions exempted". There is a considerable amount of EU jurisprudence on the interpretation of this restriction as it applies in relation to other exemptions under Article 13: see

BASC at paragraphs [27] to [34]. There may be room for an argument – I put it no higher – that, in the context of Article 13(a)(1)(l), the "transactions exempted" are to be regarded as those goods or services which are supplied pursuant to the aims which qualify for exemption (in the present case, aims of a political nature), and that only supplies which are essential to the attainment of those aims are to be granted exemption. On such an approach, ancillary fund-raising activities, although of obvious assistance to the attainment of the Association's political aims, would appear to be disqualified, because such activities are not essential to the advancement of political aims. I will not speculate any further on whether there would be merit in such an argument, and I mention the possibility only to make the point that there is already an apparently stringent requirement in place which may restrict the ambit of the exemption for organisations with aims of a primarily political nature.

Conclusion

44. In the event, for the reasons which I have given I will remit the matter to the FTT for it to reconsider and amplify its findings about the primary purpose of the Association.

TRIBUNAL JUDGE:
MR JUSTICE HENDERSON

RELEASE DATE: 23 October 2012