[2015] UKUT 401 (TCC)

Appeal number: FTC/68/2014
New appeal no: UT/2014/0017

VAT – exemption for supplies of certain services closely linked to sport or physical education – article 132(1)(m), Principal VAT Directive – entry fees for duplicate bridge tournaments – whether contract or duplicate bridge is a "sport" within the meaning of article 132(1)(m) – reference to CJEU

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE ENGLISH BRIDGE UNION LIMITED **Appellant**

- and -

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

TRIBUNAL: MRS JUSTICE ASPLIN
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, The Rolls Building, London EC4 on 14 July 2015

David Ewart QC, instructed by Dr John Petrie of the English Bridge Union, for the Appellant

Raymond Hill, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by the English Bridge Union Limited (the "EBU") from a decision of the First-tier Tribunal (Tax Chamber) (Judge Hellier and Ms Cheesman) (the "FTT") released on 12 February 2014. The FTT dismissed the EBU's appeal from a decision of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") that duplicate bridge is not a "sport" for the purposes of VAT exemption. Permission to appeal was granted by the FTT on 17 April 2014.

Reference to the CJEU for a preliminary ruling

2. After a short hearing during which we heard full argument from both parties on the substantive issue in this appeal, we have decided that we should seek a preliminary ruling from the Court of Justice on the question whether contract or duplicate bridge is a sport within article 132(1)(m) of the Principal VAT Directive (Council Directive 2006/112/EC of 28 November 2006). We set out in this short decision our reasons for reaching that conclusion.

The facts

3. The facts are not in dispute. The EBU is the national body for duplicate bridge in England. Its shareholders are the county organisations for bridge. It organises contract bridge tournaments and charges players an entry fee to play in those tournaments. The following summary, taken from the witness statement of Dr John Petrie, the EBU's treasurer, was set out by the FTT as follows:

> **"[9]** Contract bridge is a trick playing card game played by four players in two competing partnerships with partners sitting opposite each other around a table. The game has four phases: dealing the cards, bidding, playing the cards, and scoring the results. Millions of people worldwide play bridge in clubs, tournaments, online and with friends.
>
> **[10]** Most club and tournament play involves 'duplicate bridge' in which the cards held by each player in each deal are preserved so that each partnership successively plays the same set of cards as their counterparts at other tables with scoring based on relative performance. This form of the game is played competitively at national and international level.
>
> **[11]** The EBU's objects are to regulate and develop duplicate bridge in England. Its members are counties, clubs and individuals. There is no need for us to describe its operation and financing for it is agreed that it is an eligible body for the purposes of the domestic legislation and a non-profit-making organisation for the purpose of the Directive.
>
> **[12]** The EBU organises a large number of duplicate bridge competitions in which members can participate on payment of an entry fee. In 2012-13 its total entry fee income was £631,000.

> **[13]** Playing bridge involves the use of high level mental skills: logic, lateral thinking, planning, memory, sequencing and others. Playing bridge regularly promotes both mental and physical health and studies have shown that it may benefit the immune system and reduce the chance of developing of (sic) Alzheimer's disease and of mental deterioration.
>
> **[14]** The Charity Commission considered that bridge fell within the definition of 'sport' in s 2(3)(d) of the Charities Act 2006: 'sports or games which promote health by involving physical or mental skill or exertion.'
>
> **[15]** Emails to Dr Petrie from correspondent national bridge organisations in France, Holland, Belgium, Ireland and Poland indicate that they understand that no VAT is charged on their entry fees in those jurisdictions. The email from Holland carries the implication that the supply is treated as exempt because it indicates that input VAT is not recoverable (as would be the case if the supply were exempt)."

The law

4. Group 10 of Schedule 9 to the Value Added Tax Act 1994 ("VATA") provides for the relevant exemption in relation to certain supplies connected to sport:

> "**Group 10 — Sport, sports competitions and physical education**
>
> Item No
>
> 1. The grant of a right to enter a competition in sport or physical recreation where the consideration for the grant consists in money which is to be allocated wholly towards the provision of a prize or prizes awarded in that competition.
>
> 2. The grant, by an eligible body established for the purposes of sport or physical recreation, of a right to enter a competition in such an activity.
>
> 3. The supply by an eligible body to an individual of services closely linked with and essential to sport or physical education in which the individual is taking part."

5. It is common ground that the EBU is an "eligible body" for these purposes. The issue in this appeal is whether contract or duplicate bridge is a "sport" so that entry fees are exempt from VAT under Item 2. The exemption derives from the Principal VAT Directive, Article 132, which materially provides as follows:

> "**Exemptions for certain activities in the public interest**
>
> **Article 132**
>
> 1. Member States shall exempt the following transactions:
>
> …

(m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education"

Grounds of appeal

6. The EBU contends that the FTT erred in law in concluding that contract or duplicate bridge is not a "sport" within article 132(1)(m) because:

(a) the FTT concluded wrongly that:

(i) the object by reference to which article 132(1)(m) should be interpreted was not the wider one of the promotion of public health but the narrow object of making sport more accessible to a large section of the population. In doing so it is said that the FTT failed to ask itself why that narrower object was in the public interest, the answer to which is that it promotes mental and physical health;

(ii) sport normally connotes a game with a physical element; and

(iii) the juxtaposition of "sport" and "physical education" in article 132(1)(m) was indicative of the same conclusion and that it was significant that it did not include "mental education"; and

(b) the FTT was wrong to approach the appeal as a question of the interpretation of English language rather than to seek the purpose of article 132(1)(m).

7. It is also submitted that the FTT concluded wrongly that it could with confidence decide the question of the interpretation of the Directive without a reference to the Court of Justice.

The parties' submissions

8. Mr Ewart QC on behalf of EBU makes six initial points in respect of article 132(1)(m), which are not controversial. They are based upon the judgment of the Court of Justice in *Město Žamberk v Finanční ředitelství v Hradci Králové* (C-18/12) [2014] STC 1703 ("*Město*"):

(a) the exemption constitutes an independent concept of European Union law the purpose of which is to avoid divergences in the application of the VAT system as between one member state and another (*Město*, at [17]);

(b) the exemption is intended to encourage certain activities in the public interest, but only those listed (at [18]);

(c) the terms used to specify the exemption are to be interpreted strictly; however that does not mean that those terms should be construed in such a way as to deprive them of their intended effect (at [19]);

(d) the term "sport" must be interpreted in the light of the context in which it is used and of the aims and the scheme of the Principal VAT

Directive, having particular regard to the underlying purpose of the exemption in question (at [20]];

(e) the provision is not intended to confer the benefit of the exemption under it only on certain types of sport (at [21]]; and

(f) the exemption seeks to encourage and promote participation in the relevant activities in the public interest by large sections of the population (at [23]].

9. Mr Ewart submits that the reason activities in article 132(1)(m) are encouraged in the public interest is because they provide social and health benefits. He says that the benefits can be mental or physical or a combination of both. He criticised the approach of the FTT in placing reliance on the English language version of the Directive, and on the "normal English meaning" of "sport" (FTT, at [37]), and the conclusions drawn by the FTT from that exercise, namely that there must be a significant element of physical or athletic activity which has a direct effect on its outcome.

10. Mr Ewart referred us in this respect to commentary on the approach to the interpretation of Community law in *Bennion on Statutory Interpretation*, 6th edition, (LexisNexis®), and in particular to the application by the Court of Justice of a purposive or teleological rather than historical or literal interpretation (see, for example, *Henn and Derby v Director of Public Prosecutions* [1981] AC 850, per Lord Diplock at p 905B).

11. Whilst accepting the application of a purposive construction to the Directive, Mr Hill, for HMRC, argued that a literal construction of Community instruments remained of value, and that purpose was relevant to the extent that a literal interpretation of different language versions gave rise to inconsistency. He referred us, by way of example, to the recent judgment of the CJEU in the case of *European Commission v United Kingdom* (Case C-161/14) (4 June 2015), where at [21] the Court said:

> "It is settled law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of EU law. Where there is a divergence between the various language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (See, inter alia, the judgment in *Commission v Netherlands*, C-41/09, EU:C:2011:108, paragraph 44)."

12. Mr Hill pointed to the juxtaposition, in article 132(1)(m) itself, of the word "sport" and the phrase "physical education", and the absence of a corresponding reference to a mental element, which the FTT had held, rightly according to Mr Hill's submission, to be indicative of a requirement that sport connoted physical, rather than purely mental, activity. As regards purpose, he submitted that this was clear from what the Court had said in *Město*, at [23]:

> "As regards the aim of art 132(1)(m) of the VAT Directive, it must be noted that that provision has the objective of encouraging certain activities in the public interest, namely services closely linked to sport or physical education which are provided by non-profit-making organisations to persons taking part in sport or physical education. Accordingly, the provision seeks to promote such participation by large sections of the population."

13. Mr Ewart, on the other hand, submitted that a purposive approach to the construction of the Directive mandated consideration of the underlying purpose of the relevant exemption (see *Město*, at [20]). The exemption in question was included because it was in the public interest. The question of purpose could not be answered by pointing solely to the inclusion of "sport", if the issue in question was whether an activity fell within the meaning of that term. That would beg the question; the answer, argued Mr Ewart, could be found in the purpose of providing for the relevant exemptions, which Mr Ewart submitted was the health and social benefits to be obtained from the encouragement of certain activities. That was not, contrary to the finding of the FTT, at [33], and the submission of Mr Hill to this effect, gainsaid by other restrictions in article 132, such as those excluding from the scope of the exemption profit-making businesses.

14. That is a brief summary of the principal submissions on the question of principle. We also heard argument in support of the competing interpretations. Mr Ewart pointed to the acceptance, in other areas, of bridge as a sport, including under Regulation (EU) No 1288/2013 of 11 December 2013 (the Erasmus+ programme), in the invitation of the International Olympic Committee to the World Bridge Foundation to submit an application for bridge to be included in the 2020 Tokyo Olympics, and in the inclusion of bridge in the 2018 Asian Games. Mr Hill submitted that the EBU's interpretation would result in a considerable extension to the scope of the exemption, which would, he argued, be contrary to the requirement that exemptions must be construed strictly. He referred us to the definition of "sport", limited to physical activity, used by the Council of Europe in the European Sports Charter adopted in 1992 and revised in 2001, recital 12 of which makes clear that the purpose of the Charter was to provide a common European framework for sports development in Europe. Article 2(1)(a) of the Charter defines "sport" as meaning:

> "all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels".

Our reasons for making a reference to the CJEU

15. The FTT decided not to seek a preliminary ruling from the Court of Justice. It reasoned, on the material before it, that it was clear in its conclusion in relation to the English version of the Principal VAT Directive that "sport or physical education" in article 132(1)(m) did not include contract (or duplicate) bridge (FTT, at [44]). It had no relevant evidence that different language versions indicated a wider or different meaning, or therefore that the EU meaning should be any different from that

concluded by the FTT. Accordingly, although the EBU had argued that a reference should be made, the FTT decided not to do so.

16. Before the FTT, and initially in this appeal, HMRC had opposed the making of a reference, arguing that the information provided to the EBU by other European bridge associations indicating, in certain cases, that in some member states VAT was not charged on entry fees for contract bridge competitions should not be regarded as evidence of the VAT positions in other member states.

17. At the hearing before us, HMRC had changed their position in this regard. They had gone from opposing the making of a reference to one of neutrality. The reason for this change was that HMRC had themselves obtained confirmation of the VAT position in a number of member states which demonstrated, and we were provided with copies of the correspondence, that in certain member states bridge is treated as a sport for the purpose of the VAT exemption.

18. The power to make a reference, as applicable to this tribunal, is derived from article 267 of the Consolidated Version of the Treaty on the Functioning of the European Union (1 December 2009; OJ C83, 30 March 2010, p 47), which relevantly provides:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon …"

19. We were referred to the helpful summary of the principles to be applied given by Proudman J in this tribunal in *Revenue and Customs Commissioners v Bridport and West Dorset Golf Club Ltd* [2012] STC 2244, a case also on the application of the exemption in article 132(1)(m) for services closely related to sport or physical education, where the question referred related to the meaning of the phrase "additional income" in article 134, which disapplied the exemption in certain circumstances.

20. In her decision, at [33], Proudman J emphasised the distinction between the jurisdictional criterion and matters of discretion. In this case, it is clear, and the parties are agreed, that the question whether contract or duplicate bridge is a sport is a question of law, and it is a question that must be decided in order for this tribunal to determine this appeal. The jurisdictional threshold is thus met.

21. There remains what Proudman J referred to, at [34], as the limited discretion to decline to make a reference in certain cases. The principles have been encapsulated in the well-known passage from the judgment of Sir Thomas Bingham in *R v*

International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd ex parte Else (1982) Ltd and another [1993] QB 534, at p 545:

> "… I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer. I am not here attempting to summarise comprehensively the effect of such leading cases as *H. P. Bulmer Ltd. v. J. Bollinger S.A.* [1974] Ch. 401, *C.I.L.F.I.T. (S.r.l.) v. Ministry of Health* (Case 283/81) [1982] E.C.R. 3415 and *Reg. v. Pharmaceutical Society of Great Britain, Ex parte Association of Pharmaceutical Importers* [1987] 3 C.M.L.R. 951, but I hope I am fairly expressing their essential point."

22. In *CILFIT*, to which Sir Thomas Bingham referred, the Court of Justice recognised, at [13] *et seq*, that no purpose might be served by the making of a reference where the question raised is materially identical to one that has already been the subject of a preliminary ruling in a similar case, or where previous decisions of the Court had already dealt with the point of law in question, even though the questions at issue are not strictly identical. The national court or tribunal may also take the view that the correct application of Community law is so obvious (*acte clair*) as to leave no scope for any reasonable doubt as to the manner in which the question is to be resolved; but in reaching such a view (and in so doing, refraining from submitting the question to the CJEU and taking upon itself the responsibility for resolving it) the national court or tribunal must have regard to the particular characteristics of Community law and the particular difficulties of its interpretation, which are summarised by Sir Thomas Bingham in *ex parte Else*. In particular, courts and tribunals should exercise great caution in relying on the doctrine of *acte clair* (*Bridport*, at [33]), and in taking the view that the meaning of the English language version of an EU instrument is clear (*Henn and Darby*, per Lord Diplock at p 906B).

23. We have formed the view that, to adopt the words of Sir Thomas Bingham, we cannot with complete confidence resolve the issue of the Community law meaning of "sport" for the purpose of determining the issue before us. That meaning is an autonomous meaning, one that should be of general application amongst all member states. It is clear, however, that divergences in approach have appeared, and it would in our view be of little value for us to add a further domestic view to the mix. However confident we might be that we could faithfully replicate the approach of the Court of Justice, that objective is better served by the making of a reference.

24. This is not a case where there has been a ruling of the CJEU in a similar case, nor where the relevant principle is well-established by the Court's jurisprudence so that the national court can confidently do no more than apply it. The cases decided by the CJEU on the exemption in article 132(1)(m), such as *Město*, *Canterbury Hockey Club and another v Revenue and Customs Commissioners* (Case C-253/07) [2008] STC 3351 and *Revenue and Customs Commissioners v Bridport and West Dorset Golf Club Ltd* (Case C-495/12) [2014] STC 663, have not addressed the meaning of "sport" as such, and the particular question whether it extends to what are termed "mind sports", such as bridge. Nor do we consider that we could conclude that the issue is *acte clair*.

25. We decide therefore that we shall make a reference to the Court of Justice to seek a preliminary ruling on the meaning of "sport" in article 132(1)(m), as it relates to whether contract or duplicate bridge is to be regarded as a sport for the purpose of the exemption from VAT.

Draft Order for reference

26. Subject to further consideration of the form of the reference with the assistance of the parties, our provisional view is that the Court should be asked to give guidance on the essential characteristics of an activity in order that it will be a "sport" within the meaning of article 132(1)(m), with particular reference to the question whether the activity must have a significant (or not insignificant) physical element which is material to its performance or outcome, or whether a game, such as contract or duplicate bridge, with a predominantly mental element of performance and outcome, falls within that meaning.

27. This appeal is now stayed for not more than 28 days from the date of release of this decision to enable the parties to reach agreement, so far as possible, on the form of the proposed questions for reference and accompanying Schedule. A hearing will be provisionally listed at the end of that period, in case of disagreement, although we would anticipate that we shall be able to settle the final form of the Order for reference on the papers.

MRS JUSTICE ASPLIN

UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 23 July 2015