[2013] UKUT 0160 (TCC)
Appeal number: FTC/56/2012

Value Added Tax; supply of goods; business gift; disposal otherwise than for a consideration; supply by football association of end of season medals to league division points champion clubs; whether output tax payable on the value of such medals - yes; or whether accounted for by output on membership, sponsorship, copyright royalties, and/or broadcasting fees; no; Value Added Tax 1994 Schedule 4, paragraph 5; Principal VAT Directive 2006/112/EC Article 16

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

Between:

SCOTTISH FOOTBALL LEAGUE

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: J Gordon Reid QC, FCIArb and Edward Sadler

Sitting in public in Edinburgh on 11 March 2013

Gary Moore, VAT Services (Scotland) Ltd for the Appellant

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

DECISION

INTRODUCTION

1. This is an appeal against the Decision of the First-tier Tribunal (FTT) dated 2 May 2012. The Decision refused the appeal of the Scottish Football League (SFL) against a decision of the Respondents (HMRC) relating to the VAT treatment of medals and flags (collectively, "the medals") awarded by SFL each year to the winners of the First, Second and Third Division League Points Championships. The principal issue raised before us is whether the award of the medals was a business gift as the FTT has held and on which output tax is chargeable, or whether, as SFL contends, the award was a disposal of goods forming part of their business assets on which no output tax was separately chargeable. As we shall explain, we have come to the conclusion that the question whether the award of medals constituted a business gift, is largely irrelevant.

2. The original decision of HMRC appealed against disallowed the recovery of input tax on the cost of the medals. This was because no output tax had been expressly accounted for on the supply by way of the disposal of the medals when the awards were made. However, it will become clear that the real issue between the parties is concerned with output tax and whether output tax falls to be discretely accounted for on the disposal of the medals. HMRC say it does. SFL disagrees.

3. The appeal was heard at Edinburgh on 11 March 2013. SFL was again represented by Gary Moore, VAT Services (Scotland) Ltd. HMRC were represented by Iain Artis, advocate on the instructions of the Office of the Advocate General. In advance of the Hearing, we were provided with Notes of Argument and a bundle of documents and authorities.

FACTUAL BACKGROUND

4. SFL is a fully taxable organisation whose objects are to promote and extend the game of Association Football in Scotland, and to provide League Championship and League Cup Competitions for its football club members. It is empowered to conclude commercial contracts relating to sponsorship, broadcasting rights and copyright loyalties and generally to be a governing body for its members (R2.1&4). Its Constitution and Rules are set forth in a lengthy document.

5. In summary, the League is divided into three Divisions. Provision is made for membership including associate membership (Rules 8 and 17). There is a joining fee, and a small annual subscription payable by each member (£10 plus VAT - Rule 22.1). The affairs of the League are governed by a Board of Management and various committees. There are rules about annual general and other meetings, voting and the election of a president and vice-president, and Board members. The functions and powers of the Board are set out. Provision is made for the appointment of a chief executive and secretary. There are detailed provisions about club colours and names, advertising, financial record keeping and various other matters which need not be

mentioned. Members' commercial or sponsorship arrangements must not conflict with such arrangements made by the SFL (R70.1).

6. Rules 90-98 deal with competitions, fixtures, promotion and relegation. For example, all fixtures have to be completed by 15 May in any season (R91.4.1). Clause 96 provides that the clubs respectively declared the Champions of the various Divisions are to hold the trophies handed over to them and to return them the following year. Rule 96.1, much relied on by SFL in the appeal, provides that:-

> The League shall present to each of the Championship Clubs of the First, Second and Third Divisions a flag and 20 gold medals, the value whereof to be fixed by the Board.

7. It is the VAT treatment of the award of such medals under Rule 96.1 which is the subject of dispute in this appeal.

8. The FTT found as fact that each medal had a value of £450. Twenty medals awarded to the champion team of each of the three Divisions have a total value of £27,000. Nothing is said about the value of a flag. No factual findings are made (or from which it may reasonably be inferred) that the cost of providing the medals was a cost component of any transaction other than the making of the award under Rule 96.1. It is common knowledge that such medals are often presented to players rather than to the successful club but nothing turns on that – as is clear, SFL presents the medals to the club as the Rules specify, and it is for the club to determine, at its discretion, which of its players or other staff should receive a medal. The winning club appears to be given and retains a flag. The FTT has also included some other background facts in relation to the League Cup, but these are not material to the determination of the appeal before us.

9. In relation to sources of income on which SFL accounts for output tax, the FTT found as fact that Barrs Irn Bru (a sponsor) provided field advertising and had the right to present the trophy and medals to the winner of the Scottish League Points Championship (paragraph 6.14); the income from the copyright royalties from licensed bookmakers related to the outcome of matches at every level including the League and Alba Cups (paragraph 6.15). It was explained to us that this related to the use of published fixture lists. There are no factual findings (presumably because there was no evidence) about the detail of the various contracts between SFL and sponsors, bookmakers and television companies.

10. As for the history of the dispute, the FTT noted (at paragraph 18) that the recovery of input tax was blocked because output tax on the supply of the medals was not declared. This seems to have been an agreed arrangement and in operation since 1996. In 2010, correspondence began between the parties in which Mr Moore, on behalf of SFL, argued that the award of medals did not constitute a gift, that the input tax on their purchase was deductible but no output tax on their disposal was payable. The sum at stake at that stage was about £14,496 which represented input tax on the cost of medals which had been blocked in accordance with the previous arrangements over the period between about 2007 and 2010. It also represents output tax on the value of the medals. In addition, it was also argued that such output tax had already been accounted for on SFL's various income streams. HMRC disagreed.

11. The only specific information about these income streams is set out in Mr Moore's letter dated 22 November 2010 (referred to at paragraph 6.12 of the FTT's decision). After setting out the argument about gifts, to which most of it relates, the letter continues as follows:-

> "We enclose a copy of the SFL's audited accounts for the year to March 2010[1] and specifically to Note 2 of the accounts - Income. Within these notes, income derived for the SFL results in the SFL **accounting for Output VAT on all of the following:**
>
> - Sponsorship of Divisions 1, 2 and 3 by Barrs Irn Bru - £270,000
> - Copyright royalties received from Licensed Bookmakers to utilize the fixtures - £657,723 (note- although this is primarily for Division 1, 2 and 3 fixtures this will also include fixtures in connection with the League Cup and Alba Cup, but the volume of these are small in comparison to the number of league fixtures)[2];
> - Broadcasting Fees & Video/DVD Sales - £1,352,008. Similar to the bullet point above re Copyright royalties some of this income will for (sic) fees and sales in connection with the League Cup and Alba Cup but it is not possible to break this down; and
> - Annual Membership Subscription - £310[3]
>
> **.....**we therefore argue that the costs of these medals can be directly attributable to the taxable income and as such the Input VAT is recoverable and no Output VAT is required to be accounted for (under the "gift" rules)."

12. The claim for recovery of Input tax was rejected by HMRC on 3 March 2011. HMRC did not change its view on reconsideration and the original decision was upheld on 27 May 2011.

STATUTORY BACKGROUND

13. Sections 1 and 4 of VATA 1994 provide for VAT to be charged on the supply of goods or services, where it is a taxable supply made by a taxable person in the course or furtherance of his business. Section 5 provides that Schedule 4 applies for determining what is or is to be treated as such a supply. Schedule 4 provides *inter alia* as follows:-

> MATTERS TO BE TREATED AS SUPPLY OF GOODS OR SERVICES
>
> Section 5
>
> 5. (1) Subject to sub-paragraph (2) below, where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods.
>
> (2) Sub-paragraph (1) above does not apply where the transfer or disposal is –
>
> (a) a business gift the cost of which, together with the costs of any other business gifts made to the same person in the same year, was not more than £50; …
>
> (2ZA) In sub-paragraph (2) above –

[1] We have not seen these and they are not discussed by the FTT; they may not have been produced
[2] This parenthesis is part of the letter
[3] There are 30 clubs but during the season one club left and another joined, hence the extra £10

> "business gift" means a gift of goods that is made in the course or furtherance of the business in question;
>
> "cost", in relation to a gift of goods, means the cost to the donor of acquiring or, as the case may be, producing the goods;
>
> "the same year", in relation to a gift, means any period of twelve months that includes the day on which the gift is made.

14. Sections 24, 25 and 26 make provision for the crediting of input tax and setting it off against a taxable person's output tax liability. Paragraph 6 of Schedule 6 provides, in effect for present purposes, that the value of the goods disposed of under paragraph 5 of Schedule 4 is taken to be the taxable person's acquisition cost of the goods in question. Thus, the input tax and the output tax are the same. Section 81(3) gives HMRC the power to "block" (by means of a statutory set-off) a taxable person's recovery of input tax where that person has failed to account for VAT on an output supply.

15. These provisions derive from various EC Directives. Thus, Article 16 of the Principal VAT Directive provides as follows:-

> The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge, or more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.
>
> However, the application of goods for business use as samples or gifts of small value shall not be treated as a supply of goods for consideration.

THE FTT DECISION

16. The FTT concluded firstly, that the award of the medals was a supply by way of a business gift in terms of VATA 1994. It took the view that, in spite of the obligation contained in Rule 96.1, SFL could undertake to make a gift; that, the FTT said, did not alter the status of the gift.

17. Secondly, the FTT concluded, relying on Schedule 4 to VATA 1994, that output tax was due on the disposal of the medals by SFL to the appropriate member clubs. Thirdly, it concluded that as output tax had not been accounted for in respect of the supply of the medals input tax was not recoverable, and therefore the appeal failed.

GROUNDS OF APPEAL AND THE APPELLANT'S SUBMISSIONS

18. In summary, SFL contends first that the FTT erred in concluding that the award of the medals each year was a business gift. Rather, SFL argues, the award was a disposal of goods forming part of the assets of its business within the meaning of VATA 1994 Schedule 4 paragraph 5(1). This is said to be supported by Rule 96.1 which makes it clear that the award is not voluntary. Mr Moore conceded that if the FTT were correct to hold that the award of the medals was a supply by way of a business gift, then the FTT's second and third conclusions were sound.

19. In the course of the hearing, Mr Moore advanced a second argument which may have been mentioned at the hearing before the FTT, but does not appear to have been emphasised to any great extent in the FTT's findings, either in relation to the facts or

the law. The argument, which was not clearly focused in the Grounds of Appeal, is that SFL, by charging output tax on the consideration received for the supply of sponsorship, intellectual property rights, and broadcasting rights, has already accounted for output tax on the supply of the medals. SFL is therefore, it says, entitled to deduct input tax on the cost of the medals without suffering a matching output tax liability because that cost is a cost component of SFL's fully taxable business. There was a direct link between membership and the award of the medals; and also a direct link between the award of medals and the SFL's other sources of income on which output tax had already been accounted. SLF could not purchase the medals without such income. The medals are a cost component of running the league.

HMRC SUBMISSIONS

20. HMRC submitted that the approach of the FTT was sound. The award of the medals was a business gift, there being no consideration for the award. It was therefore liable to output tax by virtue of Schedule 4 paragraph 5(1) of VATA 1994. Even if the award were not so characterised, output tax was still due under paragraph 5(1). There was no direct link proved to anything other than the transaction comprising the award of the medals at the Championship presentation match. *CEC v Professional Footballers' Association* 1993 STC 86 was therefore distinguishable.

21. The argument now appearing that the award of the medals was an integral part of another transaction on which output tax had already been accounted for was unsound, because no such transaction can be identified; the acquisition of the medals was not a cost component of any such other transaction. There was no direct link between the cost of the medals and any other supplies by SFL. There was no evidence from which such a link could be established, and the FTT made no such factual findings.

22. Mr Artis also referred us to the Opinion of Advocate General (Fennelly) in *Kuwait Petroleum (GB) Ltd v C&CE* (Case C-48/97) [1999] STC 488 at paragraphs 26 and 27, *Apple & Pear Development Council v CEC* [1988] 2 CMLR 394, and *Midland Bank plc v CEC* 2000 STC 501, *GUS Merchandising Corporation Ltd v CEC* [1981] STC 569, *CEC v Professional Footballers' Association* [1993] STC 86, and *Scottish Football Association Ltd* Ref 14895 18/4/97 (Chairman TG Coutts QC).

DISCUSSION

Some General Principles

23. VAT is a tax on consumption. Accordingly, an output tax charge is necessary where there is a disposal which constitutes consumption by a taxable person of goods forming part of his business assets. Thus, Article 16 of the Principal VAT Directive (derived from Article 5(6) of the Sixth Directive - and reflected in paragraph 5 of Schedule 4 to VATA 1994) ensures equal treatment as between a taxable person who applies business assets for private purposes and an ordinary consumer who purchases goods of the same type. The Directive thus treats as a supply made for consideration and therefore subject to VAT a taxable person's self-supply or private use of goods forming part of his business assets. The rationale is that if the goods are supplied to the taxable person as part of his business he would be able to deduct the input VAT; his own consumption of the goods through private use means he is acting as the final consumer and should

therefore pay tax on that consumption. In the same way, where a taxable person supplies goods free of charge to a third party (or in some other way applies the goods in a manner which is outside the purpose of the business), the same consequences follow. It is logical to treat the taxable person in such a case as the consumer of the goods. Output tax has to be accounted for on such supply but it is usually matched by and set off against the input tax on the cost of acquisition of the goods. Business gifts of small value are excepted from this logic. It accordingly follows that whether the disposal is a business gift (other than a small value gift) or some other disposal for no consideration for one reason or another, does not matter (see in *Kuwait Petroleum (GB) Ltd c C&CE* (Case C-48/97) 1999 STC 488 at page 496 paragraphs 20-23, and the Opinion of the Advocate General (Fennelly) pages 496-7 at paragraphs 23, 24, 26 & 27).

The Appellant's First Argument

24. It is unfortunate that the principal focus of the proceedings before the FTT and indeed its decision was the question whether the award of medals constituted a business gift. Having regard to the value of each medal, some £450, it does not seem to us to matter whether the supply of medals was a business gift. It is plain that the award of the medals engages the application of paragraph 5(1) of Schedule 4. The medals are, as SFL accepts, goods forming part of the assets of its business, and once awarded are no longer part of its business assets. In awarding the medals SFL is making a supply of goods other than for a consideration, and that is so, whether the supply in law is made as a gift or made (as SFL contends) pursuant to some kind of obligation. Once that point is clear, the FTT's other conclusions mentioned in paragraph 17 above follow, and so, on SFL's Grounds of Appeal, the appeal must fail.

SFL's Second Argument

25. The Grounds of Appeal to this Tribunal are entirely devoted to the argument that the FTT erred in law in concluding that the award of the medals constituted a business gift, essentially on the basis that there was no gift because SFL was obliged in terms of Rule 96.1 of its Constitution to make the award of medals each year. Mr Moore's Skeleton Argument repeats those grounds almost word for word. It is only at the end of the Skeleton that the following submission is to be found:-

> …. The Appellant is entitled to Input Tax recovery on the gold medals without requiring to account for any Output Tax as:
>
> The Appellant is a fully taxable business with taxable income of over £2,000,000 on which £400,000 of Output Tax is declared. This income is received from sponsors such as Barrs Irn Bru, broadcasting fees from television, copyright royalties and bookmakers for use of the league fixtures.

26. We allowed Mr Moore to develop this argument in submissions, partly because Mr Artis had anticipated and dealt with it in his own Skeleton Argument, and may even, inadvertently in his desire for thoroughness of exposition (which he achieved), have encouraged such a submission. It may also be noted that Mr Moore is recorded in the FTT's summary of his submissions (at the end of paragraph 8) as having submitted that

> The Annual Membership fees of the clubs to be members of the League was a direct link to the awards and should be taken as a determining factor in allowing output tax not to be accounted for by the SFL.

27. The real issue raised by this second argument is whether output tax has already been accounted for on the supply of the medals within the overall turnover of SFL on which it has already charged output tax on its various supplies. This is a different question from whether the cost of a supply *to* a taxable person is a cost component of his business on which input tax is deductible, although both are concerned with direct links, one as between the incurring of the cost and the supplies made *by* the taxable person, the other as between the particular supply *by* the taxable person and the consideration, if any, for that supply.

28. We do not consider that a taxable person can elide liability to account for output tax on a discrete transaction falling within paragraph 5(1) of Schedule 4 to VATA 1994, by asserting that the output tax has been accounted for in some other unspecified transaction or series of transactions. If that could be done, paragraph 5(1) would become a dead letter and the general principles upon which it is based would be violated. If SFL is correct, input tax would normally be deducted on the cost of acquisition of goods, but no output tax would be payable on disposal of those goods by the taxable person even although he was acting as the final consumer.

29. Moreover, the supplies of SFL from which its income is derived are of a wholly different character. They are the grant of various incorporeal rights which would be classified as the supply of services rather than goods. It is difficult to see how output tax on the supplies of a wide range of services somehow embraces output tax on a discrete supply of goods.

30. The concept of consideration requires a reciprocal or direct link between the goods or services provided and the consideration received. That principle, established in the *Dutch Potato Case* 1981 ECR 445 at 454, 1981 3 CMLR 337 at 345, was affirmed in *Apple & Pear Development Council* (at paragraphs 11 & 12) by the European Court of Justice (now the CJEU). There, the functions of the appellant Council were essentially the advertising and the promotion and improvement of the quality of apples and pears grown in England and Wales under various schemes. The Council imposed an annual charge on its members which was not liable for VAT except in relation to one particular scheme. This enabled the Council to claim credit for input tax on goods and services supplied to them in connection with those of its activities funded by the annual charge. The Commissioners subsequently ruled that none of the Council's activities constituted business activities for the purpose of VAT and declined to allow such credit. The issue was whether the exercise of the Council's functions and the imposition of the annual charge constituted a supply for consideration. The Court concluded that any benefits received by the members were derived indirectly from the services provided to the industry as a whole (paragraph 14). The Court also pointed out that there was no relationship between the level of benefits from the services and the annual charges (paragraph 15). The mandatory charges did not constitute consideration and the exercise of the organisation's functions therefore did not constitute a supply of services effected for consideration (paragraph 16). The essence of the supply of goods for consideration is that the payment should be for the goods supplied (see *Apple & Pear* at 402 per the Advocate General).

31. The link between supply and consideration was discussed in *Supanet Ltd* VAT Decision 17682 31/5/02 (Chairman Colin Bishopp), although the primary conclusion was that there was no identifiable consideration at all. There, Supanet, an internet

service provider, challenged an assessment of some £56,000 representing output tax on the value of competition prizes (computers) offered by it to its customers. The argument was that there was a direct link between the income of a few thousand pounds received by Supanet from its subscriber customers (via BT to whom the subscribers paid telephone charges, a portion of which was passed on to Supanet) and the supply of the computer prizes, valued at £300,000. The challenge failed. In the course of the decision the authorities discussing the relationship between consideration and supply were reviewed. The Tribunal observed that there must be a reasonable correlation between the value of the consideration and the value of the goods or services; and that it must be possible to identify a direct link between consideration and goods or services. We agree. The latter proposition has recently been affirmed in *HMRC v Aimia Coalition Loyalty UK Ltd* 2013 UKSC 15 paragraphs 18 and 44.

32. Here, there is no reasonable correlation between the value of the medals awarded (£27,000) and the value of the other supplies (sponsorship, copyright and broadcasting fees and membership subscriptions). The membership fees amount to about £300 and the other individual income streams are six or seven figure sums. The contractual conditions which the members of the various divisions of the League are bound to fulfill apply to all members alike, whether or not they are awarded medals for successful performance and so such conditions or obligations cannot be construed as consideration for the award of medals. The membership fees, too, cannot, for the same reason, and because they fall well below the value of the medals, be regarded as consideration for the supply of the medals.

33. Other authorities cited to us do not assist SFL. In *Professional Footballers' Association*, the function (a gala dinner at which awards were made to certain footballers) was a self-financing event. The receipts from tickets, advertisers, and sponsors paid for the dinner, the entertainment and the awards. There was thus a direct link between the price of the ticket and the awards. In *Scottish Football Association Ltd* the issue was whether the Association was obliged to account for output tax on the caps provided to players who played for the Scotland national team in international games arranged and organised by the Association. The caps were specific to each match and a cost component of it. It was held that the spectators provided the consideration for the expected award of the cap whether awarded for a home or an away match. The spectators at the home matches were financing the home and away games by their entry money, part of which was used to purchase the caps.

34. In the present appeal there is no payment such as the ticket price for the dinner or the international match which can be directly linked to the financing of the purchase of the medals. In both the *PFA* and the *SFA* cases, the focus was on a particular transaction (the gala dinner or the international match), and how it was paid for (ticket prices, sponsorship fees for the event etc). No such link exists here between the sponsorship, the copyright or television rights income, each of which relates to the whole season and all the member clubs, and the award of the medals, which relates to three events involving the three champion clubs at or about the end of the season.

35. Mr Moore relied on some photographs illustrating the advertising which Barrs obtained at the award of the league championship cup and medals (an event which Mr Moore told us would be attended by representatives of Barrs). While Irn Bru was prominently advertised, there was no sign of any medals in the team photographs. Be that as it may,

the fact that a specific sponsor obtained publicity at the award of the medals as part of its substantial sponsorship arrangements for which it paid a considerable sum does not seem to us to amount to the sort of link required. As the FTT observed (at paragraph 11), the quality and therefore the cost of the medals lay within the discretion of SFL. It was not suggested that any part of the consideration paid to SFL for the grant of sponsorship rights and the output tax thereon was affected by the acquisition of more, or less expensive medals, or calculated by reference to *inter alia* an assumed sum for the price of the medals. This, too, negates any notion of a link between the general income of SFL and the disposal of the medals.

36. Furthermore, we also consider there is force in the argument presented by Mr Artis to the effect that there are insufficient findings of fact to enable SFL's argument to succeed. The FTT did not make significant findings on this aspect of the dispute, no doubt because it was not asked to and the focus of the evidence and submissions concentrated on the question of business gift. Insofar as the FTT did consider this aspect of the case, this seems to be restricted to recording HMRC's views (see paragraphs 6.14 and 6.15), although they observed that copyright royalties related *more to outcomes of matches at every level* (paragraph 6.15). The FTT also seemed to conclude that annual membership was not relevant (paragraph 6.16).

37. We cannot speculate on evidence which might have been led or findings which might have been made. Even accepting the quoted contents of the letter dated 22 November 2010 referred to above in paragraph 11 as correct, we are unable to conclude on the facts that output tax chargeable on a discrete transaction, namely the award of medals, has somehow been accounted for within other income streams relating to unspecified transactions which constitute consideration for the supply of a wide range of services by SFL to third parties, namely the grant of a variety of rights such as sponsorship, copyright and broadcasting rights.

38. The simple truth in this case is that the award of the medals was a transaction which was a supply of goods by SFL. That supply was for no consideration, but SFL must nevertheless account for VAT on the value of the supply. In order to make that supply, SFL purchased the medals and paid VAT. The purchase of the medals relates directly to the award of the medals – it cannot, on any reasonable basis, be related to any other transactions entered into by SFL, nor can it in some way be regarded as an overhead cost of the business on the grounds that it cannot be related to any supply made by SFL. This being so, the input VAT which it paid on the purchase of the medals can be recovered from the VAT accounted for in relation to the supply comprised by the award of the medals. If SFL fails to account for such VAT HMRC are entitled to set-off their liability to give credit for the input VAT paid by SFL on its purchase of the medals.

39. For these reasons the appeal must be dismissed.

Summary

1 A taxable person cannot elide liability to account for output tax on a discrete transaction falling within paragraph 5(1) of Schedule 4 to VATA 1994, by asserting that the output tax has been accounted for in some other unspecified transaction or series of transactions.

2 We are unable to conclude on the facts that output tax chargeable on a discrete transaction namely the award of medals has somehow been accounted for within other income streams relating to unspecified transactions which constitute consideration for the supply of services by the SFL to third parties, namely the grant of a variety of rights such as sponsorship, copyright and broadcasting rights.

DISPOSAL

40. The appeal is dismissed.

J. GORDON REID QC, FCIArb
UPPER TRIBUNAL JUDGE

EDWARD SADLER
UPPER TRIBUNAL JUDGE

RELEASE DATE: 04 APRIL 2013