



[2013] UKUT 0130 (TCC)
Appeal number FTC/15/2012

Value Added Tax – claim to repayment of output tax allegedly overpaid – whether services provided by Appellant Association to its members exempt under Value Added Tax Act 1994, Schedule 9, Group 9, Item 1(d) – whether primary purpose of Association was lobbying – whether any exemption under Item 1(d) disapplied by Note 5 – whether membership of Association restricted in accordance with Note 5 – whether defence to repayment of allegedly overpaid output tax on the ground of unjust enrichment

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL
(TAX CHAMBER)

Between :

**BRITISH ASSOCIATION OF LEISURE
PARKS, PIERS AND ATTRACTIONS
LIMITED**

Appellant

- AND -

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

Respondents

TRIBUNAL: MR JUSTICE MORGAN

**Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A
1NL on 12th February 2013**

**Mr Timothy Brown (instructed by Charcroft Baker, Chartered Accountants) for the
Appellant**

Mr Sarabjit Singh (instructed by **General Counsel and Solicitor for HM Revenue**) for the
Respondents

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DECISION

RELEASE DATE: 12 MARCH 2013

Tribunal Judge: Mr Justice Morgan:

The appeal

1. This is an appeal by the British Association of Leisure Parks, Piers & Attractions Ltd (“the Association”) against the decision of the First-tier Tribunal (“the FTT”) (Sir Stephen Oliver QC) released on 12th October 2011. The FTT gave permission, on 11th January 2012, to appeal to the Upper Tribunal.
2. The Association’s case before the FTT was that it was entitled to be repaid allegedly overpaid output tax in respect of membership subscriptions received by it and on which output tax had been charged and accounted for. The Association said that at all material times, it was exempt from VAT pursuant to the provision most recently contained in the Value Added Tax Act 1994 (“VATA 1994”), Schedule 9, Group 9, Item 1(d). The period of the claim ran from the date from which the Association (or, more accurately, a predecessor unincorporated association) was first registered for VAT (1st January 1982) to 31st March 2008, save that (for reasons which need not be explained) there was a gap in this period from 31st March 2005 to 1st October 2005.
3. An appeal to the Upper Tribunal is restricted to an appeal on a point of law: see section 11(1) of the Tribunals Courts and Enforcement Act 2007.

The relevant legislation

4. The matter was argued before me on the basis that the relevant provision pursuant to which supplies by the Association were said to be exempt from VAT was VATA 1994, Schedule 9, Group 9, Item 1(d). However, since the period during which supplies by the Association are claimed to have been exempt dates from 1st January 1982, it is I think necessary to refer to the relevant European and United Kingdom provisions which applied during that period.
5. 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."

6. 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".
7. 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.”

8. It can be seen that Parliament has split up the single exemption contained in Article 13(A)(1)(l) of the Sixth Directive and Article 132(1)(l) of the Principal VAT 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".

The issues before the FTT

9. There were three issues before the FTT as follows:
- (1) whether as regards all or any part of the period covered by the claim the Association was a body falling within the above provisions, most recently the provision contained in Item 1(d) of Group 9 in Schedule 9 to VATA 1994;
 - (2) if and to the extent that the Association was such a body, whether the exemption in Item 1(d) was disapplied by Note 5 to Group 9;
 - (3) if not, whether the Association would be unjustly enriched if it received repayment from HMRC.
10. The FTT decided the first issue against the Association. The FTT held that during the relevant period, the Association had not shown that its primary purpose was to make representations to the government in the way required by Item 1(d). That finding of the FTT meant that the Association's claim to be repaid output tax failed for the entirety of the period of claim. However, the

FTT went on to consider the other two issues. In relation to the second issue, the FTT ruled against the contentions of the Association. The FTT held that if supplies by the Association would otherwise have been exempt under Item 1(d) then that exemption was disapplied by Note 5, by reason of the findings it made as to the membership of the Association. Even though the Association's claim to be repaid output tax would fail on two independent grounds, the FTT went on to consider the third issue of unjust enrichment. The FTT held, applying section 80(3) of VATA 1994, that the Association would be unjustly enriched if it were to be repaid output VAT.

11. In this appeal to the Upper Tribunal, the Association challenges the decision of the FTT on each of these three issues.

The first issue: primary purpose

12. The first issue is whether, as regards all or any part of the period covered by the claim, the Association was a body falling within the relevant provisions which conferred exemption from VAT, most recently the provision contained in Item 1(d) of Group 9 in Schedule 9 to VATA 1994.
13. Before the FTT, and on this appeal to the Upper Tribunal, the Association referred only to the wording of Item 1(d) of Group 9 in Schedule 9 to the VATA 1994. Neither it nor the Respondents suggested that the wording of the two European Directives to which I have referred or the wording of the similar provision in VATA 1983 would produce any different result to that produced by VATA 1994. Accordingly, I need only consider the wording of the current provision which I will refer to as Item 1(d).
14. The parties did not disagree as to the meaning or the effect of Item 1(d). They agreed that the relevant legal principles were to be found in the decisions in British Association for Shooting and Conservation Ltd v Revenue and Customs Commissioners [2009] EWHC 399 (Ch) (Lewison J) and Revenue and Customs Commissioners v European Tour Operators Association [2012] UKUT 377 (TCC) (Henderson J). I can summarise the principles which I derive from those authorities, and other principles which were not in dispute, so far as they are relevant to the present appeal, as follows:
 - (1) in construing Item 1(d), which is an exception to a general principle of community law as to VAT, the court should adopt a strict but not a strained approach; a strict approach is not to be equated with a restricted approach; a court should not reject a claim relying on the exemption where the claim comes 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;
 - (2) the reference to "primary purpose" in Item 1(d) does not require the Association to show that the purpose referred to in Item 1(d) was the sole purpose of the Association but the purpose referred to in Item 1(d) must be its main or principal purpose;

- (3) it is possible for a body to have multiple objects so that no single object could be said to be predominant or the primary purpose;
 - (4) the primary purpose test involves an objective enquiry, not a subjective one; the matter is to be determined primarily by an examination of the stated objects and the actual activities of the body in question; the subjective views of the officers and members of the body may throw some light on the relevant objective enquiry but those views are not to be elevated into a diagnostic test;
 - (5) the enquiry as to the primary purpose of the body normally involves the tribunal looking at the constitutional documents of that body and other materials from which the purposes of the body can be derived tested against the reality of what the body does.
15. As I have explained, the FTT in the present case concluded that the Association had not shown, for any part of the relevant period covered by the claim, that its primary purpose was to make representations to the government in the way required by Item 1(d). The Association challenges that decision on three grounds. The first ground is that it is said that the FTT held that the Association was a trade association but did not go on to ask itself the right question which was: what was the primary purpose of the trade association? Merely to say that the Association was a trade association (which it was) does not tell one what the primary purpose of this particular trade association was. The second ground is that it is said that the FTT made up its mind as to the primary purpose of the Association by relying on the Association's constitutional documents and without considering its actual activities. Although the FTT appeared to go on to consider the actual activities of the Association, it is said that it had already pre-determined the matter without regard to those activities. The third ground was that it was said that the ultimate finding of the FTT that the primary purpose of the Association was to be a trade association, and so that it did not have as its primary purpose the purpose identified in Item 1(d), was based on a finding of fact or an inference of fact which was perverse or irrational or which left relevant factors out of account; reliance was placed on the test in Edwards v Bairstow [1956] AC 14.
16. Having set out the relevant legislation at paragraphs [3] – [4] of its decision, the FTT dealt with the first issue at paragraphs [5] – [28]. The FTT dealt with the evidence in detail and set out substantial extracts from documents. I will attempt to summarise some of these paragraphs but I need to set out other paragraphs in full.
17. The relevant part of the decision on this issue began in this way:
- “5. ... Accordingly the question is whether, under item 1(d) of Group 9, the Association had the "primary purpose" of making "representations to the Government on legislation and other public matters" affecting "the business or professional interests of its members" in part or all of the relevant period.

6. HMRC say, consistently with Notice 701/5, that a "primary purpose" is not necessarily the sole purpose of the society but is the main or principal purpose. And for present purposes an association can only have one primary purpose. I do not understand this to be challenged, as a matter of principle, by the Association.

7. HMRC do not dispute that a purpose of the Association in the relevant period was to make representations of the kind referred to in item 1(d). However, HMRC do not accept that this was the Association's primary purpose.

Evidence

8. In this Decision I use the term "lobbying" as a shorthand expression to cover the functions referred to in item 1 of Group 9. Thus, to determine whether lobbying has been the Association's primary purpose or a main or principal purpose (see above) for all or any of the periods covered by the claim, I need to examine the facts as they existed in each of the periods. I then have to decide, on the basis of that fact-finding exercise, whether the Association has satisfied me (as regards all or any of the periods) that its primary purpose was lobbying. The evidence provided by the Association included documentation relating to its structure, its registration (including visit reports), the facilities offered to its members, some letters from the Association relating to legislation proposed and extracts from management committee minutes for 2002 onwards. The chief executive of the Association from 2001 to 2010, Mr Colin Dawson OBE, gave oral evidence. I shall summarise the evidence as far as possible in chronological order.

18. At paragraphs [9] and [10] of its decision, the FTT referred to a letter from the Association to HMRC on 6th November 1981 when the Association applied to be registered for VAT. The FTT also referred to a visit from HMRC at that time and a report which recorded the main activities of the Association. The FTT then referred to the fact that there were further visits by HMRC in 1983, 1986, 1988 and 1992.
19. The FTT referred to the HMRC report at the time of the 1992 visit in these terms:

"11. The 1992 Visit Report states that the "main business activity" of the Association is - "Representing members (who are engaged in the business of amusement parks, piers etc) re private members bills and promoting member interests by other activities". "Subsidiary business activities" are described as - "Arranging for members to attend exhibitions and receiving commission from exhibition holders for doing same." The Report also observes that "The Association helps promote its members by producing magazines which may, for example,

highlight particular rides or else provide a summary as to the location of various amusement parks. Magazines are distributed to various parties." ”

20. In paragraph [12] of its decision, the FTT recorded that the Association was incorporated as a company limited by guarantee in 1996 and set out the objects clause from its Memorandum of Association. At paragraph [13], the FTT set out the Rules of the Association which stated its Objectives. At paragraphs [14] and [16], the FTT referred to a number of undated documents which summarised the benefits of membership. At paragraph [15], the FTT referred to some evidence about the make up of the membership.
21. At paragraph [17] of its decision, the FTT referred to the Association’s annual Parliamentary lunch. At paragraphs [18] – [20], the FTT referred in detail to the evidence which the Association relied upon (in the period from 2002 onwards) as to lobbying or similar activities. At paragraph [21], the FTT stated:
- “21. Mr Dawson estimated that he spent 70% of his time as chief executive on the representation of members' interests to government and other legislative bodies. A four-drawer filing cabinet had been dedicated to Gambling Act material. He said that he saw the representation of its members to the Government at all levels as the Association's primary aim.”
22. At paragraph [22] of its decision, the FTT recorded that it had heard no evidence from members as to their perceptions as to the objects of the Association or the benefits of membership.
23. The FTT then expressed its conclusions on the issue as to primary purpose as follows:

“Conclusions on primary issue

23. It is not in dispute that the Association has to satisfy the Tribunal that it qualifies for exemption as regards its supplies in the accounting period covered by the claim. For each such period therefore it must show that its primary purpose has been to make representations to the Government (UK and/or EC) on legislation and other public matters affecting the business of its members. To put the test colloquially, it has to be shown that lobbying has been the Association's primary purpose in such period.

24. The purposes of the Association as a company registered under the Companies Act are defined in its "objects clause". Its purposes, so far as concerns its role as an association representing the interest of its members, are found in its Rules. The benefits of members, as explained to the public at large, are found in the passage summarised in paragraph 16 above and in the Association's website. From these and from the wide

range of documentary evidence presented to the Tribunal, it is clear that the character of the Association is that of a trade association which has a set of specific purposes or, as formerly described in the Memorandum, specific "objects". The Association's character as a trade association is, I think, its over-arching purpose. That over-arching purpose is expressed in the statement at the start of the objects clause in the Association's Memorandum which states that its "objects are to act as the trade association for that part of the leisure industry ... which comprises amusement, theme and other parks, and piers and other static or permanent attractions and enterprises for the public and/or tourist entertainment". Each of the specific purposes or objects (and I do not see any significant difference between those two terms in the present context) provides the means by which the Association functions as a trade association for the leisure industry. The individual descriptions in the Memorandum of the specific objects are said to be "without prejudice to the generality of the opening words". The demands on the Association's resources will vary as between the particular specific objects and, as regards a particular object, the demands in one accounting period may be different because the particular activity or function has changed.

25. Assisting and promoting the interests of its members is a theme common to all the specific objects, i.e. both those set out in the Memorandum and in the Rules. The Association through its promotion of safe practice, dissemination of information, training, lobbying, facilitating networking, providing a CRB "umbrella", for example, is thereby functioning as a trade organisation. The evidence shows, I think, that that was what the Association was doing when registered and that is what has continued throughout the periods covered by the claim.

26. The thrust of the Association's case is that lobbying has grown into the Association's predominant or primary purpose. The evidence does not, however, bear this out. Virtually all the documentary evidence relating to lobbying has come from the three to four most recent years to which the claim relates. I accept that in these recent years, and probably from 2005/6 onwards, lobbying has made the greatest demands on the resources of management and space. I record also that until the early 2000s, no suggestion had been made and no evidence exists to show that lobbying had been making a heavy demand on the Association's resources. In that connection I mention that the statement in the 1992 Visit Report (see paragraph 11 above), which is supported by no explanation or reference to the circumstances, has not persuaded me that lobbying was then a principal purpose of the Association.

27. I accept Mr Dawson's evidence that 70 per cent of his time has come to be spent on lobbying. But a purpose or, as here, a primary purpose, will not necessarily be determined from the level of a particular claimant's activities. There was moreover, no evidence to show the views of the members, to whom the manner in which the Association has represented their interests will have been a primary concern. I cannot therefore conclude that they endorse the Association's contention that lobbying is its primary purpose.

28. Looked at overall, the Association has retained as its primary purpose its function as a trade association which has, throughout the periods covered by the claim, represented and promoted the interests of its members.”

24. The Association's first ground of challenge to this reasoning is the contention that it was not enough for the FTT to hold that the Association was a trade association. It is said that it should have gone on to ask itself: what type of trade association was it? Was it a trade association the primary purpose of which was lobbying? In my judgment, the FTT did ask, and then answered, the right question. The FTT asked itself whether the primary purpose of the Association was lobbying and it held that it was not. That is apparent from the many places, for example, in paragraphs [5], [7], [8], [23], [26] and [27] of the decision where the FTT is plainly considering the right question. The Association's challenge to the decision appears to be based on the way in which the FTT expressed itself in paragraphs [24], [25] and [28] where the FTT held that the character of the Association was a trade association. I do not read those references as a failure to ask the right question. Instead, I read those references as findings that the purposes of the Association were the varied purposes of a trade association and that lobbying was not the primary purpose of the Association.
25. As to the second ground of challenge to the FTT's decision, both parties to this appeal accept that it was appropriate for the FTT, when seeking to ascertain the primary purpose of the Association, to look at the constitutional documents of the Association and any other materials from which the purposes of the Association could be derived and then to consider the evidence as to the reality of what the body did. Although the Association submits that the FTT left out of account the reality of what the Association did and determined the matter by reference only to the constitutional documents and other materials as to the general character of the Association as a trade association, I cannot accept that as an accurate description of what the FTT did. It seems to me that the FTT rightly paid close attention to what the Association did throughout the period covered by the claim, made detailed findings on that subject and then came to its overall conclusion in the light of those findings and all other relevant materials.
26. In relation to the Edwards v Bairstow challenge, the Association relied on two matters in particular. It was said, first, that the FTT had erred in its treatment of the evidence as to the 1992 Visit Report. That report is referred to in paragraph [11] of the decision and is then considered in paragraph [26] of the

decision. I do not consider that the statements in the 1992 Visit Report amount to a finding that making representations to Government on legislation was then the main business activity of the Association. The Association relies on the statement in the 1992 Visit Report which refers to “representing members ... re private members bills” but I do not consider that that reference, read in context, is a statement that the representation of members in relation to private members bills was the main business activity of the Association. I consider that the 1992 Visit Report was saying that representing members in relation to private members bills and “other activities” were together the main business activity of the Association. In any event, the comments in the 1992 Visit Report were not the only evidence as to the activities of the Association at that time and at other times during the period covered by the claim. The FTT considered all of that evidence and I consider that it was entitled to reach the conclusion which it expressed in paragraph [26] of its decision.

27. The Association also criticised the approach of the FTT and its finding in paragraph [27] of its decision when it said that “ ... a primary purpose will not necessarily be determined from the level of a particular claimant’s activities.” There is an ambiguity in the reference to a “claimant”. It is unclear whether that was a reference to Mr Dawson or to the Association. It seems to me to be more likely than not that the reference was to Mr Dawson rather than to the Association. The reference to the claimant immediately follows the FTT’s finding in relation to Mr Dawson. If the FTT had intended to refer to the Association then it would have been necessary to consider not only the amount of time spent by Mr Dawson on lobbying but also the amount of time spent by the other member of staff on other activities. If the reference to the claimant was a reference to Mr Dawson, then I do not consider that the FTT erred in principle or made a finding that was not open to it in the comment it made in paragraph [27]. Further, if the FTT’s statement is to be interpreted as saying that the primary purpose of the Association was not “necessarily” to be determined from the level of the Association’s activities, then again I do not consider that such a statement was wrong in principle or perverse. On that reading of the FTT’s statement, the point it was making was that a finding as to the primary purpose of the Association should take into account a number of matters and the particular level of activity at a point in time was not the only relevant matter and was not itself conclusive as to the primary purpose.
28. I note that paragraph [27] of the FTT’s decision went on to refer to the views of the members. The Association did not submit to me that this reference disclosed an error of law. It appeared to accept that a reference to the views of the members was permissible even though the enquiry as to the primary purpose of the Association was an objective one. As explained by Henderson J in the European Tour Operators case at [28], the views of the members of the Association may throw some light on the enquiry but their views are not conclusive as to the answer to be given to what is an objective enquiry
29. It follows that I do not accept any of the challenges put forward by the Association to the FTT’s decision on the first issue.
30. Before leaving the first issue, I should comment that the evidence considered by the FTT suggested that lobbying was more important in the later part of the

period which was the subject of the claim and was much less important in the earlier part of that period. Indeed, based on the FTT's description of the evidence before it, it seems to me that the Association had really no tenable case for saying that lobbying was the primary purpose of the Association for much of the lengthy period for which the Association was claiming exemption. I asked counsel for the Association whether it was seeking to challenge the FTT's decision for all of that period or only for the later part of it. He stated that the challenge was to the decision in relation to the whole of the period of the claim. Indeed, he did not make submissions in the alternative that I should find that the claim was established for the later part of the period even if it was not established for the whole of the period. In any case, based on the FTT's findings, the Association did not establish its claim to exemption for any part of the period. I consider that the Association is unable to show that the FTT made any error of law in relation to its decision on the first issue.

31. If the Association fails, as I hold that it does, in challenging the FTT's decision on the first issue, it follows that its appeal against the result arrived at by the FTT must be dismissed and that it is unnecessary for the Upper Tribunal to adjudicate on the second and third issues which were decided by the FTT and which were raised again on appeal. However, as the second and third issues were argued before the Upper Tribunal, I will deal with them albeit more briefly than would be the case if my decision were determinative of the appeal.

The second issue: Note 5

32. The second issue was: if and to the extent that the Association was a body which came within Item 1(d), was the exemption in Item 1(d) disapplied by Note 5 to Group 9. I have set out the text of Note 5 earlier in this judgment. Relevantly, it refers to the association restricting its membership wholly or mainly to persons whose business or professional interests are "directly connected with the purposes of the association".
33. The FTT made findings of fact as to the different classes of members of the Association. Those members comprised "Operating Members" and "Trade Associate Members". This latter class of members primarily consisted of suppliers of goods and services of various kinds to the leisure industry. The FTT's findings appeared to be by reference to the position in 2010, which was after the end of the period which was the subject of the Association's claim to repayment.
34. On the assumption being made for the purposes of the second issue that the primary purpose of the Association was lobbying (within Item 1(d)), the FTT held that it was not sufficient for the purposes of Note 5 for the business or professional interests of members (such as the Trade Association Members) to have a connection with only one subsidiary ingredient in the purposes of the Association rather than a direct connection with the purposes of the Association, the primary purpose of which was lobbying.
35. The FTT then proceeded on the basis that the business or professional interests of the Trade Associate Members did not have a direct connection with the

purposes of the Association. It then held that because Trade Associate Members made up some 31% of the membership of the Association, it followed that the Association did not restrict its membership “wholly or mainly” to persons whose business or professional interests were directly connected with the purposes of the Association. The FTT commented on the meaning of “wholly or mainly” in this context.

36. The decision of the FTT on Note 5 is unsatisfactory for a number of reasons. The first reason is provided by the decision of Henderson J in the European Tour Operators case. The FTT’s decision in relation to Note 5 in the case which is before me was cited to Henderson J. He did not agree with it. He pointed out the contrast between the reference to “the primary purpose” in Item 1 (d) and the reference to “the purposes” in Note 5. He said at paragraph 42 of his judgment:

“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; 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.”

37. No one submitted to me that I should not follow the approach of Henderson J in that case. It follows that the FTT in the present case did not apply the correct legal test for the purposes of Note 5.
38. The second respect in which the decision of the FTT in the present case is unsatisfactory is that the FTT did not explicitly ask itself the question which I consider is posed by Note 5: does the Association restrict its membership to persons whose business or professional interests are directly connected with the purposes of the Association? The FTT referred to the rules of the Association which dealt with the entitlement to apply to be an Operating Member or a Trade Associate Member but did not comprehensively refer to the rules which referred to various other classes of membership and which dealt with the entitlement to apply to be a member within one of those classes. Instead, the FTT considered the actual position as to membership in 2010 and held that because Trade Associate Members then represented some 31% of the membership of the Association, the requirements of Note 5 were not met.
39. In my judgment, what Note 5 requires is that the Association restricts its membership in accordance with Note 5. In principle, an association could restrict its membership by its rules, or by its practice, as to eligibility for membership. If the rules of an association provided that membership was restricted in a way which complied with Note 5, then there would be a relevant restriction on membership for the purposes of Note 5, unless it was shown that the rules had been replaced by a practice which was not restricted in the way laid down by the rules themselves. Further, if the rules of an association did not impose a restriction on eligibility for membership which complied with Note 5, then an association might be able to show that it had a practice to

restrict such eligibility more narrowly than was provided by its rules and that the restrictions imposed in practice did comply with Note 5.

40. In the present case, it appears that the Association did not set out to establish that its rules did restrict eligibility for membership in a way which complied with Note 5. Nor did the Association seek to establish that it had a practice which restricted eligibility for membership more narrowly than did the rules and that such a practice complied with Note 5.
41. As it happens, the materials placed before the Upper Tribunal on this appeal contained the relevant rules of the Association as to eligibility for membership and those rules did not restrict membership in a way which complied with Note 5. In the absence of any evidence as to the existence of a more restricted practice, it would seem to follow that even if the primary purpose of the Association had come within Item 1(d), the exemption pursuant to Item 1 (d) would have been disapplied by Note 5.
42. If I am right as to the approach to Note 5, then it seems to me that it will normally be inappropriate to examine the make up of the particular membership at any one point in time. I can see that if it were argued that a restriction on eligibility contained within the rules was not being enforced in practice, then that point might be demonstrated by looking at the make up of the actual membership. However, if neither the rules nor the practice imposed the necessary restriction on eligibility, then it would not follow that membership was restricted in accordance with Note 5 just because the actual members turned out to be from a class which was narrower than the classes of members who were eligible for membership. Furthermore, if it could ever be relevant in a particular case to examine the make up of the actual membership, I doubt if there was any point in the present case in looking at the position in 2010, where the application of Item 1(d) (and its predecessors) had to be considered in relation to the period 1982 to 2008.
43. In the skeleton argument served on behalf of the Respondents on this appeal to the Upper Tribunal, this point about the need to show that eligibility for membership was restricted in accordance with Note 5 was taken by the Respondents. There was a dispute as to whether this point had been taken before the FTT. The FTT did not refer to this point in its decision. The Respondents submitted that the point had been adequately taken in oral submissions at the end of the hearing before the FTT. The Association objected to the point being taken against it on this appeal to the Upper Tribunal.
44. Because I have already decided that the Association's appeal fails on the first issue, I do not consider that there is any advantage in resolving the question whether this point about the restriction on eligibility should be open to the Respondents on this appeal. The answer to that question does not affect the outcome of this appeal and is not of wider general interest. The correct interpretation of Note 5 is of wider general interest but I have already expressed my views on that matter.

45. Similarly, it does not seem to me to be necessary to consider what the position would be in this case if I held that the point about the restriction on eligibility were not open to the Respondents and I attempted to apply the test identified in paragraph 36 above instead of the test applied by the FTT.

The third issue: unjust enrichment

46. The third issue is: if the Association would otherwise be entitled to claim repayment of its overpayment of output tax, would such repayment by HMRC to the Association result in the Association being unjustly enriched?

47. Section 80(1) of VATA 1994 provides:

“Where a person -

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount.”

48. Section 80(3) of VATA 1994 provides:

“It shall be a defence, in relation to a claim under this section by virtue of subsection (1) ... above, that the crediting of an amount would unjustly enrich the claimant.”

49. The FTT recorded that there was agreement between the parties as to the approach it should adopt, as follows:

“42. It is not in dispute that, for the Tribunal to find that repayment would unjustly enrich the Association, the Tribunal needs to be satisfied that the Association (i) has charged amounts of VAT to its customers that it ought not to have charged, (ii) has passed the economic burden of the wrongly charged VAT to its customers, (iii) has suffered no loss or damage as a result of having passed the mistaken charge to its customers and (iv) is unable or unwilling to reimburse its customers with any amounts paid to it by HMRC.”

50. The FTT then considered the questions arising, as follows:

“44. The burden is on HMRC to show that the economic burden of the wrongly charged VAT (assuming that it was wrongly charged) was passed on to the Association's customers (see *Baines & Ernst Ltd v Customs and Excise Commissioners* [2006] STC 1632 at paragraph 13). That burden, say HMRC, is discharged in the present case. That is because there is no dispute that the Association passed on the economic burden of

any wrongly charged VAT to its customers by charging output tax on subscription fees to its VAT-registered numbers, which those members then recovered from HMRC as input tax.

45. I agree with HMRC that in principle the economic burden of wrongly charged VAT was passed on by the Association to its members or "customers" for these purposes. The onus shifts to the Association to show why it suffered loss or damage as a result of having passed this charge on. The Association has produced no evidence on this point. I cannot see that the Association did in fact suffer any loss or damage. It passed the VAT charge on to its "customers". "

51. The FTT then referred to the following argument put forward on behalf of the Association:

"46. The Association's principal argument in resistance to the claim that repayment would unjustly enrich it is that it is a not for profit organisation and any profits are held by the Association for the benefit of the members. Therefore, it is said, although the Association may be enriched, it is not unjustly so."

52. The FTT rejected this argument and it has not been repeated on the appeal to the Upper Tribunal.

53. The FTT then dealt with a further argument for the Association, as follows:

"49. The Association contends that HMRC cannot demonstrate that it would be unjustly enriched if it were paid the output tax. The recovery rates of its members are not known. In all probability the zoo members, for example, will have been exempt and so will have recovered nothing; others might record less than the standard rate.

50. The Association has pointed to no other members in positions comparable to that of the zoos.

51. So far as the point is relevant I cannot see that HMRC is required to examine the recovery rate of each member. I refer to paragraph 60 of the decision of the Advocate General Jacobs in *Weber's Wine World* [2003] ECR 1-11365 where he observed that while the burden may lie with the tax authority to establish unjust enrichment, the threshold should not be unduly high. The fact is that the Association has not borne any part of the output tax that it now seeks to recover. The entirety was passed on to its members. It would, in my view, be unjustly enriched if the VAT were now to be repaid to it. I cannot therefore see that the fact that some members were exempt alters this."

54. In my judgment, this was a straightforward case of unjust enrichment. As to the four questions which were agreed by the parties to be the relevant questions, on the assumption (for present purposes) that the Association ought not to have charged VAT to its members, the answers are:
- (1) the Association has charged amounts of VAT to its customers (i.e. its members) which it ought not to have charged;
 - (2) the Association has passed the economic burden of the wrongly charged VAT to its customers (i.e. its members);
 - (3) the Association has suffered no loss or damage as a result of having passed the mistaken charge to its customers (i.e. its members); and
 - (4) the Association is unable or unwilling to reimburse its customers (i.e. its members) with any amounts paid to it by HMRC; on this last point, the evidence was that the Association's Memorandum of Association prevented the Association paying a dividend to its members.
55. In view of the answers recorded in paragraph 54 above, the defence of unjust enrichment was made out. I add the following comments. The Association is not to be equated in law with its members. It is not possible to hold that any repayment being made by HMRC to the Association is effectively a payment back to the members who earlier had wrongly paid VAT on subscriptions to the Association. This is because the Association and its members are in law different persons. Further, the members who paid subscriptions in the period of the claim, 1982 to 2008, will not be the same persons as the current members of the Association. It does not seem to me to be relevant to consider the concept of passing on between the members and their customers or the ability of the members to claim as input tax the VAT they paid to the Association. If that were relevant, the FTT's findings in paragraphs [49] – [51] would not assist the Association to avoid a finding of unjust enrichment on the part of the Association.
56. Accordingly, if the third issue had become material to the outcome of this appeal, I would have dismissed the appeal on the third issue.

The result

57. The result is that the appeal is dismissed.

Costs

58. Finally, I direct that any applications as to the costs are to be made in writing, to be served on the other party and on the Upper Tribunal not later than 21 days following the release of this decision.

.....

MR JUSTICE MORGAN

UPPER TRIBUNAL JUDGE

RELEASE DATE: 12 MARCH 2013