Appeal numbers
UT/2016/0025, 0026 and 0027

VAT – whether affiliation fees paid by golf clubs to golf associations standard-rated or exempt by virtue of Value Added Tax Act 1994 Schedule 9 Group 10 Item 3 – whether exemption applied to supplies to profit-making bodies – whether supplies relating to standardised handicaps essential to sport

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) ABBOTSLEY LIMITED **Appellants**
(2) CROMWELL GOLF CLUB
(3) CAMBRIDGE MERIDIAN GOLF CLUB

- and –

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

Tribunal: The Hon Mr Justice Arnold and Judge Charles Hellier

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 22-23 May 2018

Timothy Brown for the Appellants

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

DECISION

Introduction

1. This is an appeal from a decision of the First-Tier Tribunal (Tax Chamber) (Judge Swami Raghavan) dated 11 December 2015 ([2015] UKFTT 662 (TC)) dismissing an appeal by the Appellants against a decision of the Commissioners of Her Majesty's Revenue and Customs ("HMRC") that affiliation fees paid by the Appellants to golf governing bodies are exempt from VAT by virtue of Value Added Tax Act 1994 Schedule 9 Group 10 Item 3.

2. The case is unusual for two reasons. First, the Appellants argue that the relevant supplies are standard-rated, while it is HMRC who argue that they are exempt. The Appellants told the FTT that their object was to highlight the unfair distortion of competition between proprietary and members' golf clubs arising from the different way they are treated for VAT purposes.

3. Secondly, the appeal has reached this Tribunal by an unusual route. Permission to appeal against the FTT's decision was refused both by the FTT and by this Tribunal. The Appellants sought judicial review of this Tribunal's decision to refuse permission to appeal. Edis J sitting in the Administrative Court granted the Appellants permission to apply for judicial review on two grounds, although he refused it on a third ground. HMRC then withdrew their opposition to the substantive application for judicial review. As a result, the Appellants were granted permission to appeal on the two grounds for which Edis J had given permission.

4. The FTT's decision addressed a wider range of issues than we are concerned with. In particular, it was part of the Appellants' case before the FTT that the Value Added Tax (Sports, Sports Competitions and Physical Education) Order 1999 ("the 1999 Order") did not correctly implement the relevant provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("the Principal VAT Directive") and the Appellants sought a reference to the Court of Justice of the European Union. Edis J refused permission to apply for judicial review in respect of this issue, and it is therefore not before us.

5. The FTT's decision was given after a three-day hearing at which the FTT heard oral evidence from six witnesses. In addition, the FTT received written evidence from a further 19 witnesses. The FTT's decision is a detailed and careful one running to 144 paragraphs. There is no challenge to the FTT's findings of fact. The grounds of appeal for which the Appellants have permission are restricted to two alleged errors of law.

6. As we will explain, certain issues were raised by the Appellants during the hearing of the appeal which are not within the scope of the grounds for which

they have permission. Furthermore, in at least one case, the issue has not even been the subject of any decision by HMRC, let alone the FTT.

The facts

7. Reference should be made to the FTT's decision for its full findings of fact. For the purposes of this appeal, the relevant facts may be summarised as follows.

8. The First Appellant ("Abbotsley") is a company limited by shares. It owns two golf courses on the same site in Abbotsley: the Abbotsley Course and the Cromwell Course. The Third Appellant ("Cambridge Meridian") is a partnership. It owns a golf course in Cambridge. Both Abbotsley and Cambridge Meridian are proprietary golf clubs, that is to say, ones owned by, and operated for the benefit of, their respective proprietors. They are profit-making organisations. Both are registered for VAT.

9. The Second Appellant ("Cromwell") is an unincorporated association. It is a members' golf club, that is to say, one owned by, and operated for the benefit of, its members for the time being. Its members play on the Cromwell Course owned by Abbotsley, as explained further below. It is a non-profit making organisation. It is not registered for VAT.

10. Like other golf clubs, Abbotsley and Cambridge Meridian pay annual affiliation fees to a number of regional and national governing bodies of the game of golf. Members affiliate to a club (e.g. Abbotsley and Cambridge Meridian); the clubs affiliate to a county union (for men, e.g. Cambridge Area Golf Union) or county association (for women, e.g. Cambs and Hunts Ladies' County Golf Association); the county unions and associations affiliate to the national union (England Golf, which was formed on 1 January 2012 by a merger between the English Golf Union and the English Womens' Golf Association); and the national union is a member of the Council of National Golf Unions (CONGU). The county unions/associations and England Golf are all non-profit making organisations.

11. Although clubs are not obliged to affiliate to county unions/associations, and hence to England Golf, they do so in order to attract members for the reasons explained below. In order to remain affiliated, clubs must pay affiliation fees to both the county unions/associations and England Golf. The fees are payable yearly on 1 January and calculated on a per capita basis for every club member as at 30 June in the preceding year. Sanctions are applied by both the county unions/associations and England Golf for non-payment of the fees.

12. The clubs charge the affiliation fees to their members, but the clubs must pay the fees irrespective of whether the members pay the clubs. The Appellants' evidence was that in 2014 roughly two-thirds of their members paid. Roughly

one-third did not for a variety of reasons, but mainly it appears because those members did not consider that they derived any benefit from the fees.

13. Although Cromwell collects affiliation fees from its members who pay, the FTT found that there had been some confusion as to whether Cromwell or Abbotsley was liable to pay the fees to the county unions/associations and to England Golf. It appears that the liability is that of Abbotsley as the owner of the golf course.

14. The FTT found that the principal service provided by the county unions/associations and England Golf in return for the payment of affiliation fees (although there are others) is the management of the CONGU handicapping system. CONGU has developed a standardised handicapping system which is only available to members of affiliated clubs. The system enables members to have a CONGU handicap and therefore to play in serious competitions. The system is administered in England by England Golf and the county unions/associations. It is a common, but not invariable, practice for those organising competitions to stipulate that an entrant must possess a CONGU handicap. Nevertheless, many club members choose not to obtain a CONGU handicap.

15. Although only about one-third of the golfers in England belong to clubs, the FTT found that members are attracted to clubs where better players play, and those players typically want to have a CONGU handicap and to participate in competitions. If a club failed to pay affiliation fees, the club's members would lose their CONGU handicaps. If that happened, some members would leave the club. Accordingly, it was the Appellants' own evidence that it would be "commercial suicide" for a club not to affiliate with the county unions/associations and England Golf. Indeed, it had taken 13 years for Abbotsley to recover from being temporarily expelled because of a dispute over fees.

16. The FTT found that the true beneficiaries of the supply relating to CONGU handicaps by county unions/associations and England Golf to clubs such as the Appellants were the golfers who were the members of the clubs.

The legislative framework

17. Article 132(1)(m) of the Principal VAT Directive provides:

> "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".

18. Article 133 provides that Member States may make the granting of this exemption to bodies other than those governed by public law subject to one or more of four specified conditions. The details do not matter for present purposes, but we note that the 1999 Order was expressed to be made pursuant to what is now Article 133.

19. Article 134(a) provides, so far as relevant:

> "The supply of goods or services shall not be granted exemption, as provided for in point… (m) … of Article 132(1), in the following cases:
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> (a) where the supply is not essential to the transactions exempted".

20. Article 132(1)(m) is implemented by the Value Added Tax Act 1994 Schedule 9 Group 10 Item 3 ("Item 3"), which (as amended by the 1999 Order and as at the date of the decision under appeal) provided for an exemption in the following terms:

> "The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part".

Ground 1

21. The Appellants' first ground of appeal is that the FTT misinterpreted the judgment of the CJEU in Case C-253/07 *Canterbury Hockey Club v Revenue and Customs Commissioners* [2008] ECR I-7821 and wrongly concluded that the exemption in Item 3 applied to supplies to profit-making organisations such as Abbotsley and Cambridge Meridian.

22. In *Canterbury* the taxpayers were two hockey clubs, both of which were members' clubs, unincorporated associations and non-profit making organisations. The clubs paid affiliation fees to England Hockey Ltd ("EHL") in return for various services. HMRC decided that the services supplied by EHL were subject to VAT at the standard rate. The clubs appealed, contending that the services were exempt pursuant to Item 3. The VAT and Duties Tribunal held that the services supplied by EHL should be treated as supplies to the members of the clubs due to the clubs' status as unincorporated associations without legal personality. HMRC appealed. The clubs cross-appealed, contending that Item 3 did not properly implement Article 13A(1)(m) of Council Directive 77/388/EC ("the Sixth VAT Directive"), the predecessor to Article 132(1)(m) of the Principal VAT Directive, due to the requirement that the supply be made to an "individual". The High Court allowed HMRC's appeal, but on the club's appeal referred two questions to the CJEU, of which the first was as follows:

> "For the purposes of the exemption contained in Article 13A(1)(m) of the Sixth Directive, does the term 'persons' in the context of "persons taking part in sport" include corporate persons and unincorporated associations, or is it limited to individuals, in the sense of natural persons or human beings?"

23. The Court of Justice began its consideration of this question by noting at [17] that it was settled law that the exemptions specified in Article 13 of the Sixth VAT Directive were to be interpreted strictly, but that did not mean that they should be interpreted in such a way as to deprive them of their intended effect. It went on to note at [21]-[22] that the benefit of the exemption under paragraph (m) was subject to three main conditions: first, the services must be supplied by a non-profit making organisation; secondly, they must be closely linked to sport or physical education and supplied to persons taking part in sport or physical education; and thirdly, by virtue of Article 13A(2)(b) (now Article 134(a)), they must be essential to the transaction exempted, namely sport or physical education.

24. The Court acknowledged at [26] that, while the term "persons" was wide enough to include not only natural persons, but also unincorporated associations and corporate persons, in normal linguistic usage only natural persons took part in sport. It nevertheless rejected the argument that only services supplied to natural persons should be exempt for the following reasons:

> "27. However, Article 13A(1)(m) of the Sixth Directive is not intended to confer the benefit of the exemption under that provision only on certain types of sport but covers sport in general, which also includes sports necessarily practised by individuals in groups of persons or practised within organisational and administrative structures put in place by unincorporated associations or corporate persons, such as sports clubs, provided that the requirements set forth in paragraphs 21 and 22 of the present judgment are fulfilled.
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> 28. Sport within such a structure generally entails that, for practical, organisational or administrative reasons, the individual does not himself organise the services which are essential to participation in the sport, but that the sports club to which he belongs organises and puts those services in place, as, for example, the provision of a pitch or referee necessary for participation in every team sport. In such situations, it is, first, between the sports club and the service supplier and, second, between the sports club and its members that the services are supplied and the legal relationships formed.
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> 29. Thus, if the words 'services … supplied … to persons taking part in sport' in Article 13A(1)(m) of the Sixth Directive were interpreted as meaning that they require that the services in question be directly supplied to natural persons taking part in

> sport within an organisational structure put in place by a sports club, the exemption provided for by that provision would depend on the existence of a legal relationship between the service supplier and the persons taking part in sport within such a structure. Such an interpretation would mean that a large number of supplies of services essential to sport would be automatically and inevitably excluded from the benefit of that exemption, irrespective of the question whether those services were directly linked to persons taking part in sport and who was the true beneficiary of those services. Such a result would, as the Commission correctly maintains, run counter to the purpose of the exemption provided for by that provision which is to extend the benefit of that exemption to services supplied to individuals taking part in sport.
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> 30. It follows, besides, from that interpretation that the exemption for transactions effected by undertakings or organisations mentioned in Article 13A(1)(m) of the Sixth Directive would not benefit certain persons who participate in sport solely because they participate in it within a structure managed by a club. That interpretation would not be consistent with the principle of fiscal neutrality, inherent in the common system of VAT, in compliance with which the exemptions provided for in Article 13 of the Sixth Directive must be applied …. In fact, that principle precludes, in particular, economic operators who effect the same transactions being treated differently in respect of the levying of VAT …. It follows that that principle would be disregarded if the possibility of invoking the benefit of the exemption under Article 13A(1)(m) of the Sixth Directive depended on the organisational structure particular to the sporting activity practised.
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> 31. In order to ensure the effective application of the exemption under Article 13A(1)(m) of the Sixth Directive, that provision must be interpreted as meaning that services supplied in connection with, among others, sports practised in groups of persons or within organisational structures put in place by sports clubs are, generally, eligible to benefit from the exemption under that provision. It follows that, to determine whether supplies of services are exempt, the identity of the material recipients of those services and the legal form under which they benefit from them are irrelevant."

25. The Court explained the impact of this reasoning on the second and third conditions at [32]:

> "However, to be eligible for that exemption, the services must, in accordance with Article 13A(1)(m) and the first indent of Article 13A(2)(b) of the Sixth Directive, be supplied by a non-profit-making organisation and they must be closely linked and

> essential to sport, since the true beneficiaries of those services are the persons taking part in sport. By contrast, supplies of services which do not meet those criteria, particularly those linked to sports clubs and to their operation such as, for example, advice about marketing and obtaining sponsors, cannot benefit from that exemption".

26. Accordingly, the Court ruled that Article 13A(1)(m) was to be interpreted as meaning that:

> "in the context of persons taking part in sport, it includes services supplied to corporate persons and to unincorporated associations, provided that – which it is for the national court to establish – those services are closely linked and essential to sport, that they are supplied by non-profit-making organisations and that their true beneficiaries are persons taking part in sport".

27. The Appellants contend that the exemption in what is now Article 132(1)(m) of the Principal VAT Directive only applies to supplies to non-profit making organisations and does not apply to supplies to profit-making organisations, and hence Item 3 must be interpreted in the same way.

28. Counsel for the Appellants submitted that this contention received support from *Canterbury*. In particular, he argued that it was to be inferred from what the Court of Justice said at [27] that the "organisational and administrative structures put in place by unincorporated associations or corporate persons, such as sports clubs" were operated for the benefit of the clubs' members, and hence that the clubs were non-profit making organisations. In support of this argument, he pointed out that (a) the hockey clubs in *Canterbury* were non-profit making members' clubs and (b) a corporate person could be a non-profit making organisation, for example, a company limited by guarantee (as in the case of CONGU).

29. We do not accept this argument for the following reasons. First, while the hockey clubs were unincorporated associations, the question referred to the Court of Justice referred to both unincorporated associations and corporate persons, and the Court ruled that what is now Article 132(1)(m) applied to services supplied to corporate persons as well as unincorporated associations.

30. Secondly, while corporate persons can be non-profit making organisations, it is much more usual for them to be profit-making organisations. The Court did not differentiate between those which were profit-making and those which were not, however. Had the Court considered it relevant to enquire whether the recipient was a profit-making organisation or not, the Court would surely have said so.

31. Thirdly, it is clear from the Court's reasoning why the Court did not consider this relevant. The essence of the Court's reasoning is that, having regard to the purpose of the exemption, the nature of the ostensible recipient of the service is immaterial and that what matters is whether the true beneficiaries of the service are persons taking part in sport (or physical education). On this reasoning, not only is it immaterial that the ostensible recipient is an unincorporated association or corporate person (or a partnership, as in the case of Cambridge Meridian), but also it is immaterial whether the recipient is profit-making or not.

32. Fourthly, it would run counter to the principle of fiscal neutrality articulated by the Court at [30] for the availability of the exemption to depend on whether the club was a profit-making organisation or not.

33. Counsel for the Appellants sought to gain assistance from the decision of the Court of Justice in Case 416/85 *Commission of the European Communities v United Kingdom* [1988] ECR 3127. As counsel for HMRC submitted, however, that case was concerned with zero-rating, which has a different legislative basis (now Article 110 of the Principal VAT Directive) and is subject to a separate body of case law. It cannot affect what the Court of Justice said 20 years later in *Canterbury*.

34. Counsel for the Appellants also relied upon the decision of the First-Tier Tribunal (Tax Chamber) in *Berkshire Golf Club v Revenue and Customs Commissioners* [2015] UKFTT 627 (TC), [2016] SFTD 244 at [251]-[266] that a corporate golf package supplied to corporate persons like KPMG so that KPMG could entertain their clients was a standard-rated supply. We agree with counsel for HMRC that that case is readily distinguishable from the present case. Corporate golf packages are standard-rated because the true beneficiary of the service is the corporate person, since the purpose of the exercise is to promote the corporate person's business.

35. Finally, counsel for the Appellants submitted that it could not be correct to interpret Article 132(1)(m) as extending to supplies to profit-making organisations like Abbotsley and Cambridge Meridian, because in such cases the true beneficiaries would not receive the benefit of the exemption since the further supplies from the profit-making organisations to their members were standard-rated, contrary to the purpose of the exemption articulated by the Court of Justice in *Canterbury* at [29] ("which is to extend the benefit of that exemption to services supplied to individuals taking part in sport"). He suggested that this was a question which might need to be referred to the Court of Justice.

36. As counsel for HMRC pointed out, however, this submission is premised on the further supplies from Abbotsley and Cambridge Meridian to their members being standard-rated, but that was not the case at the relevant time. From 2000 to 2018 HMRC did not require proprietary golf clubs to charge VAT on the

onward supply of affiliation fees to their members. This was because HMRC operated an extra-statutory concession under which proprietary clubs were permitted to treat affiliation fees as if they were disbursements. HMRC have withdrawn this concession with effect from 1 April 2018. Thus, while it is correct to say that it is now HMRC's position that such supplies are standard-rated, that was not the position at the time of HMRC's decision which was the subject of the appeal to the FTT and hence the appeal to this Tribunal.

37. As the FTT discussed in its decision at [106]-[119], the Appellants raised before it the question whether affiliation fees were properly disbursements under the legislation. As the FTT held, however, there was no issue for it to resolve, because the parties were agreed that affiliation fees were not disbursements. Although the Appellants apparently did not want to take advantage of the extra-statutory concession, that was a matter for them (and their members) and not for the FTT. If and in so far as the Appellants wished to challenge HMRC's decision to offer the extra-statutory concession, that was a matter for judicial review and not within the FTT's jurisdiction. We would add that, in the absence of any such challenge, the extra-statutory concession must be taken to have been lawful.

38. Counsel for HMRC acknowledged that, although it was not within the scope of the present appeal, there was a potential issue as to the correct treatment of the onward supply of affiliation fees by proprietary clubs to their members. The Court of Justice recognised in *Canterbury* at [25] that there may be two supplies, the first from the service supplier to the sports club to the second from the sports club to its members. The Court's analysis focussed on the first supply rather than the second, no doubt because the hockey clubs were non-profit making organisations. Accordingly, there are two possibilities. The first, which HMRC believe to be correct, is that supplies from profit-making organisations (i.e. proprietary clubs) to their members are standard-rated whereas supplies from non-profit making organisations (i.e. members' clubs) to their members are exempt (subject to any question as to whether the club is an "eligible body") because of the inbuilt restriction in Article 132(1)(m). Thus the exemption itself provides "divergent conditions of competition for different operators" (see Case C-495/12 *Revenue and Customs Commissioners v Bridport and West Dorset Golf Club Ltd* [EU:C:2013:861], [2014] STC 663 at [36]-[37]). The second, which HMRC do not believe to be correct, is that the onward supply should be treated as if it were a supply by the governing bodies directly to the golfers, and thus exempt. Given that it is not an issue which arises on this appeal, however, it is neither necessary nor appropriate for us to express any views on this question. The answer to it may or may not provide support for the submission we have recorded in paragraph 35 above.

39. Before leaving this aspect of the matter, however, we should address the position of Cromwell. Since Cromwell is a non-profit making organisation, it would not be affected by the Appellants' argument that the exemption in Item 3 does not apply to supplies to profit-making organisations even if that argument succeeded. Furthermore, Cromwell does not charge its members VAT on affiliation fees because it is not registered for VAT. Cromwell is nevertheless

concerned that HMRC have expressed the provisional view that Cromwell is not an "eligible body" and thus could not benefit from the exemption in respect of supplies of affiliation fees to its members if it chose to register for VAT. If so, Cromwell would wish to argue that the relevant provisions, which derive from the 1999 Order, are incompatible with the Principal VAT Directive. This again is not an issue within the scope of the appeal. Moreover, as counsel for HMRC pointed out, it is not one in respect of which HMRC have yet made a final decision.

40. Cromwell complained that HMRC have shifted the goal posts with regard to this issue, because at one stage HMRC were suggesting that Cromwell was not an eligible body by virtue of Note (2A)(c) to Item 3 (commercial influence) because it was part of the wider commercial undertaking of Abbotsley, whereas counsel for HMRC suggested that it was because of Note (4)(a) (definition of "commercial influence" including relevant supply) read with Note (6)(b) (definition of "relevant supply" including grant of licence to occupy land). As counsel for HMRC pointed out, however, HMRC are still seeking information to enable them to make a final decision. Moreover, we note that the Appellants themselves stated in paragraph 27 of their Statement of Facts on their application for judicial review that:

> "The Cromwell Club does not own or have control of a golf club and therefore has, as is required, an agreement with the first claimant to make reasonable playing facilities available. It has exclusive use and occupation of the Cromwell course for substantial periods of time. Its use and occupation is by way of a licence and does not give rise to a proprietary interest. This arrangement is a mandatory requirement of England Golf pursuant to Condition 1.3."

Ground 2

41. The Appellants' second ground of appeal is that the FTT misinterpreted or misapplied the judgment of Lewison J (as he then was) in *British Association for Shooting and Conservation Ltd v Revenue and Customs Commissioners* [2009] EWHC 399 (Ch), [2009] STC 1421 ("*BASC"*) and wrongly concluded that the supplies of CONGU handicaps by the county unions/associations and England Golf to golf clubs such as the Appellants were "essential to sport".

42. In Case C-415/04 *Staatssecretaris van Financiën v Stichting Kinderopvang Enschede* [2006] ECR I-1385 ("*Enschede*") a question was referred to the CJEU as to whether childcare services arranged through a non-profit making Foundation were exempt under Article 13A(1)(g) to (i) of the Sixth VAT Directive. Like Article 13A(1)(m), those provisions were subject to Article 13A(2)(b), which provided that the supply would not be granted exemption if it was not essential to the transactions exempted.

43. In his Opinion Advocate General Jacobs interpreted this requirement in the following manner:

> "54. It seems difficult to suppose that a parent can use childcare services without first being put in touch with the carer. The Foundation stresses that the childcare services in question are accessed only through its activities as intermediary. The Netherlands Government however argues that other channels are also available, including advertisements or commercial agencies.
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> 55. It seems to me that if the Foundation were to do no more than keep a list of all people known to offer childcare and to make that list available to parents, the service could in no way be described as essential. There are many other ways in which parents can enter into contact with would-be carers.
>
> 56. However, if the Foundation's screening and training activities are such that its services as intermediary provide access to only such competent and trustworthy carers as parents would otherwise have been unable to identify, then the latter services may be viewed as essential in order to gain access to childcare of that quality, even if the Foundation does not accept responsibility for any shortcomings in the childcare actually provided.
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> 57. I am thus of the view that the relevant factual assessment is whether the care to which access is provided is of such a kind or quality as parents could not be assured of without the Foundation's services as intermediary."

44. In its judgment the Court of Justice adopted the Advocate General's reasoning on this point:

> "27. As the Advocate General has correctly noted at points 55 to 57 of his Opinion, the mere fact of keeping a list of all people known to offer childcare and making that list available to parents cannot be described as an essential service. Conversely, if the Foundation's screening of host parents' past records, and the fact of providing them with training, result in the selection only of host parents who are competent, trustworthy and such as to provide a higher quality of childcare than parents could otherwise have obtained without using the Foundation's services, these services could then be regarded as essential to the provision of quality childcare.
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> 28. It is for the national court to determine whether, in the light of the facts of the case before it, the childcare service used by parents on the basis of the Foundation's services as intermediary between parents and host parents is of such a nature or quality that it would be impossible to obtain a service of the same value

without the assistance of an intermediary service such as that offered by the Foundation.

…

30. The answer to the question referred must therefore be that Article 13A(1)(g) and (h) of the Sixth Directive, read together with Article 13A(2)(b) thereof, must be interpreted as meaning that services as an intermediary between persons seeking, and persons offering, a childcare service, provided by a body governed by public law or an organisation recognised as charitable by the Member State concerned, may benefit from exemption under those provisions only where:

…

– that service is of such a nature or quality that parents could not be assured of obtaining a service of the same value without the assistance of an intermediary service such as that which is the subject-matter of the dispute in the main proceedings;

…"

45. In *BASC* Lewison J considered *Canterbury*, *Enschede* and two other decisions of the CJEU, and concluded at [34] that:

"i) The fact that a service is of great assistance to an exempted transaction is insufficient to make that service essential to that transaction;

ii) The fact that there are alternative means of entering into an exempted transaction is relevant in determining whether the services in question are essential to that transaction;

iii) But in considering that question the decision-maker must ask not merely whether, without the service in question, it would be impossible to enter into an exempted transaction, but whether it would be impossible to enter into an exempted transaction of the same value;

iv) In the case of sport the exempted transaction is the sport itself."

46. It does not appear that Case C-434/05 *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* [2007] ECR I-4793 was drawn to Lewison J's attention. In that case questions were referred to the CJEU as to whether the temporary supply of teachers was exempt under Article 13A(1)(i) of the Sixth VAT Directive. On the question of "essential to", the Court of Justice held:

"38. … as is also clear from the first indent of Article 13A(2)(b) of the Sixth Directive, the supply of services or goods which are closely related to the main transactions referred to, inter alia, in Article 13A(1)(i) may be granted exemption only if they are essential to the transactions exempted (see also, to that effect, … *Stichting Kinderopvang Enschede*, paragraph 25).

39. In order to be described in those terms, the temporary supply of teachers, such as that at issue in the main proceedings, should be of a nature and quality such that, without recourse to such a service, there could be no assurance that the education provided by the host establishments and, consequently, the education from which their students benefit, would have an equivalent value (see, by analogy, *Stichting Kinderopvang Enschede*, paragraphs 27, 28 and 30).

40. In that regard, it should be observed, as the Netherlands Government has done, that there may well be commercial placement agencies whose services are not exempt and whose activities include the supply of teaching staff to schools or universities. In the main proceedings, for the supply of teachers by Horizon College to be regarded as essential to the education provided by the host establishments, it would have to be of a nature such that – owing, for example, to the qualifications of the staff in question or the flexibility of the terms of their supply – the same level and quality of teaching could not be assured simply by turning to such placement agencies.

41. It falls to the referring court, taking into account all of the specific facts of the dispute before it, to determine the essential character of the services supplied by Horizon College."

47. More recently, in Case C-699/15 *Revenue and Customs Commissioners v Brockenhurst College* [EU:C:2017:344], [2017] STC 1112 questions were referred to the CJEU as to whether supplies of restaurant and entertainment services provided to paying members of the public as part of the education of students studying at a college were exempt under Article 132(1)(i) of the Principal VAT Directive. On the question of "essential to", the Court of Justice held:

"28. As regards the second condition, it follows from paragraph 39 of the judgment of 14 June in *Horizon College* (C-434/05, EU:C:2007:343), that, in order to be classified as supplies of services essential to the exempt activities, those supplies must be of a nature and quality such that, without recourse to them, there could be no assurance that the education provided by the body referred to in Article 132(1)(i) of Directive 2006/112 and, consequently, the education from which their students benefit, would have an equivalent value.

29. In the present case, it is apparent from the order for reference that the practical training was designed to form an integral part of the student's curriculum and that, if it were not provided, students would not fully benefit from their education.

30. In that regard, the order for reference notes that the catering functions of the restaurant are all undertaken by students of the College, under the supervision of their tutors, and that the purpose of operating the College's training restaurant is to enable the students enrolled in catering and hospitality courses to learn skills in a practical context.

31. The same applies to the performing arts courses. The College, through the students enrolled on those courses, stages concerts and performances to enable the students to acquire practical experience.

32. It must be stated that, without these practical aspects, the education provided by the College in the fields of catering and hospitality and of the performing arts would not have an equivalent value.

33. That finding is corroborated by the assertion of the United Kingdom of Great Britain and Northern Ireland that the College's training restaurant is tantamount to a classroom for the students, and the assertion of the European Commission that students benefit from preparing meals and performing table service in a real-life setting, which is an important part of their education.

34. In those circumstances, it appears that the supplies of restaurant and entertainment services at issue in the main proceedings must be regarded as essential to guaranteeing the quality of the principal supply of education provided by the College."

48. It is clear from this case law that a supply of a service is "essential to" the exempted transaction if the supply is of such a nature and quality that, without it, there could no assurance that the exempted transaction would have an equivalent value.

49. Two points may be noted about this test. First, it is plain that the test is an objective one. Secondly, it is clear that it does not depend on an investigation of the extent to which the recipients of the service in fact rely upon the nature and quality of the service without which there could no assurance that the exempted transaction would have an equivalent value. Taking the facts of *Enschede* by way of illustration, the test does not depend on the extent to which the parents in question in fact relied upon the screening and training provided by the Foundation. Thus it would not detract from the availability of the exemption that some parents did not rely upon the screening and training,

provided that other parents did. This cannot be a statistical question (do at least 51% of parents rely upon the screening and training?). Rather, it is a matter for the evaluation of the national court taking into all the relevant circumstances.

50. This understanding of the law is confirmed by the judgment of the CJEU in Case C-18/12 *Město Žamberk v Finanční ředitelství v Hradci Králové, now Odvolací finanční ředitelství* [EU:C:2013:95], [2014] STC 1703. In that case questions were referred to the CJEU as to whether supplies of a variety of services by a municipal aquatic park were exempt under Article 132(1)(i) of the Principal VAT Directive. Having concluded that there appeared to be a single complex supply, the Court held:

> "33. As for the question whether, in the context of such a single complex supply, the predominant element is the opportunity to engage in sporting activities falling within Article 132(1)(m) of the VAT Directive or, rather, pure rest and amusement, it is necessary to make that determination, as has been pointed out at paragraph 30 of the present judgment, from the point of view of the typical consumer, who must be determined on the basis of a group of objective factors. In the course of that overall assessment, it is necessary to take account, in particular, of the design of the aquatic park at issue resulting from its objective characteristics, namely the different types of facilities offered, their fitting out, their number and their size compared to the park as a whole.
>
> 34. As regards, in particular, aquatic areas, it is necessary for the national court to take into account, inter alia, whether they lend themselves to swimming of a sporting nature, in that they are, for example, divided into lanes, equipped with starting blocks and of an appropriate depth and size, or whether they are, on the contrary, arranged so that they lend themselves essentially to recreational use.
>
> 35. On the other hand, the fact that the intention of some visitors does not relate to the predominant element of the supply at issue determined in this way cannot call that determination into question.
>
> 36. An approach consisting in taking account of the intention of each visitor taken individually as to the use of the facilities which are made available would be contrary to the objectives of the VAT system of ensuring legal certainty and a correct and straightforward application of the exemptions provided for in Article 132 of the VAT Directive. In that regard, it should be pointed out that, to facilitate the measures necessary for the application of VAT, regard must be had, save in exceptional cases, to the objective character of the transaction in question …."

51. Although *BASC* was not cited by either party, the FTT directed itself in accordance with it at [77] and [99]. The FTT was not referred to the *Horizon*, *Brockenhurst* or *Město* cases. The FTT found at [99] that the facility of CONGU handicapping was of great assistance to the sport of golf, but that was insufficient to make it essential. The FTT found at [100] that it was possible to play golf in non-handicap competitions and in handicap competitions using a different handicapping system, but the question was whether without CONGU handicapping it would be impossible to participate in golf of the same value.

52. The FTT went on:

> "101. In my view without the system of CONGU handicapping it would be impossible to participate in golf of the same value, or putting it in the terms of the test as expressed by Judge Bishopp, without the facilitation of CONGU handicaps the quality of the sport of golf would be of a materially poorer quality. I reach this conclusion for the following reasons. First playing without handicap results, for those who would otherwise not have it, (i.e. not professionals) in a less competitive game. Secondly, while it is clearly possible to play the sport using other types of handicapping by agreement this will require an additional effort on the part of organisers in settling what system to use or devising their own. There will not be such a readily available pool of competitors or potential competitors; the CONGU handicapping system facilitates the organising of competitions with a greater breadth and diversity of competitors than would otherwise be the case. The CONGU handicap offers a standardised system across the nations of the UK. From the golfers' point of view it enables them to access a far greater number of competitions than would otherwise be the case. The essential nature of CONGU is borne out by the behaviour of golfers and the evidence that if the facility is not offered this would have adverse consequences in terms of attracting members. Players obviously care if their club allows members to get a CONGU handicap even if they do not themselves play competitively. In other words their behaviour demonstrates that the provision and facilitation of competition is important even if the form of golf they play is social. This is clear from the evidence and also by looking at what happened when the ability to play in competitions and get CONGU handicaps was withdrawn from Abbotsley. Further the very fact that withdrawal of CONGU handicaps is deployed as a sanction for non-payment of the fee, and viewed as such indicates that it is of importance (otherwise it would simply be an empty threat).
>
> 102. The common system of handicapping and scratch rating is a means by which competition at higher levels can take place. The fact that some individuals have no interest themselves in using

the facility does not stop the service being regarded as essential to sport. It may not be essential to the sport in the way they prefer to practise it but it is still essential to the sport when viewed in a broader sense and as that term is interpreted under the relevant case law.

103. The fact the calculation of the fee happens to be based on a headcount of number of members does not necessarily mean that the number of members who require CONGU handicaps is determinative. The facility of offering a CONGU handicap will become relevant as soon as there is one person who wants to play in a county competition and it is in that sense that the ability for the 'true beneficiaries' to be able to access inter county competitions is essential to the sport."

53. Counsel for the Appellants submitted that the FTT had erred in law because it had substituted Lewison J's third factor for the proper test, which was whether the supply was essential for golf. The fact that golf of the same value could not be achieved without the supply was but one of the factors to be considered and was not solely determinative of the issue.

54. We do not accept this submission for the following reasons. First, as we have explained, it is settled law that a supply of a service is "essential to" the exempted transaction if the supply is of such a nature and quality that, without it, there could be no assurance that the exempted transaction would have an equivalent value. It follows that, in considering whether it would be impossible to participate in golf of the same value without CONGU handicaps, the FTT applied the correct test.

55. Secondly, in considering that question, the FTT took into account all the relevant factors. The evaluation of those factors was a matter for the FTT. Counsel for the Appellants was unable to identify any relevant factor which the FTT did not take into account. In particular, the FTT took into account the fact that many golfers did not want CONGU handicaps (and in some cases were not prepared to pay affiliation fees for that reason). Nor was counsel for the Appellants able to identify any factor which the FTT took into account which it ought not to have done. Although he argued that the FTT wrongly had regard to the clubs' decision to make the supplies to the golfers, that was not part of the FTT's reasoning in [101]-[103].

Conclusion

56. For the reasons given above, the appeal is dismissed.

MR JUSTICE ARNOLD AND JUDGE HELLIER

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