



**TC02017**

**Appeal number: MAN/08/0504**

*VAT –supplies by a students’ union - was it run essentially voluntarily – no – output tax was properly payable and an appeal in respect of a reclaim for overpaid tax is dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**LOUGHBOROUGH STUDENTS’ UNION**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE Richard Barlow**

**Sitting in public in Manchester on 12 and 13 January 2012.**

**John Tallon QC instructed by VAT angles VAT consultancy for the Appellant**

**Richard Chapman of counsel, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs, for the Respondents**

## DECISION

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1. Loughborough Students' Union (the Union) appeals against decisions by the respondents by which they refused to agree to repay to the Union sums accounted for as VAT output tax, repayment of which the Union has claimed by way of voluntary disclosures. Not all the voluntary disclosures are technically subject to this appeal but  
10 the Decision should enable the parties to settle all the claims. The sum in dispute is substantial, being in the region of £455,000, but the parties have made their submissions and presented their evidence on the basis that the Tribunal need not, at this stage at least, make a ruling about the quantum of the claims and a decision in principle on the various points raised is what is required.

15 2. The claims span the tax periods ending 01/02 to 07/08. After 07/08 the Union's constitution was changed and no claims are currently before the Tribunal for any period after the end of July 2008.

3. The appeal is concerned with two main issues.

4. The first is whether the Union has accounted for output tax on activities that  
20 should have been exempt from VAT under item 2(b) of Group 13 of Schedule 9 to the VAT Act 1994 (the Act) (supply by an eligible body of admission to a theatrical, musical or choreographic performance of a cultural nature). The second is whether the Union has accounted for output tax on activities that should have been exempt from VAT under item 1 of Group 12 of Schedule 9 (a supply of services by a charity  
25 in connection with an event that is organised by a charity whose primary purpose is the raising of money and is promoted as being primarily for the raising of money).

5. The claims in respect of Group 13 cover a number of events in each relevant period such as gigs, events or balls consisting of musical performances by bands, dances and the like held for the students. The Group 12 claims are restricted to  
30 annual Freshers' Balls and Graduation Balls (which are also included in the Group 13 claim). The Group 12 claim is therefore for smaller sums than the total and is essentially alternative to the Group 13 claim if that claim fails.

### **The law.**

6. The relevant legislation relating to the Group 13 claim is:

35 "Section 31(1) of the Act: A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9  
...

GROUP 13 [of Schedule 9]

Item No

...

2. The supply by an eligible body of a right of admission to -

...

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(b) a theatrical, musical or choreographic performance of a cultural nature.

#### NOTES

...

(2) For the purposes of item 2 “eligible body” means any body (other than a public body) which –

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(a) is precluded from distributing and does not distribute any profit it makes;

(b) applies any profits made from supplies of a description falling within item 2 to the continuance or improvement of the facilities made available by means of the supplies; and

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(c) is managed and administered on a voluntary basis by persons who have no direct or indirect financial interest in its activities”.

7. With the exception of the Freshers’ and Graduation Balls, the respondents did not dispute that events of the type organised by the Union and which have given rise to the claims under appeal are events which fall within Item 2(b). There is no suggestion that performances of a cultural nature are restricted to what might be termed High Culture and so any performance which is musical or choreographic will be capable of qualifying. The respondents put the Union to proof that the balls had the quality of a performance in the relevant sense. The respondents conceded that the union qualifies for the exemption so far as Notes 2(a) and 2(b) are concerned.

8. Therefore the issues raised concern the question of fact about the Balls and whether or not the Union is managed and administered on a voluntary basis by persons having no direct or indirect financial interest in the activities (the eligible body point).

9. In the context of the legal submissions relating to the eligible body point a number of authorities were cited to me namely: *Customs and Excise Commissioners – v- Zoological Society of London* (CJEU) [2002] STC 521 (the *Zoo* case), *Bournemouth Symphony Orchestra –v- Customs and Excise Commissioners* (CA) [2007] STC 198 (the *Orchestra* case) and *Keele University Students’ Union –v- Customs and Excise Commissioners* [2009] UKFTT 161 (TC).

10. Before referring to the authorities in detail I should record the fact that the respondents conceded that, as the Sixth Directive and the Common System Directive

both refer, in their relevant articles, to bodies “administered on an essentially voluntary basis”, the UK legislation should be read in that light and so the word “essentially” should be taken to modify the phrase “voluntary basis”.

11. In the *Zoo* case the CJEU judgment includes the following paragraphs:

5                   “20. In order to determine the persons directly associated with the management and administration of a body for the purposes of the second indent of art 13A(2)(a) of the Sixth Directive, reference must be made, first, to the constitution of the body in question in order to identify the members of the directing organs and their specific tasks.

10                   21. Next, it must be determined which persons actually carry out the management and administration of the body, in the sense that, like the directing members of a commercial undertaking, they take the decisions of last resort concerning the policy of the body, particularly in the financial area, and carry out the higher supervisory tasks. As the Advocate  
15                   General points out in paragraph 32 of his Opinion, such activities are characterised by the taking, rather than the implementation, of policy decisions and accordingly are carried out at the highest level. Therefore, persons carrying out purely executory tasks are not affected by the requirement that management and administration be on an essentially  
20                   voluntary basis.

                      22. Finally, in the light of those considerations, it is for the competent national authorities to determine, in respect of each body concerned, which are the persons who fall within the scope of the additional condition laid down in the second indent of Article 13A(2)(a) of the Sixth Directive  
25                   and who must therefore fulfil the requirement of not having a financial interest in the body's results.

                      23. The answer to part (a) of the question must therefore be that, on a proper construction of the second indent of Article 13A(2)(a) of the Sixth Directive, the condition requiring a body to be managed and administered  
30                   on an essentially voluntary basis refers only to members of that body who are designated in accordance with its constitution to direct it at the highest level, as well as other persons who, without being designated by the constitution, do in fact direct it in that they take the decisions of last resort concerning the policy of that body, especially in the financial area, and carry out the higher supervisory tasks.  
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**Part (b) of the question**

                      24. By part (b) of its question, the referring court is asking essentially whether, on a proper interpretation of the second indent of Article 13A(2)(a) of the Sixth Directive, the words on an essentially voluntary basis refer to the composition of the organs entrusted with the tasks of managing and administering a body, in the sense that it would be  
40                   permissible for some of those who have a financial interest in the body to

be involved in those tasks exceptionally and in an incidental way, or whether those words refer to the reward which those persons receive, in the sense that it would be permissible to grant them certain exceptional and symbolic financial advantages.

5           25. The Zoological Society, the United Kingdom Government and the Commission are agreed that, on a proper construction of the words on an essentially voluntary basis, even if all the management of the body must be carried out by unpaid persons, the fact that paid staff take part occasionally or incidentally in the adoption of essential decisions, or that  
10           small or token payments are made to those staff, is not sufficient to deprive their activity of its essentially voluntary character and to justify the conclusion that the body pursues a disguised commercial purpose.

15           26. In that respect, it is apparent from the purpose of the second indent of Article 13A(2)(a) of the Sixth Directive, as explained in paragraph 17 of this judgment, that the condition laid down by that provision is intended to make a distinction between the activities of commercial undertakings and those of non-profit-making bodies, that is to say those that do not aim to generate profits for their members. The words on an essentially voluntary basis thus refer to the members who compose the directing organs and  
20           those persons who, without being designated by the constitution, do in fact direct the body concerned, and refer also to the reward which the latter may receive, habitually or exceptionally, from that body.

25           27. It is for the competent national authorities to determine, for each body in question and by means of an overall assessment, whether, by reason of any contribution to the management of the body, as defined in the context of the answer to part (a) of the question, by persons having a financial interest in it, and by reason of any reward given to them, the essentially voluntary character of the management or administration of a body can be accepted or not.

30           28. The answer to part (b) of the question must therefore be that, on a proper interpretation of the second indent of Article 13A(2)(a) of the Sixth Directive, the words on an essentially voluntary basis refer to the members who compose the organs entrusted with the management and administration of a body of the kind referred to in that provision and those  
35           persons who, without being designated by the constitution, do in fact direct it, and refer also to the reward which the latter may receive, habitually or exceptionally, from that body”.

40           12. Paragraphs 20 to 22 of the judgment are concerned with the question of how to identify the persons who are concerned with the management and administration of a body so as to identify those who must not have a financial interest in the body’s results if the body is to have the status of one that can qualify for the exemption. It is important to note that the Court decided that those who are required to carry out the decisions of last resort by the body’s constitution are included in that category but that any others who actually carry out those functions are included as well.

13. In paragraph 23 the Court then added the point that it is the same persons with respect to whom the “essentially voluntary” question arises. In other words those who are required to make the decisions of last resort by the constitution of the organisation are joined by any others who actually make those decisions. Paragraphs 24 to 27 of the judgment then discuss the questions of small or token payments and symbolic financial advantages and whether they can be ignored when considering whether a body is being conducted on an essentially voluntary basis and the Court appears, at the end of paragraph 26 of its judgment, to have excluded from exemption any case where a person who is one of the relevant decision makers obtains a habitual or even an exceptional reward. However in paragraph 27 the Court appears to contradict itself because it there stated that it would be for the National Court to decide the question by an “overall assessment” about whether the conduct of the organisation is on an essentially voluntary basis, which makes it appear that what it said at the end of paragraph 26 was not the last word on that question and that there could be cases where some reward to one or more of the relevant decision makers could be ignored.

14. In the *Orchestra* case the Court of Appeal, following the *Zoo* case, held that the orchestra was not being conducted on an essentially voluntary basis. It held that the fact that one musician member of the Board of eight last resort decision makers was paid a salary did not prevent the organisation being conducted on an essentially voluntary basis because the payment he received was for his playing in the orchestra and so he was paid as an employee in that capacity but he received no payment as a decision maker. On the other hand the fact that the managing director was paid a salary was fatal to the orchestra’s claim to be run on an essentially voluntary basis because he was a member of the Board and was thus not acting voluntarily. The most relevant passages of the judgment are the following taken from the judgment of Lloyd LJ:

“[109] The judge [Mann J in the High Court] held that remuneration paid at a proper flat rate (rather than, for example, with a results-based bonus element, or at such a high rate as to be regarded as a disguised way of extracting profits) does not give the employee a financial interest in the results of the activities of the body. He considered that to read the reference to “interest” as including such a salary would give it a very wide scope, not justified by the aim of the indent, excluding not only paid employees but also a wide class of persons with indirect “interests” in the success of the body’s activities. As Mann J said at paragraph 33, straightforward remuneration is not necessarily a way of getting profits into the hands of members, or of persons in a similar position, and it is therefore not within the scope of what the Court identified at paragraph 17 of its judgment as the objective.

[110] For the reasons given by the judge on this point, supported by the Court’s rejection of the Advocate-General’s proposal for the answer to question (b), I agree with the judge that the payment of remuneration at a proper rate which is not variable according to the results of the body’s activities does not give the employee in question a financial interest for

the purposes of Note 2(c) or an "interest" for the purposes of the second indent.

5 [111] I also agree with him, however, that this does not dispose of the question whether the management and administration is essentially voluntary. I do not regard the *London Zoo* case as deciding that there is only one composite question in this respect, such that, having found that none of the relevant directors has a financial interest, the essentially voluntary point follows without more. As the judge observed, that could, in theory at least, result in the entire board, or the majority of it, being paid at a full rate, including for taking part in the highest level of the management and administration of the body, and the management and administration nevertheless being "essentially voluntary".

15 [115] I respectfully disagree with Chadwick LJ's observation, in the middle of his paragraph [24], that what is to be derived from the judgment in the *London Zoo* case is that the national court must consider "whether persons who participate in the management and administration of the body seeking exemption receive some financial reward for doing so". It seems to me that, if that were taken as the sole test, it would give effect to the words "managed and administered on an essentially voluntary basis", but not to the words "by persons who have no direct or indirect interest ... in the results of the activities concerned". I agree with Chadwick LJ that for the relevant body to have a managing director who is paid for taking part in the decision-making process at the highest level, as Mr Henson was, is inconsistent with the exemption, but in my judgment that is because it does not allow the management and administration to be described as being carried out on an essentially voluntary basis, not because his flat rate remuneration gives him a financial interest in the results of the activities.

30 [117] I consider, as Mann J did, that to treat a flat rate salary at a proper level as a financial interest for this purpose would go too far in excluding from participation in the management and administration of the body persons who, though they have financial dealings with the body, do not have a real interest in the results of its activities. It would make the musician director's participation fatal, because he would clearly have a financial interest in that sense. If, however, this test is to be limited by requiring a nexus between the financial interest, on the one hand, and the participation in the decision-making process, on the other, which could result in the musician director not having a financial interest, it would also not catch someone such as the employee who is paid on a basis related to profits or results, whom I have postulated in paragraph [112] above. It is for those reasons, and because it seems to me to fit better with the natural reading of the second indent, that I regard the questions to be posed as two, and separate, rather than as a single question involving two elements: a financial interest (which in Chadwick LJ's view could be by way of flat-rate salary) and a nexus between that interest and participation in the

decision-making process. I agree that both these elements have to be considered, but I do not see that any nexus is required between the two.

5 [123] It might be thought that the presence of the managing director on the Board is a somewhat arbitrary factor as the criterion determining whether a body, otherwise eligible for exemption from VAT on these grounds, should or should not qualify for such exemption. That would be too narrow a view. Even if the person in the position of the managing director (whatever the title given to the post) were not a member of the Board, he could still be one of the persons by reference to whom the second indent has to be satisfied. That would be the case if he was, on the facts, someone who, without being designated by the constitution, does in fact direct it, in that he takes, or shares in the taking of, the decisions of last resort concerning the policy of the body, especially in the financial area, and carries out the higher supervisory tasks: see the first ruling of the ECJ in the *London Zoo* case, quoted at paragraph [89] above. If a proper examination of the facts shows that, despite not being a member of the Board, he plays a significant part in the higher decision-making processes of the body, and is not limited to implementing decisions reached without his participation, then the second indent has to be satisfied in respect of him. In other words, if the payment of a full salary to the managing director, being a member of the Board, prevents the body from fulfilling the conditions in the second indent, it would not be sufficient, in order to avoid this problem, to remove him from the Board, if he were to continue to take part in the management and administration of the activities of the body at the highest level.

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30 [131] I therefore agree with Chadwick LJ as to the result of the appeal by the BSO, but not as to all of his reasoning. It seems to me that the judge was right in his conclusion and in the reasons he gave. I do not regard flat-rate remuneration at a proper rate as giving the employee a financial interest in the results of the employer's activities. I do not regard it as necessary, for the second indent to exclude a body from the exemption, that there should be a nexus between the financial interest of a relevant person and his or her participation in the highest decision-making process of the body. Rather, I would hold that, if remuneration is to constitute a financial interest, it must be either results-based in some way or at such a high rate as to be a disguised means of distributing profit. I would also hold that no person who has a financial interest may, consistently with the second indent, take any part in the management and administration of the body. However, I would also hold that the question whether the body is managed and administered on an essentially voluntary basis is separate, and turns on the terms and basis on which all those who take part in the management and administration do so. That fact that (unlike the musician director) the managing director is paid at a full and proper rate for doing so means that, even though he is only one out of 8 directors, the management and administration of the BSO is not carried out on an

essentially voluntary basis. I would dismiss the BSO's appeal on that basis.

15 15. Those two authorities make it very clear that in order to qualify as an eligible  
body the Union must show that its management at the level of the decision makers of  
last resort, both those who are constitutionally required to make the decisions and any  
others who actually do make them, do not only have no financial interest in the  
activities of the Union but also that they are acting essentially voluntarily. So far as  
the latter point is concerned payment of a salary to a decision maker at the relevant  
level is capable of defeating a claim that an organisation is an eligible body if the  
10 salary is paid for the making of the decisions.

15 16. A question that was touched upon in the *Orchestra* case was whether the  
payment of a salary at less than the full rate for the job might be treated differently  
from payment of a full salary. It was reported at paragraph [109] of the judgement of  
Lloyd LJ that counsel for the Commissioners had argued that a salary at more than a  
nominal rate would amount to a financial interest. In fact the judgment of the Court  
was that a salary would not constitute a financial interest but that it would preclude  
the organisation from arguing that it was managed essentially voluntarily in the  
relevant sense. Lloyd LJ appeared to agree that more than a nominal salary could be  
sufficient to defeat the essentially voluntary question as the following paragraph  
20 appears to suggest:

25 “[113] It seems to me that there are two questions, and that the essentially  
voluntary question must be addressed separately from that of financial  
interest. Otherwise it would, at least in theory, be possible for a body to  
qualify despite the fact that, in the case postulated by the judge, all or a  
majority of the members of the Board are paid (*at a flat rate which is  
more than nominal*) for their participation in the deliberations of the  
Board or, in the case which I have suggested, a member of the Board who  
is not paid for such participation is someone who has a separate financial  
interest in the results of the body's activities”. [Emphasis added].

30 17. The *Zoo* case, as already mentioned, left some room for the National Courts to  
make judgments about how far small payments might not defeat the essentially  
voluntary requirement. Indeed it is obvious from the fact that the word essentially is  
used that there must be some limit on how significant a payment may be before the  
conduct of the organisation is held to be run other than voluntarily because if just any  
35 payment is intended to be enough to preclude an organisation from qualifying for  
exemption the phrase used in the Directives would be “entirely voluntarily” rather  
than “essentially voluntarily”.

40 18. It is a matter for the National Court (the Tribunal) to decide the issue whether  
the essentially voluntary condition is complied with by making an overall assessment  
of the relevant facts. Lloyd LJ's remarks in paragraph [113] of the *Orchestra* case  
and the use of the word “essentially” provide an indication to the Tribunal that in  
making that overall assessment it is relevant to consider that some, probably small,  
payments might not defeat the voluntariness of the actions of the decision makers.

Indeed the fact that only one of eight Board members in the *Orchestra* case was paid emphasises the fact that essentially voluntary is intended to be a rather strict test.

19. Paragraph [123] of Lloyd LJ's judgment makes it clear that the relevant decision maker (or makers) may preclude an organisation from being operated essentially voluntarily even though that person or those persons have no formal entitlement to make the decisions provided they do in fact "play a significant part in the higher decision making processes of the body".

20. In light of those authorities the respondents do not assert that the Union fails to qualify as an eligible body on the basis that anyone has a financial interest but they do assert that it fails on the basis that some of the decision makers of last resort are paid and so the Union is not, in their contention, run essentially voluntarily.

21. The Union contends that it is run essentially voluntarily.

22. The relevant statutory provisions concerning the Group 12 claim relating to the Freshers' and Graduation Balls are:

15 "GROUP 12

Item No

1. The supply of goods and services by a charity in connection with an event -

(a) that is organised for charitable purposes by a charity ... ,

20 (b) whose primary purpose is the raising of money, and

(c) that is promoted as being primarily for the raising of money".

23. The *Newsvendors Benevolent Institution* case (Decision number 14343) was cited. That case dealt with questions about whether an event was part of a series of events. As the current statutory provision only limits the exemption to cases where more than 15 events occur within a financial year and as only two events per year are in issue that case has no relevance to this appeal. The *Cheltenham and Gloucester CHE Students' Union* case (Decision number 15727) was cited but that case concerned the version of Group 12 that pre-dated the amendments having effect from 1 April 2000. The current version of the legislation specifically refers to fundraising being the primary purpose of an event, which was not the case before 1 April 2000, and so that case bears no real relevance to the present appeal.

### **The facts.**

24. I read the statements of Andrew Parsons, salaried general manager of the Union, Paul Moore, salaried finance officer and Georgina Payne who had been a sabbatical officer of the Union for the academic year 2008-09 and who is now studying for a PhD. Mr Parsons and Ms Payne were called to give evidence and were cross

examined. I also saw a number of documents including, in particular, Constitutions and Union Council meeting minutes.

5 25. When the Loughborough University of Technology was created by Royal Charter it was decreed that there would be a Students' Union. I was provided with copies of extracts of the Constitution of the Union in two forms. The first covers all material periods up to 22 May 2005 and the second covers the period from 23 May 2005 to 31 July 2008, after which date the constitution was amended again and the Union is not currently seeking to argue that any overpayment of VAT occurred after 31 July 2008.

10 26. The Union which is the appellant in this appeal actually consists of a Union for the University, Loughborough College and the RNIB Vocational College and all currently registered students of those institutions are members of the Union by reason of that registration, unless they have opted out of membership. Members of staff of the University and certain other institutions may be included in certain other  
15 categories of membership.

27. Both forms of the constitution provide that the Council will be the governing body and the powers and duties of the Council are set out as follows:

“The powers and duties of the Council will be as follows:

20 (i) To formulate and decide on the policy of the Union; such decisions should be passed by a simple majority vote in accordance with the standing orders of the Council.

25 (ii) To take an overview of the administration and implementation of policy of the Union in accordance with the Union's core objectives, by means of the receipt and approval of reports from those who sit on the Executive Committee, and other bodies of the Union.

(iii) Council may decide that it is not fit or able to make a decision and therefore may refer the matter to a referendum. A referendum shall work in accordance with Standing Order B of the Constitution.

30 (iv) Council shall delegate to the Executive Committee day-to-day management of the union's affairs and the implementation of its policies.

(v) Council may delegate other matters to any body of the Union that it sees fit.

35 (vi) Council shall appoint practicing (sic) Chartered Accountants to act as Union Auditors. Copies of the audited accounts must be presented and adopted by the Council before being presented to the constituent colleges.

(vii) To make changes to the Constitution, Schedules, or Standing Orders in accordance with the constitution”.

28. The membership of the Council consists of: those who sit on the executive committee, the student officers of the Union, and representatives of the halls of residence and the colleges (the numbers in the last two categories being appointed roughly according to the numbers of students resident in the halls and attending the colleges). Evidence was given that the membership of the Council was about 70 to 75 people.

29. The student officers are defined in Schedule IV of the constitution and they include nine “sabbatical officers” who are also referred to as “executive sabbatical officers”. The student officers appear in total to number about 27 including the sabbatical officers. The executive committee, whose members are ex officio members of the Council, include a number of the student officers so there are a number of Council members who sit on the Council in a dual capacity ie as student officers and as members of the executive committee. The sabbatical officers are members of the Executive Committee.

30. The role of the Executive Committee is expressed largely in terms of the day to day management of the Union and it is expressly made answerable to the Council. However, its duties include a duty to “oversee and manage the Union’s finances” and “to make decisions in the absence of Union Committees”. The respondents also emphasised a provision that the Executive Committee is “to take on plenary powers outside term time”.

31. In the earlier version of the Constitution all Council members had a vote at the Council and decisions were made by a simple majority with a quorum of 50% of the members (though the executive committee members were not counted towards the quorum according to the evidence of Mr Parsons). From 23 May 2005 the voting rights of “those who sit on the executive committee” were removed. I was told that in practice that meant that the sabbatical officers no longer had a vote, though as they were also members of the Council in their capacity of student officers there was arguably an ambiguity in the rules and they might have still had a vote in their other capacity. The amendments to the Constitution also limited but did not abolish the Executive Committee’s plenary powers during the vacation. The amendments precluded it from changing the Constitution or any existing Union policies.

32. The Union also has trustees who, at material times, were the Executive Sabbatical Officers and the Registrars of the constituent colleges. Mr Parsons’ evidence was that the Council had responsibility for budgets until the further change to the Constitution made from 1<sup>st</sup> August 2008 and he stated that the Council was the decision maker of last resort until that date. As I understand it, thereafter the trustees took on more if not all responsibility for decisions of last resort.

33. Mr Parsons explained in his evidence that decisions taken by the council were often the result of an informal process by which a consensus was reached before the actual meeting but his evidence was clear that the Executive Committee would not present a fait accompli to the Council and was not immune from criticism if it appeared to be assuming the Council would agree with its proposals. He categorically

denied that the council merely acted as a rubber stamp when that was put to him by Mr Chapman.

34. As far as the Balls were concerned he said that they were a celebration and that the Union tended to book well known acts for the Balls.

5 35. He also explained that the sabbatical officers' were paid approximately two thirds of what might have been considered a starting salary for a graduate in his or her first employment at the times in question.

36. The change in the Constitution was described by Mr Parsons as having arisen from an idea that there would be a conflict of interest if the sabbatical officers had a vote on the Council given that they were paid by the Union. I must say that given that they did not have a vote until after they had been appointed that does not appear a very realistic concern. The Council Minutes for 23<sup>rd</sup> May 2005 suggest that the conflict was seen as arising from the fact that the Executive Committee members were answerable to the Council but were entitled to vote in Council meetings therefore having the opportunity to vote on their own conduct if called to answer to the Council for something they had done.

37. Ms Payne produced a copy of her terms of employment which, as is the case for all the sabbatical officers, was for thirteen months. That term is set so that there is always a hand-over period when the newly appointed sabbatical officers take over from their predecessors.

38. She explained that most sabbatical officers put themselves forward for election in the year after they graduate. Clearly much of the sabbatical officers' time is spent on day to day activities such as, in her case, arranging elections and no doubt in other cases arranging the entertainments. It seems obvious that within the Union as within any organisation a good deal of time of the responsible executives will be taken up with questions that cannot be described as issues of last resort. No doubt the managing director of the Orchestra also only acted in respect of decisions of last resort for part only of his employment but his position and the fact that he was paid was held to be sufficient to deprive the Orchestra of the status of an organisation that was managed and administered on an essentially voluntary basis.

39. Ms Payne said that strategic plans are developed by the executive members and then are put before the Council and that before the presentation of a plan to the Council workshops will take place with interested students and the executive would sound out Council members and take advice from them. Not all executive proposals were accepted and she mentioned a proposal she had made about how to conduct elections which was turned down.

40. Ms Payne said that much of what was decided within the executive committee was really decided by the individual members who were responsible for that area of the Union's activities and although they were discussed in the executive the executive committee meetings consisted more of sharing information than debating and taking decisions.

41. Reports from the executive committee were often not discussed in the Council though they were copied to the Council members before the meeting so that the Council members could make up their minds before the meeting. When it was put to her that the Council simply rubber stamped reports she disagreed and said that she had  
5 been a member of the Council herself before she was a sabbatical officer and had always read the reports before the meetings.

42. As far as the Balls were concerned Ms Payne said that they were part of the student experience and a regular feature of the calendar and that they did make money. She said the publicity for the Balls mainly centred on publicising the acts  
10 who were performing but that it was made clear that proceeds went to the Union.

43. I have read the Council minutes produced at the hearing and my overall view is that in the large majority of cases the proposals put forward by the Executive Committee members are adopted without much debate and usually by a very large majority, indeed often without any votes against.

15 **Findings.**

44. Although the sabbatical officers are not paid a full salary for a new graduate I find that does not assist the Union's case for saying that the Union is run on an essentially voluntary basis. The authority of the *Orchestra* case suggests that only a small payment would be irrelevant.

20 45. Before the change in the constitution (ie before May 2005) the sabbatical officers were paid a salary at a rate sufficiently high to affect the issue of whether the Union was run essentially voluntarily and were voting members of the body which made the decisions of last resort. Coincidentally they represented approximately the same proportion of that body's membership (being nine of about 75) as the managing  
25 director represented on the board of the orchestra. Although I do not regard that coincidence as in any way decisive, the *Orchestra* case is certainly authority for the proposition that the payment of salaries to some members of the body of last resort decision making cannot be ignored just because the paid members cannot out vote the unpaid.

30 46. I find that the sabbatical officers had an influence on the decision making process of the Union far in excess of their proportionate numbers. The Union acted on an admirably democratic basis of prior consultation and attempted consensus but it is very clear that the sabbatical officers played a very large part in that process.

35 47. The question arises whether the factual analysis of the essentially voluntary issue for the period after the sabbatical officers no longer had a vote on the Council is different from that for the period when they did have a vote on the Council.

40 48. I find that the same reasoning applies after as well as before the change in the constitution. The influence and importance of the sabbatical officers appears from the minutes and the evidence to have continued to be effectively the same as it was before the change in the voting arrangements.

49.

50. It follows that I hold that the appeal in respect of the voluntary disclosure for the repayment of VAT under Group 13 fails because the sabbatical officers were paid a sufficiently large amount and took a sufficient role in the decision making process of last resort and had sufficiently large influence over those decisions of the Union as to preclude it from being managed and administered on an essentially voluntary basis at all material times.

51. As far as the alternative claim for a smaller repayment under Group 12 is concerned I hold that the evidence given falls well short of proving that the primary purpose of the Balls was to raise money. The evidence was that the Balls were put on for the students' entertainment and no evidence was given about what profits were made. There was also no evidence to suggest that the Balls were promoted as being primarily for that purpose. I do not doubt that the publicity disclosed that profits would go to the Union but that is not the same as disclosing that the primary purpose of the events were to raise funds.

52. Accordingly the appeal is dismissed.

53. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**RICHARD BARLOW  
TRIBUNAL JUDGE**

**RELEASE DATE: 8 May 2012**