



**TC03353**

**Appeal number: TC/2009/11818**

*VAT – Exempt services – Item 1(d) of Group 9 of Schedule 9 VATA 1994 – Whether membership subscriptions of a trade association constitute exempt supplies – Matter remitted by Upper Tribunal for reconsideration – Appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**EUROPEAN TOUR OPERATORS ASSOCIATION      Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE PETER KEMPSTER  
                  MRS CAROLINE DE ALBUQUERQUE**

**Sitting in public at Bedford Square, London on 3 September 2013**

**Mr Tim Brown of counsel, instructed by Charcroft Baker, for the Appellant**

**Mr James Puzey of counsel, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs, for the Respondents**

## DECISION

1. This appeal was originally heard by the First-tier Tribunal (the current panel) in  
5 December 2010. The appeal concerns the VAT liability of membership subscriptions  
paid to the Appellant (“the Association”). The Tribunal’s decision, allowing the  
appeal, is reported as [2011] UKFTT 88 (TC) (“the FTT Decision”). The  
Respondents (“HMRC”) appealed to the Upper Tribunal, which gave its decision,  
10 reported as [2012] UKUT 377 (TCC), [2013] STC 1060 (“the UT Decision”),  
remitting the case to the First-tier Tribunal. The case thus comes before us again, as  
more fully detailed below.

### Background

2. By a case note issued on 22 March 2013 (“the Case Note”) Judge Kempster  
proposed to the parties that the remittal hearing should proceed on the following basis.  
15 Both parties agreed to that proposal.

“1. The [FTT Decision] has been set aside by the Upper  
Tribunal.

2. The Upper Tribunal has remitted the case to the First-  
20 tier Tribunal for reconsideration as detailed in paragraph 44  
of the [UT Decision].

3. No directions have been or are to be given by the  
Upper Tribunal under s 12(3) [Tribunals, Courts and  
Enforcement Act 2007].

4. Although the [FTT Decision] has been set aside, it is  
25 not necessary for the First-tier Tribunal to hear the appeal *de  
novo*. Instead, the First-tier Tribunal is to reconsider the case  
as directed by paragraph 44 of the [UT Decision], and then  
remake its decision on the appeal in the light of that  
reconsideration.

5. If possible that reconsideration will be performed by  
30 the same panel as heard the original appeal (myself and Mrs  
de Albuquerque).”

3. We are to reconsider the case as directed by Henderson J in paragraph 44 of the  
UT Decision:

35 “... I will remit the matter to the FTT for it to reconsider and amplify  
its findings about the primary purpose of the Association.”

4. The relevant parts of the FTT Decision are as follows:

“32. We have approached our consideration and conclusions on  
the following bases:

40 (1) We must ascertain the "primary purpose" of the Association.  
If it has multiple aims then it is its main object that counts (see  
Lewison J in *BASC* - paragraph 8 above). Its primary purpose is what

5 its directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions (*Bookmakers' Protection Association* – paragraph 11 above). The Association's professed purposes must be tested against what happens in reality (see Lewison J in *BASC* - paragraph 8 above).

(2) The burden of proof lies on the Association (see Lewison J in *BASC* - paragraph 7 above) and the standard of proof is the normal civil standard of balance of probabilities.

...

10 *The primary purpose of the Association*

33. The constitutional documents of the Association set out a number of aims of the Association. These include and give prominence to that of making political representations on behalf of the tour operators industry.

15 34. In practice the Association clearly has a number of activities. Having carefully considered all the evidence presented to us, our conclusion is that, like any membership organisation, the Association is eager to access funds to enable it to undertake its activities. It runs networking and marketing events and charges fees to some for attendance at those events in order to raise such funds. We do not consider that such ancillary activities have overtaken or supplanted the original, primary aim of the Association: "to establish relations with the European Institutions". Thus we find that is the primary purpose of the Association.

25 35. Turning to the geographical limitation on Item 1(d) as agreed between the parties (paragraph 15 above), the tour operator industry is one which by its very nature crosses national borders. It is unsurprising that the representational activities of the Association extend beyond UK domestic concerns to those of other European countries; also, that the members concerned with such issues are not restricted to the UK or even other EU countries. We accept the evidence of several examples of representational work involving lobbying or influencing the UK government and/or EU institutions in relation to matters affecting the tour operator industry in the UK (for example, that concerning tourism and the Olympic games). Adopting the parties' interpretation of "the Government" in Item 1(d) we conclude the representational activities of the Association do satisfy that part of the test in Item 1(d).

30 36. Accordingly, we find that the primary purpose of the Association meets the test in Item 1(d) of Group 9."

40 5. The relevant parts of the UT Decision are as follows:

45 "27. Apart from the reference to *Bookmakers' Protection Association*, the authority relied on for the propositions in sub-paragraphs (1) and (2) above was the judgment of Lewison J in *BASC*. The former case was a decision of the VAT Tribunal (*Bookmakers' Protection Association (Southern Area) Ltd v Customs and Excise Commissioners* [1979] VATTR 215), in which the Chairman had expressed the view that in order to determine the primary purpose of the taxpayer:

5 “we must have regard to the objects set out in its Memorandum and its various activities to determine what its directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions. The words “primary purpose” indicate to us that the test is subjective and not purely objective.”

10 28. In my judgment it is wrong to regard the “primary purpose” test as a subjective one, and the FTT erred in law when it directed itself that the primary purpose of the Association was “what its directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions”. The relevant enquiry is an objective one, to be answered primarily by an examination of the stated objects and the actual activities of the body in question. The subjective views of the members or officers may throw some light on this enquiry, but they cannot be elevated into a diagnostic test. That this is the correct approach is in my judgment clear, both as a matter of principle (the aims or purposes of an organisation are an objective concept, and may be quite distinct from the subjective views or motives for joining of individual members), and on the authority of *BASC* where at [47] Lewison J commented as follows on the Tribunal’s approach in that case:

25 “I see no legal error in this conclusion. The tribunal has looked at *BASC*’s constitutional document, supplemented it by reference to other materials from which, objectively, conclusions about its objectives can be drawn, and tested that against the reality of what it does.”

30 29. It is also worth noting, as Lewison J pointed out in *BASC* at [45], that an organisation may have multiple objects no single one of which could be said to be predominant. There is no legal necessity for an organisation to have a single predominant purpose. It is not altogether clear to me that the FTT in the present case had this possibility in mind, because sub-paragraph 32(1) of the Decision could be read as implying that the Association must have had a single primary purpose.

35 30. ...

40 31. The argument advanced by Mr Puzey for HMRC centres on the finding by the FTT in paragraph 38 of the Decision that “most of the members of the Association are associate members who join the Association not because of the lobbying activities of the Association but instead for the networking and marketing opportunities it provides to the associate members”. Mr Puzey submits that if, as the FTT has found, this was the reason why the majority of the members (albeit associate members) joined the Association, the previous finding in paragraph 34 that its principal purpose was “to establish relations with the European Institutions” cannot stand. In support of this argument, Mr Puzey relies on the test which the FTT derived from the VAT Tribunal decision in the *Bookmakers’ Protection Association* case, cited above, that account must be taken of what the members

considered to be the most important services being provided in return for their subscriptions, and that the test is of a subjective character.

5 32. Mr Puzey also submitted that the Decision contains very little analysis or weighing up of the political activities of the Association (in the form of making representations to the UK and EU governments) on the one hand, and all its other activities on the other hand. In oral argument, Mr Puzey adopted a suggestion from the Bench to the effect that there appears to be an unexplained jump in paragraph 34 of the Decision from the proposition that the Association's fund-raising activities were of an ancillary nature to the conclusion that the primary aim of the Association at all material times had been to establish relations with the European Institutions. The word "thus" in the final sentence of paragraph 34 suggests that the FTT regarded this as a necessary conclusion once the former proposition was established, but this ignores the fact that the Association carried on several activities apart from running networking and marketing events and political lobbying. No separate consideration appears to have been given to the question whether such other activities might have constituted aims or purposes of the Association which were at least on a par with its lobbying activities.

10 15 20 25 30 33. To the extent that Mr Puzey's argument is based on the FTT's finding in paragraph 38 of the Decision, and the principles derived by the FTT from the *Bookmakers' Protection Association* case, I would reject it. As I have already explained, I consider that the relevant test is essentially objective in nature, and that the FTT erred in law in following the guidance in the latter case (which was not binding on it). Accordingly, there is in my judgment no necessary inconsistency between the finding of primary purpose in paragraph 34 of the Decision and the finding in paragraph 38 that the subjective reason why most associate members joined was to take advantage of the networking and marketing opportunities afforded by membership.

35 40 45 50 34. I am more concerned, however, about the apparent logical gap in the reasoning of the FTT in paragraph 34, to which I drew attention in the course of the hearing. Furthermore, since the FTT is the sole tribunal of fact, I cannot be sure that it would have reached the same conclusion had it not misdirected itself in law about the nature of the test to be applied, and had it clearly taken into account the possibility that the Association might have "multiple objects no single one of which could be said to be predominant" (*BASC* at paragraph [45]). This is a case that depended on a careful evaluation of all the evidence, both written and oral, in the light of a correct appreciation of the relevant legal test. In my view it is clearly not a case where it can be said that only one conclusion was reasonably open to the FTT, on the basis of its primary findings of fact, if it had correctly directed itself in law. It follows, in my judgment, that the case must be remitted to the FTT for it to reconsider and amplify its reasoning and conclusions about the primary purpose of the Association. I will therefore make such an order, unless it appears from consideration of HMRC's second ground of appeal that HMRC's appeal is in any event bound to succeed."

## Approach

6. In the Case Note Judge Kempster proposed to the parties that the approach to be taken by the First-tier Tribunal in making its reconsideration be as follows. Both parties agreed to that proposal.

5                   “1. In ascertaining the “primary purpose” of the Association for the purposes of Item 1(d) of Group 9 sch 9 VATA 1994 the test to be applied is not a subjective one. The test is not what the Association’s directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions.

10                   2. Instead, the test is an objective one. The aims and purposes of the Association are an objective concept, and may be quite distinct from the subjective views or motives for joining of individual members. The test is to be answered primarily by an examination of the stated objects and the actual activities of the Association; the subjective views of the members or officers of the Association may throw some light on that enquiry. The Association may have multiple objects no single one of which could be said to be predominant; there is no legal necessity for an organisation to have a single predominant purpose. Consideration should be given to whether activities other than running networking and marketing events and political lobbying might have constituted aims or purposes of the Association which were at least on a par with its lobbying activities.”

7. Both parties agreed that no further evidence should be called and the Tribunal considered it could determine the appeal without further evidence beyond that presented in the first hearing, as set out in the FTT Decision.

8. The relevant law is set out in the FTT Decision and the UT Decision.

9. We heard submissions from both parties, as set out below.

## Respondents’ Case

10. Mr Puzey for HMRC submitted as follows.

30 11. Although both parties and both Tribunals had for convenience used the phrase “political lobbying”, it was important to refer to the statutory definition in Item 1(d):

35                   “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”

12. Both parties had proceeded throughout the litigation on the basis that “representations to the Government” for the purposes of the appeal meant representations to the UK Government and also to the EU institutions on matters affecting domestic UK law. Despite reservations expressed by the Upper Tribunal on this approach (see UT Decision at [15-16]), it has not been determined that this approach is incorrect and therefore it should be applied at the present rehearing.

13. The activities eligible for exemption under Item 1(d) do not extend to providing information to members of the Association on actual or proposed legislation, nor to facilities such as the legal helpline, tax information and planning advice nor general promotion of the Association itself for marketing or networking purposes. Mr Jenkins' evidence (see FTT Decision at [29]) was that he did not distinguish between advice to members and influencing Government as it was a "two way process." It is necessary to identify clearly each of the Association's activities and weigh them up comparatively rather than seeking to elide different and distinct activities. The ECJ in *Institute of the Motor Industry v CCE* [1998] STC 1219 made it clear (at paragraphs 17 and 18) that it was only the activities set out in detail in Article 13A that were to be exempted and that it was not possible to include others by implication because they appear to be in the public interest.

14. The Association maintains that its non-political activity was subordinate to and directed towards facilitating the political lobbying. The Upper Tribunal had warned against any attempt to elide or run together different and distinct activities. For this reason the evidence of Mr Jenkins, as previously given, should be viewed cautiously because it contained no attempt to distinguish each separate activity or analysis of the relative contribution of each one to the overall picture of what the Association was doing.

15. HMRC accepts that lobbying does occur but contends that it is not the primary purpose of the Association. The Association has a number of purposes and lobbying is not the main one. In fact, it is not clear that there is a single main purpose; that would be fatal to the Association's case as Item 1(d) refers to "the primary purpose" – see Lewison J in *BASC* at [41].

16. In considering the stated objects of the Association, these were as recorded at [18-21] of the FTT Decision. The Upper Tribunal found (at [7] of the UT Decision) that when the objects were recast on incorporation of the Association in 2003, the new clause covered essentially the same ground as the former clause. Consequently, there appears to be no substantive change in the objects before and after incorporation of the Association.

17. It is apparent that these are multiple objectives which may be fairly summarised as promoting the overall goal of furthering the interests of the European inbound tourist industry. One means by which this can be achieved is by the lobbying of the UK Government and the European Union institutions on matters affecting the industry but clearly there are other means of doing so, some of which the stated objects refer to. The stated objects are not an exhaustive or even a comprehensive statement of how the Association goes about promoting the inbound European tourist industry and the interests of its members in particular. It is apparent that the Association carries out activities such as the promotion of networking and marketing opportunities for its members, which plainly further the interests of the members and ultimately the industry as a whole, yet these are not expressly referred to within the stated objects. It cannot sensibly be argued that such activity is not part of the purposes of the Association nor that it is other than an entirely separate activity from the lobbying of politicians on legislation and public matters.

18. Furthermore, an examination of the stated objects does not reveal that political lobbying is the primary objective with other items being subordinate to that. Those stated objects are separate, distinct and not apparently ranked in any order of priority. Fairly, the Association has not maintained that they are so ranked.

5 19. At the initial hearing the Tribunal was presented with a large volume of documents, covering two decades of activity. The Association served copies of handbooks, press releases, website pages, some reports on the Olympics and position papers, the members' welcome pack and over 200 pages of extracts from yearbooks. What is noticeable, however, is how few examples there are of material prepared for  
10 the purposes of political lobbying. Essentially, there are position papers or representations on the effect of the Olympics on tourism, visa policy and the tour operators' margin scheme; and these topics are revisited or repeated in briefings and press releases. However, an examination of the material as a whole illustrates that the Association is engaged in a wider range of activity, which may be properly  
15 characterised as the promotion of the tourist industry in general and the interests of the membership in particular. The evidence was that the Association was a conscientious and effective trade association, but not that it was a lobbying organisation.

20 20. The Tribunal had concluded from its consideration of the evidence that "most of the members of the Association are associate members who join the Association not because of the lobbying activities of the Association but instead for the networking and marketing opportunities it provides to the associate members" ([38] of the FTT decision). While the Upper Tribunal had discounted the subjective views of the members, it was noteworthy that the majority of members considered the networking  
25 and marketing activities were the most important.

30 21. The evidence chosen by the Association itself was not sufficient to show that the test was met. The Association provided a range of services to its members and undertook activities extending well beyond political lobbying for the benefit of the tourist industry as a whole. It is not possible to discern lobbying as preeminent in this range of activities. The Association is far more than a pressure group on legislators but rather it seeks to promote the tourist industry and its members' interest in a variety of ways, which are essentially designed to provide commercial benefits.

### **Appellant's Case**

22. Mr Brown for the Association submitted as follows.

35 23. The Association concurred with HMRC's point that while "lobbying" was a useful shorthand description, the legislative phrase in Item 1(d) was "make representations to the Government on legislation and other public matters". Accordingly, any everyday connotations of "lobbying" should be discounted.

40 24. HMRC had emphasised that the Association was not *purely* a lobbying organisation but that was not the correct test. What mattered was "the primary purpose of" the Association (Item 1(d)). It had never been denied that the Association

carried out a number of day-to-day activities, and that those were some of the valuable benefits of membership (that was clear from the handbooks and other material presented by the Association), but the test centred on the primary purpose.

25. The evidence that the test was satisfied was clear from three sources:

5 (1) The constitution of the Association gave prominence to the making of political representations on behalf of the tour operators industry – as already found by the Tribunal ([33] of the FTT Decision).

10 (2) The extensive documentation presented gave plentiful examples of lobbying activities – the 1999 members’ handbook alone set out ten areas of legislation on which representations had been made.

(3) The evidence of Mr Jenkins – tested extensively under cross-examination – was clear that the Association’s primary purpose was lobbying; he had estimated that 80% of his time and the organisation’s resources were devoted to lobbying.

### 15 **Consideration and Conclusions**

26. We have approached this reconsideration on the basis proposed to and accepted by the parties as set out at paragraph [6] above. We are grateful to the Upper Tribunal for the correction and clarification that the appropriate test is not a subjective one, as adopted by the VAT Tribunal in the *Bookmakers’ Protection Association* case, but  
20 instead “an objective one, to be answered primarily by an examination of the stated objects and the actual activities of the body in question.”

27. We have refreshed our memories as to the evidence (both documentary and oral) considered at the earlier hearing (summarised at paragraphs [17] to [31] of the FTT Decision, which we adopt here without repetition), some of which was also helpfully  
25 restated in the bundles prepared by the parties for this hearing. We have carefully noted the Upper Tribunal’s determination that, “The aims and purposes of the Association are an objective concept, and may be quite distinct from the subjective views or motives for joining of individual members. The test is to be answered primarily by an examination of the stated objects and the actual activities of the  
30 Association; the subjective views of the members or officers of the Association may throw some light on that enquiry.” We have re-examined and re-evaluated the evidence in that light.

28. Having carefully considered that evidence and the representations made by both parties at the hearing, we conclude as follows.

35 29. Although the Association has a number of objects, the Association does have a predominant purpose. It is clear to us from the evidence that the primary object of the formation, existence, and continuation of the Association was to provide a political lobbying body representing tour operators based in Europe. That was and is the Association’s predominant purpose. Even without the benefit of the extensive  
40 evidence that we have seen, the Upper Tribunal noted:

“[5] ... It is therefore of some interest to note that on a form completed by an officer of Her Majesty's Customs and Excise on 1 December 1992 in the course of a VAT compliance visit, the structure and organisation of the business was described in the following terms:

5           *'Trade association for tour operators and suppliers to tour operators (in-bound to Europe). They represent trade by lobbying the EC Parliament regarding European legislation that affects tour operators. Clients pay annual subscriptions for which they receive the*  
10           *mentioned service and consultation via meetings and newsletters. A conference is held once a year for which receipt of payment.'*

15           It seems reasonable to infer that this description reflected what the officer was told about the activities of the Association, and (since no exemption was sought at the time) that the prominence given to political lobbying of the European Parliament was not prompted by any considerations of self-interest, but was rather an accurate reflection of a main, if not the main, activity of the Association in these early years.

...

20           [11] It is convenient to note at this point that, despite the length of the period in issue, both sides have been content to proceed on the footing that the position remained essentially unchanged throughout, with the result that the exemption is either available for the whole of the period or none of it.”

25           30. Although the Association has a number of objects other than lobbying and carries on a number of other activities, we are satisfied that none of those constituted aims or purposes which were at least on a par with those lobbying activities. Instead, the evidence taken as a whole establishes on (and in our view, beyond) the balance of probabilities that the Association had a predominant primary purpose which is to provide a political lobbying body representing tour operators based in Europe.

30           31. Having reached that conclusion on the predominant primary purpose of the Association, we consider that it satisfies the requirement in Item 1(d): “to make representations to the Government on legislation and other public matters which affect the business or professional interests of its members”. Thus Item 1(d) is satisfied.

35           **Decision**

32. For the reasons set out in paragraphs [26] to [31] above, the appeal is ALLOWED.

33. 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.

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**PETER KEMPSTER  
TRIBUNAL JUDGE**

**RELEASE DATE: 19 February 2014**

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