



TC04169

Appeal number: TC/2012/08248

VALUE ADDED TAX – charity – supplies of catering services – whether supplied in the course or furtherance of a business – provision of books and publications – whether supplied for a consideration – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LIVERPOOL MUSLIM SOCIETY

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MISS SUSAN STOTT FCA CTA**

Sitting in public in Liverpool on 26 August 2014

Mr Zikrullah Omope of Ziko Associates for the Appellant

Mrs Pat Roberts of HM Revenue & Customs for the Respondents

DECISION

5 *Background*

1. The Appellant (“the Society”) is a charity the objects of which include promoting Islam as a religion, the relief of need, the advancement of education amongst Muslims in the North West of England and the provision of social welfare services. The Society has developed and operates the Islamic Cultural Centre at Hatherley Street, Liverpool (“the Centre”). The Centre comprises a Mosque together with multi-purpose halls and rooms used for educational, welfare and social purposes.

2. On 21 July 2011 the Society applied to be registered for VAT. It was subsequently registered for VAT with effect from 1 August 2007. The Society made its first VAT return for the period 1 August 2007 to 30 September 2011. The return showed output tax of £2,747, input tax of £132,110 giving a net sum being reclaimed from HMRC of £129,362.

3. The Society contends that it has taxable income comprising supplies in the course of catering and supplies of books and publications. The bulk of the input tax being reclaimed in the first return relates to construction services supplied to the Society for the purposes of constructing the Centre.

4. Following a visit to the Centre and subsequent correspondence HMRC have refused the claim to input tax credit. That decision was notified to the Society in a letter dated 31 May 2012. At the same time HMRC stated that they intended to de-register the Society. The basis of those decisions (“the Decisions”) was that the Society was not making supplies in the course or furtherance of a business.

5. The Society appealed the Decisions in a notice of appeal dated 24 August 2012. The grounds of appeal were essentially that the Society was entitled to be registered and reclaim input tax on the basis that it was making taxable supplies in the course or furtherance of a business.

6. At the hearing of the appeal Mr Omope who appeared for the Society, asked us to deal with a number of associated matters. In the end both parties agreed that the following issues fall to be resolved in this appeal:

(1) Whether and to what extent the Society has made taxable supplies in the course or furtherance of a business.

(2) Whether and to what extent the Appellant was entitled to credit for input tax.

(3) Whether the decision to de-register the Society was reasonable.

7. We heard evidence on behalf of the Society from Mr Omope and from Mr Ahmed Farah. Mr Omope is a trustee of the Society. He has been involved with the Society, on and off, since 1983. Mr Farah is a trustee and treasurer of the Society. He has been involved with the Society since 2002.

5 8. We heard evidence on behalf of HMRC from Mrs Joanne Murphy, the officer of HMRC who made the Decisions.

Findings of Fact

9. On the basis of the evidence we make the following findings of fact.

10 10. We have already set out the Society's charitable objects in paragraph 1 above. In 1992 the Society obtained planning permission for the following development:

"To erect a three storey Islamic Cultural Centre (halls, kitchen, bookshop, classrooms and offices) in a phased development, including a dome on the corner of Mulgrave Street and Hatherley Street."

15 11. The first phase of construction was completed in or about 1992 and comprised a single storey building. We understand that it was accepted that those works were correctly zero-rated for VAT purposes.

20 12. By 2007 funds had been raised to enable the second and final phase works to be carried out. This involved adding a first and second floor to the existing structure. However the walls and steel supports already in place were not strong enough and a considerable part of the existing structure was demolished. Work commenced in August 2007.

25 13. Work in the final phase was carried out by a construction company called Morgan Ashurst plc (now known as Morgan Sindall). The Society provided Morgan Ashurst with a certificate for zero-rating purposes to the effect that the building would be used solely for a relevant charitable purpose. The works were carried out and Morgan Ashurst invoiced for their construction services on the basis that they were properly zero-rated. The works were completed by April 2008. By 20 May 2009 the Society had paid
30 Morgan Ashurst the total sum invoiced of £611,000.

35 14. In 2010 there was a VAT visit to Morgan Ashurst. The officer carrying out that visit was made aware that the construction services supplied to the Society by Morgan Ashurst should not have been zero-rated because what had been built was not a new building, but an extension to the existing building. It seems that Morgan Ashurst drew their incorrect VAT treatment to the attention of the officer after the officer had indicated he or she wished to look at this particular contract as part of a sample.

15. It is not clear why Morgan Ashurst had not realised at the time of the contract and invoicing that their construction services ought to have been

standard rated. This was a one-off contract for the Society, but one might expect Morgan Ashurst to be aware how their supplies should be treated for VAT purposes in these circumstances. The certificate issued by the Society merely confirmed that the building was to be used for a qualifying purpose. It is up to the contractor to ensure that all other conditions for zero-rating are satisfied. It must have been clear to Morgan Ashurst that the works involved an extension and could therefore not qualify for zero rating.

16. HMRC operate an extra statutory concession for traders who rely on an incorrect customer declaration claiming eligibility for zero rating. Where a supplier takes all reasonable steps to check the validity of the declaration but fails to identify an inaccuracy and zero rates the supply, HMRC will not seek to recover the VAT from the supplier. Mr Omope invited us to find that Morgan Ashurst had taken all reasonable steps to check the validity of the declaration. We do not have evidence as to what steps they took. In any event, it was not an inaccuracy in the Society's declaration as to its intended use which led to the incorrect zero rating. It was the failure of Morgan Ashurst to identify that the other conditions for zero rating were not satisfied.

17. On 19 May 2010 Morgan Ashurst issued the Society with a VAT only invoice for £105,325 being the VAT due on the contract price. The Society's first VAT return claimed input tax credit of £132,110. The balance of £26,785 included VAT on the fitting of a washroom, furnishings and carpets at the Centre and VAT on general overheads.

18. In September 2011 there was correspondence between the Society and Pinsent Masons on behalf of Morgan Ashurst. It seems from that correspondence that the Society had reluctantly decided to register for VAT with a view to then reclaiming the VAT being charged by Morgan Ashurst. The application for registration was submitted to HMRC on 21 July 2011. The business activities were described as "*sale of hot meals to luncheon club members*". The estimated value of taxable supplies in the next 12 months was £5,000.

19. The first VAT return described above was submitted by the Society on 7 November 2011. Shortly thereafter Mrs Murphy commenced her enquiries into that return. During the course of those enquiries and in this appeal the Society contends that it makes taxable supplies of catering services and of books and publications. We shall now consider our findings of fact relevant to the use of the Centre and in particular the circumstances in which the Society provides catering services and books and publications.

20. People using the Centre include 3-4,000 people who attend for Friday prayers and on other days of the week. They are not necessarily members of the Society. Membership of the Society is obtained simply by signing the register of members which gives that individual a right to participate in the election of officers.

21. One of the uses of the Centre since the early 1990s has been as a day centre providing various social welfare services. People attending the day centre include elderly people, people who are destitute and people with disabilities. They receive advice on welfare benefits, health and well being.
5 Trips are arranged to places of interest. Lectures and presentations are given on various topics including civic duties and responsibilities, employment matters and setting up in business. Hot meals are also provided at lunchtime on weekdays and we describe this service in more detail below. Liverpool City Council provides a grant for the provision of welfare services through the day
10 centre.

22. Until August 2010 the day centre operated exclusively from the Centre, which also included kitchen facilities used to provide hot meals. However the accommodation available in the Centre became too small when alterations to the Mosque were made. In August 2010 the Society started to use a portakabin
15 at the rear of the site as the day centre. This included a new kitchen and canteen area for meals to be cooked and consumed. After August 2010 some activities including the serving of some meals and social activities continued to be conducted in the main building. The portakabin had cost approximately £18,000 plus VAT of £2,625 which is part of the input tax credit on the first
20 return.

23. The provision of meals at the day centre had grown out of the meals on wheels service operated by Liverpool City Council in the 1980s. There was a low take up by the Muslim community. The Society therefore started to provide a meals on wheels service and also canteen meals at a day centre
25 which had been established partly for that purpose. By the time the Centre was completed the Society had developed a fully fledged day centre which operated from the Centre. The day centre had a manager, deputy manager, three project workers, a cook and a cleaner all employed by the Society. The President of the Society would also cook on a voluntary basis.

30 24. In 2010-11 the Society received a grant of £60,000 for the day centre from Liverpool City Council Community Resources Unit. Approximately £45,000 of this was spent on salaries. The grant did not cover the purchase cost of food and materials which were approximately £8,000 and which were funded by the Society.

35 25. People who have meals are predominantly but not exclusively Muslims. Originally the Society charged recipients £1.25 per head for a meal. Over the years the price has increased. In 2011 the cost was £2.00 per head and it is now £2.50 per head. Individuals who cannot afford to pay for a meal receive a free meal. We did not have direct evidence as to the extent to which meals
40 were provided free of charge and understandably Mr Omope was wary of giving an estimate which might have been misleading. We consider below the extent of free meals.

26. We were provided with an Income and Expenditure Account for the Society covering the period August 2007 to December 2011. As far as the meal service is concerned this showed sale of subsidised meals of £17,115 with a cost of food materials of £23,105.

5 27. The Income and Expenditure Account showed the following entries:

	<i>Income</i>	<i>£</i>
	<i>Sale of Subsidised Meals</i>	<i>17,115</i>
	<i>Gifts and Donations (Restricted)</i>	
	<i>Building Project Fund</i>	<i>806,967</i>
10	<i>Disaster & Hardship Relief Fund</i>	<i>159,886</i>
	<i>Gifts and Donations (Unrestricted)</i>	
	<i>General Donations</i>	<i>383,696</i>
	<i>Rental Income</i>	<i>107,594</i>
	<i>Grants</i>	<i>254,919</i>
15	<i>Total Income</i>	<hr/> <i>1,730,177</i>
	<i>Cost of Goods Sold (Food Materials)</i>	<i>23,105</i>
20	<i>Gross Profit</i>	<i>1,707,072</i>

28. Expenses in the Income and Expenditure Account included “Books and Publications” which was £103,694.

25 29. The Centre itself has different rooms for different activities. The rooms are used by members and those attending the Mosque, those attending the day centre and possibly other community groups. Members of the Society and others who use the Centre make gifts and donations either to specific funds or generally. Some people make one-off donations, others make regular donations. Specific funds are maintained, known as “the Building Project Fund” and “the Disaster & Hardship Relief Fund”. The Building Project Fund
30 is for capital projects and not for the general upkeep and maintenance of the

Centre. The Disaster and Hardship Relief Fund receives donations for specific appeals, such as that following the 2004 Indian Ocean Tsunami. Grants are then made from the fund to organisations such as Muslim Aid. Donations for the Disaster & Hardship Relief Fund are generally made following an announcement at Friday prayers. Charities are also permitted on occasion to make collections in the Centre. Such collections go through the Society's accounts and a cheque is issued to the charity.

30. Maintenance and upkeep of the Centre and the other expenses of the Society in pursuing its charitable objects are paid for out of "General Donations" and the "Rental Income" which relates to rental property owned by the Society. The only way people attending the Centre make a financial contribution to its upkeep is through the General Donations, although occasionally an individual might contribute to paying a specific bill.

31. In the Income and Expenditure Account the General Donations of £383,696 are those which the Society contends are the consideration for supplies of books and publications. The Society provides booklets, leaflets and DVDs the aim of which is to educate and inform people about issues affecting people of the Muslim faith. Copies of the Koran are also available and we saw an invoice from August 2010 where the Society purchased 50 copies of the Koran at a unit price of £7 per copy. The books and publications do not have a cover price, although they are available to purchase from commercial organisations. The Society maintains a stock of books and publications. Individuals might also request specific publications not in stock and the Society will obtain them. Some books are held as reference books to be read at the Centre but most are available to individuals to take away and keep.

32. The Centre does not have a permanent bookshop, although there was provision for one in the planning permission referred to above. The Society considered that it was better to make books and publications available with provision for donations because the books and publications being provided are considered essential to individuals practising the Muslim faith.

33. There is an area in the Centre described as a library where the books and publications are kept. It was not clear from the evidence whether this is a separate room. Next to the books is a box with a sign marked "Donations". Mr Omope confirmed that the inference to be drawn is that the books and publications are available to be taken but there is a hope that individuals will make a suitable donation. There is no suggested amount and the Society has no interest in knowing how much an individual might have donated or indeed whether an individual has made any donation at all.

34. Mr Omope considered it unlikely that an individual would make a donation without taking a book or leaflet. He also thought that some individuals would make a donation to cover a book they were taking for themselves or as a gift for someone else, or in relation to books taken by someone else whether known to them or not. Mr Omope may well be right but

we cannot identify on the evidence before us the extent to which such instances might occur or the intention of persons making donations.

5 35. Books may be taken by people who regularly attend the Centre and by occasional visitors. There are also approximately 70 group visits to the Centre in any year, including visits by schools and colleges. There is no admission charge for entry to the Centre, but groups are given an opportunity to make donations which are treated as General Donations.

10 36. Occasionally the Centre organises exhibitions where antiquities, rare books and other documents are displayed. This might include for example historic copies of the Koran. People have an opportunity to make donations for the pleasure of being able to see the exhibition and we understand that these donations are included within the General Donations. Again, there is no suggested level of donation.

15 37. It was put to Mr Omope that the Centre was predominantly a place of worship and as such no activities at the Centre were in the course or furtherance of a business. Mr Omope stated that every activity done in a fair and just manner and in accordance with Allah's guidance is an act of worship. Further, that Islam is a complete way of life so that a place of worship encompasses every lawful activity. We accept that is the case, and we accept
20 that there is no reason why we should not find that business activities are carried on from the Centre if the facts support such a conclusion.

25 38. For completeness we should record that the Society submitted its second VAT return for the quarter ended 31 December 2011 in February 2012. The Society claimed a repayment of £1,252 in that return which was paid by HMRC without question. We accept Mrs Murphy's evidence that this repayment "*slipped through the net*". It does not affect our findings of fact above, nor is it relevant to the issues which we must decide on this appeal.

Decision and Reasons

30 39. The first issue for determination, whether and to what extent the Society is making taxable supplies in the course or furtherance of a business can be broken down further as follows:

(1) Do the Society's activities in providing meals amount to the carrying on of a business?

35 (2) Is the Society's General Donation income consideration for a supply of books and publications?

40. Article 9(1) of the Principal VAT Directive (*EC Council Directive 2006/112/EC*) provides as follows:

40 " 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."

41. Article 9 is implemented within the United Kingdom by section 4 of the *Value Added Tax Act 1994* (“VAT Act 1994”) which sets out the scope of VAT on a taxable supply:

5 “ (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

10 (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.”

42. Section 5 VAT Act 1994 sets out what is meant by a supply of goods. In particular section 5(2)(a) provides that:

 “‘supply’ in this Act includes all forms of supply, but not anything done otherwise than for a consideration.”

15 43. A taxable person is a person who is registered or required to be registered under the VAT Act 1994 (section 3(1)). Where a taxable person incurs input tax that input tax can be recovered pursuant to sections 24-26A VAT Act 1994. For these purposes “input tax” is defined by section 24(1) as follows:

20 “ Subject to the following provisions of this section, “input tax”, in relation to a taxable person, means the following tax, that is to say –

- (a) VAT on the supply to him of any goods or services
- (b) ...

25 being (in each case) goods or services used for the purpose of any business carried on or to be carried on by him.”

30 44. In relation to the provision of meals, the question is whether that activity is carried on in the course or furtherance of a business. It is accepted that the £2 paid for a meal is consideration for a supply of catering services.

45. In relation to the provision of books and publications the question is whether there is a supply at all. In particular whether there is any consideration for the provision of books and publications.

35 46. Mrs Roberts submitted that:

(1) The meals provided were subsidised to such an extent that they were not run on a commercial basis. In particular Liverpool City Council paid for the staff cooking and serving those meals including the chef.

(2) There was no sufficient link between donations made and books and publications obtained. Books were freely available irrespective of any donation. In the absence of consideration there was no supply.

5 47. Mr Omope submitted that the meals were supplied in the course or furtherance of a business and that the books and publications were supplied for a consideration.

48. We set out below the legal principles to be applied in resolving these issues and how we apply those principles to the facts of the present appeal.

10 (1) *Provision of Meals - Course or Furtherance of a Business*

49. In *Customs and Excise Comrs v Lord Fisher* [1981] STC 238 Ralph Gibson J identified 6 indicia as to whether an activity amounts to a business for VAT purposes. They are well established and were cited with approval by Lord Slynn in the House of Lords in *Institute of Chartered Accountants in*
15 *England and Wales v CCE* [1999] STC 398 at 404:

20 “In regards to 'business' for the purposes of the 1994 Act Ralph Gibson J held in *Customs and Excise Comrs v Lord Fisher* [1981] STC 238 at 247 on earlier authority 'that "business" is or may be in particular contexts a word of very wide meaning', but that 'the ordinary meaning of the word "business" in the context of this Act excludes, in my judgment, any activity which is no more than an activity for pleasure and social enjoyment', though the fact that the pursuit of profit or earnings was not the motive did not prevent an activity from being a business if in other respects it plainly was. He referred (at 245) to six indicia listed by
25 counsel for the commissioners as the test as to whether an activity was a business- was it (a) a 'serious undertaking earnestly pursued'; (b) pursued with reasonable continuity; (c) substantial in amount; (d) conducted regularly on sound and recognised business principles; (e) predominantly concerned with the making of taxable supplies to
30 consumers for a consideration; and (f) such as consisted of taxable supplies of a kind commonly made by those who seek to make profit from them.”

50. Since the hearing of the present appeal the Upper Tribunal has re-affirmed that it is necessary to take into account the charitable activities of a
35 body contending that it is carrying on a business in pursuing its charitable objects. In *Commissioners for HM Revenue & Customs v Longridge on the Thames* [2014] UKUT 0504 (TCC) Rose J conducted an analysis of various domestic and ECJ authorities and the factors relevant to the question of whether there is an economic activity or business. In particular she considered
40 the relevance of the fact that the price charged for a service is subsidised. She referred to *C & E Commissioners v Morrison's Academy Boarding Houses Association* where the Court of Session held that Morrison's Academy was

making a taxable supply in the course or furtherance of a business even though it did not seek to make a profit.

51. In *Customs & Excise Commissioners v Yarburgh Children's Trust* [2001] EWHC 2201 (Ch) Patten J was concerned with a charity providing day care facilities for children. He stated at [23]:

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“... the motive of the person who makes a supply of goods or services is not relevant to and more particularly cannot dictate the correct tax treatment of that transaction ... But the exclusion of motive or purpose in that sense does not require or in my judgment allow the Tribunal to disregard the observable terms and features of the transaction in question and the wider context in which it came to be carried out. This is because the transaction if looked at in isolation will not usually enable the Court to decide whether it was carried out in the course or furtherance of a business which is the test under VATA 1994 Section 4(1) or to use the language of the Sixth Directive whether it was a supply of services effected for consideration by a taxable person acting as such: i.e. by a person who is carrying out some form of economic activity: see Articles 2 and 4(1). This test necessitates an enquiry by the Tribunal into the wider picture. It will need to ascertain the nature of the activities carried on by the person alleged to be in business, the terms upon which and manner in which these activities (including the transaction in question) were carried out and the nature of the relationship between the parties to the transaction. This is not intended to be an exhaustive or particularised list. But it is clear that the questions posed by Gibson J in Lord Fisher's case or by the Court of Session in *CCE v Morrison's Academy Boarding House Association* [1978] STC 1 simply could not be answered by reference only to the fact that a service was provided at a price. That is the beginning not the end of the enquiry.”

52. A similar conclusion was reached by Evans-Lombe J in *Customs & Excise Commissioners v St Paul's Community Project Ltd* [2004] EWHC 2490 (Ch).

53. In *Longridge on the Thames*, having quoted that passage from *Yarburgh Children's Trust*, Rose J then stated as follows at [38]:

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“ The judge concluded that the ‘overwhelming impression’ gathered from the evidence was that the playgroup was not predominantly concerned with the making of taxable supplies for a consideration. The factors he considered relevant included that the fees were fixed to maintain a balance between remaining affordable and meeting its operating costs. I respectfully share Patten J's conclusion that it is possible and indeed necessary to take into account the charitable nature of the activity as part of its ‘observable terms and features’ whilst avoiding the twin heresies of taking account of the purpose for which the

activity is conducted or regarding an activity as not ‘economic’ because it is non-profit making.”

54. HMRC’s case is that the Society is not making taxable supplies in the course or furtherance of a business. Mrs Roberts relied on the decisions in Morrison’s Academy and Lord Fisher. In relation to whether there was a business she also relied on a decision of the First-tier Tribunal in *The People’s Dispensary for Sick Animals v Commissioners for HM Revenue & Customs [2012] UKFTT 362 (TC)*. We do not consider that the PDSA appeal adds anything to the principles stated in the authorities cited above, although it does illustrate the application of those principles.

55. We do not consider that the subsidy from Liverpool City Council is particularly relevant to whether the Society is providing catering in the course or furtherance of a business. A business can still be carried on where the cost to consumers is subsidised by grants. As appears from the authorities referred to above it is relevant, although not determinative, that the provision of meals is non-profit making. Mr Omope accepted that the Society did not seek to make a profit from the provision of meals.

56. The grant received from Liverpool City Council covered the salary of a cook but did not cover the cost of food and other cooking materials. Taking that into account it is clear that the income obtained from the sale of meals did not cover the direct costs of food materials. So the Society was making a gross loss on the meals. It is probably more accurate to say that the Society subsidised the cost of meals to people attending the day centre. That is consistent with the Society’s charitable objects which include the relief of need and the provision of social welfare.

57. We note also that the President of the Society provided his services on a voluntary basis, although the extent to which he did so was not identified in the evidence. In any event, we do not consider that this is a significant factor in the context of this appeal.

58. We consider that 5 of the 6 indicia in *Lord Fisher* are satisfied in the present case. The remaining item on which we must focus is whether the activity of providing catering is “*predominantly concerned with the making of taxable supplies to consumers for a consideration*”.

59. The Society is providing catering services for a consideration. The amount charged is intended to be heavily subsidised so that the Society does not recover the direct costs incurred. Where individuals are unable to afford the cost of a meal they are provided with a free meal, although there was no evidence before us as to the extent to which meals were provided free of charge.

60. The income produced by the Society in relation to the sale of meals was modest compared with its other sources of income, in particular General Donations and rental income. Even if no meals had been provided free of charge, the total sales value of meals was £17,115 over a 52 month period.
5 That equates to £76 per week or approximately 8 meals per day. If that figure is right it would suggest that the activity itself was not very significant in the context of the Society's charitable activities generally. More likely however is that were a significant number of free meals provided. Either way it tends to support HMRC's case that the provision of meals was not carried on by way
10 of business.

61. In all the circumstances we consider that the Society was not supplying meals in the course or furtherance of a business. It was doing so as part of its charitable objects, providing free or subsidised hot meals and social welfare. This aspect of the Society's activities is not predominantly concerned with
15 making taxable supplies to consumers for a consideration.

(2) *General Donations – Consideration for Books and Publications*

62. In *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509 the CJEU was concerned with the liability to VAT of sums given by passers-
20 by to the player of a barrel organ on the public highway. The CJEU considered that there was no liability to VAT. It stated as follows

“ 13. In its judgments in *Staatssecretaris van Financiën v Coöperatieve ardappelenbelaarplatts* (Case 154/80)[1981] ECR 445 at 454, para 12 and *Naturally Yours Cosmetics Ltd v Customs and Excise Comrs* (Case 230/87)[1988] STC 879 at 886, [1988] ECR 6365 at 6389, para 11, the
25 court stated on this point that the basis of assessment for a provision of services is everything which makes up the consideration for the service and that a provision of services is therefore taxable only if there is a direct link between the service provided and the consideration received (see also the judgment in *Apple and Pear Development Council v Customs and Excise Comrs* (Case 102/86)[1988] STC 221 at 237,
30 [1988] ECR 1443 at 1468, para 11, 12).

14. It follows that a supply of services is effected 'for consideration' within the meaning of art 2(1) of the Sixth Directive, and hence is
35 taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

40 15. In a case such as that which is the subject of the main proceedings, it is clear that those conditions are not fulfilled.

16. *If a musician who performs on the public highway receives donations from passers-by, those receipts cannot be regarded as the consideration for a service supplied to them.*

5 17. *First, there is no agreement between the parties, since the passers-by voluntarily make a donation, whose amount they determine as they wish. Second, there is no necessary link between the musical service and the payments to which it gives rise. The passers-by do not request music to be played for them; moreover, they pay sums which depend not only on*
10 *the musical service but on subjective motives which may bring feelings of sympathy into play. Indeed some persons place money, sometimes a considerable sum, in the musician's collecting tin without lingering, whereas others listen to the music for some time without making any donation at all.*

15 18. *In addition, contrary to the arguments of the German and Netherlands governments, the fact that the musician plays in public with a view to collecting money and actually receives certain sums in so doing is of no relevance for the purpose of determining whether the*
20 *activity in question constitutes a supply of services for consideration within the meaning of the Sixth Directive.*

25 19. *That interpretation is not affected by the fact that a musician such as Mr. Tolsma solicits money and can in fact expect to receive money by playing music on the public highway. The payments are entirely voluntary and uncertain and the amount is practically impossible to determine.”*

30 63. *In Church Schools Foundation Ltd v Commissioners of Customs & Excise [2001] EWCA Civ 1745 the Court of Appeal was concerned with donations to a charity by a company owned by the charity and used to fund building works to the charity's property. It quoted the passage above from Tolsma and held that there was no direct link between the execution of the building works and the donations. At [43] the Vice Chancellor stated:*

35 *“ If an individual or unassociated charity makes a donation to another charity for its general purposes the implementation of those general purposes could not be a supply of services for consideration in the form of the donation. If authority were needed for such an obvious proposition it is to be found in Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarpplaats GA [1981] ECR 445 and Apple and Pear Development Council v Customs and Excise [1988] STC 221. In my judgment it makes no difference if the donation is for a specific purpose of the charity. In such a case there is no supply of services or*
40 *consideration "for" that supply. Then let it be assumed that there is some relationship between the donor and the recipient charity. Of itself that cannot provide the necessary link between the supply consisting of the*
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execution of the specific purpose and the donation. This proposition is also demonstrated by the same two cases.”

64. HMRC relied on decisions of the VAT Tribunal in *Newport County AFC Social Club Ltd (Decision 19807)* and in *Friends of Ironbridge Gorge Museum (Decision 5639)*. Again, these decisions merely illustrate the application of the principles described above.

65. Mr Omope relied on an extract from Charities Guidance Notes published by HMRC. In particular various paragraphs giving examples of the VAT treatment where a charity makes an admission charge to view the charity’s property and also provides a book about the property where a donation is made.

66. We must decide this appeal on the basis of the law applied to the particular facts we have found. We do not consider that the guidance covers the particular factual situation we are concerned with in this appeal. In any event, it is simply HMRC’s view of the law and is not authoritative. We do acknowledge however that the examples include reference to whether what is described as a donation can be consideration for the taxable supply of a publication. We accept that the description given of “donation” is not determinative of the issue. It is necessary on the facts to consider whether something is paid as consideration for the goods supplied. In particular whether there is a direct link between the payment made and the goods supplied.

67. The absence of profit does not arise in relation to books and publications. If the donations are consideration for a supply of books and publications then the Society would make a profit. The General Donations were £383,696 and the cost of books and publications was £103,694. Subject to any stock adjustments, the Society on the face of it made a gross profit of £280,002 on books and publications.

68. It is clear to us however that there is no sufficient link between the donations and the books and publications.

69. The Society is a charity which has as one of its objects the advancement of education amongst Muslims in the North West of England. One of the ways in which it fulfils that object is to make available the books and publications. Consistent with its charitable objects it chooses to do so in a way which does not require payment. The books and publications have no set price. Whatever sums are received by way of donation cannot be related to specific books or publications. It is not a question of making a profit, selling them at cost price or selling them at a subsidised price. Rather the Society makes them freely available because they are essential reading for individuals who practise the Muslim faith.

70. The General Donations received in the box placed next to the books are exactly that - general donations for the upkeep of the Centre. They are not consideration for the supply of books or publications. There is a hope that people who attend the Centre will make a donation when they take a book. It is clear that substantial donations are received in this way. There is no way of knowing whether a particular donation is accompanied by the taking of a book, and if so whether the donation is significantly more or less than the cost of the book being taken. Alternatively, whether it is simply a donation for the upkeep of the Centre as this seems to be the only way in which such donations are generally made.

71. In our view as a matter of law the position is analogous to that of Mr Tolsma. He played a barrel organ in the hope that passers-by would make a donation. The donations made were entirely voluntary. The amount donated would depend very much on the subjective motives of the passer-by who may linger to listen to the music or simply make a donation and walk quickly past.

72. In all the circumstances we are satisfied that the Society is not making a supply of books and publications because there is no consideration for such a supply.

73. We note that the Society's treatment of the General Donations prior to Morgan Ashurst issuing the VAT only invoice is consistent with the General Donations not being consideration for a supply of books and publications. If the Society had been supplying books and publications for a consideration then that supply would have been taxable, albeit zero rated. In the absence of any agreement with HMRC the Society would have been over the threshold for compulsory registration. However it did not register for VAT. For the reasons given above, the Society was right not to register because it was not making taxable supplies.

74. The answer to the first issue therefore in relation to both catering and books and publications is that the Society was not making any taxable supplies in the course or furtherance of a business.

75. Our answer in relation to the first issue also determines the second issue. The VAT incurred by the Society was not used for the purpose of any business carried on by the Society. As such it was not input tax within section 24(1) VAT Act 1994.

76. Turning to the third issue before us, whether it was reasonable of HMRC to decide to de-register the Society for VAT purposes. That depends upon whether the Society is making taxable supplies.

77. There was a suggestion in some correspondence from HMRC that one ground upon which the decision to de-register was taken was the low level of income from meal sales. That is not a relevant factor if it was intended to suggest that a trader with a small taxable income obtained in the course or

5 furtherance of a business may not be registered for VAT. Mr Omope was right to say that the issue is whether there are taxable supplies made in the course or furtherance of a business. For the reasons given above we are satisfied that the Society was not making taxable supplies in the course or furtherance of a business. HMRC are therefore entitled to de-register the Society.

78. Finally, HMRC contended at one stage that the VAT claimed as input tax had not been paid and by virtue of section 26A VAT Act 1994 the Society was not entitled to input tax credit. Section 26A provides as follows:

10 “(1) Where –

(a) a person has become entitled to credit for any input tax,
and

15 (b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of six months following the relevant date, he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.

20 (2) For the purposes of subsection (1) above “the relevant date”, in relation to any sum representing consideration for a supply, is –

(a) the date of the supply; or

(b) if later, the date on which the sum became payable.”

25 79. It is true that an amount of £105,325 remains outstanding to Morgan Ashurst. However during the course of the hearing Mrs Roberts properly conceded that for VAT purposes the payments made by the Society should be treated as including an appropriate proportion of VAT payable at that time. Hence the sum £105,325 outstanding in 2010 represented a sum of £89,816 due for the construction services together with VAT thereon of £15,509. Strictly therefore it is only the sum of £15,509 which has not been paid and
30 could fall within section 26A. For the reasons we have given however the denial of credit under section 26A does not arise because the Society is not entitled to recover the input tax in any event.

35 80. In the course of argument Mr Omope relied on the fact that energy bills received by the Society had been charged VAT at the rate applicable to businesses, whereas charities and non-profit organisations are entitled to pay VAT at 5% on energy used for non-business purposes. We accept that is the case but it does not help us to decide, on the basis of our findings of fact, whether or not the Society incurred expenditure in the furtherance of a business. Whether or not the Society would be entitled to a refund of VAT
40 paid to energy suppliers is not a matter for the Tribunal.

Conclusion

81. For the reasons given above we are satisfied that the Society was not making supplies of meals in the course or furtherance of a business, and in relation to General Donations it did not receive income in consideration for supplies of books and publications. In the circumstances the Society is not
5 entitled to be registered for VAT. In the light of our conclusions we must dismiss the appeal.

82. 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
10 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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JONATHAN CANNAN

TRIBUNAL JUDGE

RELEASE DATE: 4 December 2014