[2017] UKFTT 0325 (TC)

TC05803

Appeal number: TC/2015/07089

VALUE ADDED TAX – Local Healthwatch Organisation – whether carrying on economic activity for VAT purposes – held yes - whether public body for purposes of Article 13.1 Principal VAT Directive – held no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEALTHWATCH HAMPSHIRE C.I.C. **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
CHRISTOPHER JENKINS

Sitting in public at Southampton on 4 and 5 April 2017

Michael Conlon QC, instructed by PKF Francis Clark with Princecroft Willis, for the Appellant

Isabel McArdle, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This Appeal concerns whether a Local Healthwatch organisation ("LHO") is in business for VAT purposes when it performs Healthwatch services under a contract with a local authority ("LA").

2. Healthwatch Hampshire C.I.C. ("HH") appeals against a decision on a review by HMRC dated 11 November 2015 which upheld a previous HMRC decision dated 29 June 2015.

3. The key questions to be determined by the tribunal are:

(1) Do the activities of HH under its contract with Hampshire County Council ("HCC") amount to economic activity such that it should be registered for VAT or are they more correctly described as the performance of public functions or state activities.

(2) Is HH a public body for the purposes of Art 13.1 of the Principal VAT Directive ("PVD") and therefore effectively outside the scope of VAT.

(3) If it is a public body for the purposes of Art 13.1 is it carrying out its activities as a public body or in some other capacity.

(4) If it is a public body for the purposes of Art 13.1 and is treated as carrying out those activities as a public body would its treatment as a non-taxable person lead to significant distortions of competition.

4. The tribunal decided that:

(1) The activities of HH do indeed amount to economic activity and not the performance of public functions or state activities, and therefore it is required to register for and account for VAT on the supplies it makes.

(2) It is not a public body for the purposes of Art 13.1.

(3) Even if it were a public body its activities are not being performed in its capacity as a public body.

(4) If it were a public body and its activities were considered to be carried out as a public body its treatment as a non-taxable person would lead to significant distortions of competition.

5. The tribunal therefore decided that HH's appeal should be ALLOWED.

Facts

6. We received witness statements from Peter Andrews, Head of Risk and Information Governance, Hampshire County Council, Christine Holloway, Chair of Healthwatch Hampshire, Martyn Jewell, Board Business Manager, Healthwatch Hampshire, Andy Payne, Head of the Network Development Team, Healthwatch

England and Dr Mark Sharman, Chief Executive Officer of Help & Care, from whom we also received oral evidence.

7. The facts are not in dispute between the parties and are summarised below.

8. Healthwatch is the name given to the provision of an independent consumer champion for health and social care. It is operated at two levels: nationally, through Healthwatch England and locally, through Local Healthwatch Organisations.

9. New arrangements for Healthwatch were introduced by the Health and Social Care Act 2012, by amending the Local Government and Public Involvement in Health Act 2007 ("LGPIHA"), with effect from 1 April 2013, replacing the earlier system of local involvement networks. Under these new arrangements local authorities, including HCC, were required to enter into contractual arrangements with a body corporate, which was required to be a social enterprise and a Community Interest Company and to fulfil certain other criteria, for the provision of various services which are set out in s 221(2) LGPIHA as follows:

(a) promoting, and supporting, the involvement of local people in the commissioning, provision and scrutiny of local care services;

(b) enabling local people to monitor for the purposes of their consideration of matters mentioned in subsection (3), and to review for those purposes, the commissioning and provision of local care services;

(c) obtaining the views of local people about their needs for, and their experiences of, local care services; and

(d) making–

(i) views such as are mentioned in paragraph (c) known, and

(ii) reports and recommendations about how local care services could or ought to be improved,

to persons responsible for commissioning, providing, managing or scrutinising local care services and to the Healthwatch England Committee of the Care Quality Commission.

(e) providing advice and information about access to local care services and about choices that may be made with respect to aspects of those services;

(f) reaching views on the matters mentioned in subsection (3) and making those views known to the Healthwatch England Committee of the Care Quality Commission;

(g) making recommendations to that committee to advise the Commission about special reviews or investigations to conduct(or, where the circumstances justify doing so, making such recommendations direct to the Commission);

(h) making recommendations to that committee to publish reports under s 45C(3) of the Health and Social care Act 2008 about particular matters; and

(i) giving that committee such assistance as it may require to enable it to carry out its functions effectively, efficiently and economically.

10. These are categorised in the contract between HH and HCC as:

(1) Public and Patient Involvement;

(2) Information, Signposting and Advice;

(3) Advocacy Services.

11. Advocacy services, essentially representing those who wish to complain about a particular aspect of healthcare provision in the area, are not part of the general Healthwatch design and are not included in s 221(2) but local authorities were permitted to include these as part of the services to be performed if they so wished, which is what happened in this case.

12. In 2013, in anticipation of the new arrangements, a consortium was set up with the aim of forming a new company, HH, as a social enterprise company, which would bid for the Healthwatch activities for HCC. HH is a company limited by guarantee but is not a charity. It is however non-profit making in its objectives, and any profits which do arise can only be spent for the benefit of the local community. The consortium consisted of three organisations:

(1) Help and Care ("H&C") – which is a company limited by guarantee, incorporated on 18 April 1996. It is a registered charity whose objects include assisting in the care and welfare of the elderly and sick. H&C has been involved in public involvement in health since 2003 and in Healthwatch since 2013. H&C is VAT registered.

(2) Community Action ("CAH") – which is a company limited by guarantee which supports other local not-for profit organisations in delivering services to local communities. It is a registered charity.

(3) Citizens Advice Hampshire ("CitAH") – which is a company limited by guarantee, incorporated in 2008 to support independent citizens' advice charities in Hampshire, Portsmouth and the Isle of Wight. It is a registered charity.

13. HCC invited tenders for the contract, to be priced within an overall budget. Dr Mark Sharman, Chief Executive of H&C, informed us that he understood that in response to the tender there were 31 expressions of interest, although many of these were from companies and organisations which had no real understanding of what was involved. Seven organisations were selected for the next stage and were sent pre-qualifying questionnaires. Of these five were selected and sent a formal invitation to tender but only HH responded to this invitation. HCC evaluated the tender, in accordance with the procedure prescribed for local authority contracts and awarded the contract to the consortium on 4 February 2013.

14. A contract ("the HCC Contract") was signed between HCC and HH on 23 August 2013. Importantly however, HH then sub-contracted some of those services to H&C by an agreement, which was effective from 1 April 2013. Certain other elements were sub-contracted to CitAH by a sub-contract dated 2 December 2015, but these elements were later added to the sub-contract with H&C.

15. H&C is VAT registered and HMRC and H&C have agreed that the services provided to HH under the sub-contract are subject to VAT. If therefore HH is not able to register for VAT it is unable to recover the VAT charged on the sub-contract. By contrast, if HH charges VAT on its charges to HCC, HH can recover the VAT suffered on its charges from H&C and HCC can recover any VAT suffered in full under s 33 of the Value Added Tax Act 1994 ("VATA").

16. HH registered for VAT based on its understanding that the service charges it made to HCC were consideration for a taxable supply. Initially therefore HH added VAT to its service charges and accounted for this to HMRC as output VAT. Initially H&C also based its VAT accounting for the sub-contract on the same understanding. Consequently, H&C charged HH VAT and accounted for it to HMRC as output VAT.

17. In discussions between HMRC and the Chartered Institute of Public Finance and Accountancy ("CIPFA") in 2013, the view was expressed that "local authority funding to LHOs for carrying out statutory activities" was outside the scope of VAT. On 27 June 2014, HMRC wrote to HH adopting this view and requiring HH to make corrective accounting.

18. HH's advisers requested a reconsideration. Significant correspondence took place over the next twelve months between HMRC and Princecroft Willis, advisers to HH and H&C, but, subject to the outcome of this appeal, the situation remains that H&C is required to account for VAT on its services under the sub-contract but HH is not considered to be making taxable supplies on its contract with HCC, and cannot therefore recover the VAT it suffers on the charges from H&C, leaving HH in financial difficulties.

19. As the 3-year term of the HCC Contract neared its end, the parties negotiated a 12 month extension of the contract. Importantly, HCC required a cost-saving. This was negotiated and agreed between HH and HCC at £75,000. The saving (which was negotiated with, and passed through to, the sub-contractors, H&C) was achieved by cutting the post of Youth Engagement Officer and reducing the budget for community groups.

Legal Framework

20. In accordance with ss 1 and 4 VATA, VAT is charged, inter alia, on the supply of goods or services in the UK where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

21. Supply is defined in s 5 VATA as including "all forms of supply but not anything done otherwise than for a consideration". Business is defined in s 94 VATA as including any trade, profession or vocation, but it is well established that it is has

precisely the same meaning as the expression "economic activity" which is used in the PVD.

22. Art 9 of the PVD provides that:

"Taxable person shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall in particular be regarded as economic activity."

23. Also of relevance to the arguments raised in this case is Art 13.1 of the PVD, which provides that:

"States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions. However, where they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition…"

24. A number of cases were cited to us in the course of argument in order to aid our interpretation of the expression "economic activity", some relating directly to VAT and others to competition law. Unfortunately UK case law on these issues and that emerging from the CJEU has differed slightly in recent years. However we were much assisted as regards the question of what constitutes "economic activity" for VAT purposes by the recent judgement in the Court of Appeal in the case of *HMRC v. Longridge on the Thames* [2016] STC 2362 ('*Longridge*'), which makes it quite clear that we should follow the principles developed by the CJEU, as very helpfully explained in the judgements of Arden LJ and Morgan J in that case.

25. Morgan J set out these principles very clearly in his judgement in *Longridge* at [109] as follows:

"It is possible to distil certain propositions, relevant to this case, from the terms of the Principal VAT Directive and from the decisions of the CJEU. I consider that the following general propositions are established:

(1) It is only supplies, of goods or services, "for consideration" which are subject to VAT: Article 2 PVD;

(2) There must be a direct link between the supply and the consideration before it is right to hold that the supply is "for consideration": Case C-246/08 *European Commission v Finland* [2009] ECR 1 – 10605 ("*Finland*") at [44]-[45]:

(3) Indeed, if there is no direct link between the supply and the consideration, the question of economic activity does not strictly arise as there is no consideration to form the basis of an assessment to VAT: *Finland* at [43];

(4) VAT is charged on the amount of the consideration; it is irrelevant for the purpose of calculating the VAT payable whether the consideration for the supply is above or below the market value of the supply: *Finland* at [44] refers to "the value actually given";

(5) It is irrelevant for the purpose of calculating the VAT payable whether the consideration for the supply is at a concessionary rate; whatever precisely was meant by the word "concession" in Case 50/87 *EC v France* [1988] ECR 4797 at [21], it cannot be taken to mean that any reduction in price by way of a concession takes the supply outside the scope of economic activity; indeed, in *EC v France* at [20], the CJEU obviously thought that lettings by local authorities at subsidised rents were an economic activity:

(6) Article 9 states that a taxable person is a person who carries on any economic activity, whatever the purpose of that activity: *Finland* at [37];

(7) If a person supplies goods or services "for consideration", i.e. satisfying the test of direct link referred to in (2) above, and the activity is "permanent", then there is a rebuttable presumption, or a general rule subject to possible exceptions, that the supply for consideration is an economic activity: *Finland* at [37];

(8) The character of the activity (i.e. whether it is an economic activity) is to be judged objectively: *Finland* at [37];

(9) The subjective motive of the person making the supply does not influence the identification of the objective character of the supply; this follows from the proposition that the character of the activity is to be judged objectively:

(10) A charitable activity can be an economic activity: see Case C-235/85 *Commission v Netherlands* [1987] ECR 1471;

(11) A non-profit making activity can be an economic activity: *Finland* at [40].

Discussion

26. Not all the principles set out by Morgan J in *Longridge* are relevant in this case, but a number are very directly relevant. We consider that the key issues are:

(1) There must be a direct link between the services rendered and the consideration received.

(2) It is not necessary for the taxpayer to have a profit motive.

(3) Article 9 states that a taxable person is a person who carries on any economic activity, whatever the purpose of that activity.

(4) If a person supplies goods or services "for consideration", i.e. satisfying the test of direct link referred to in (1) above, and the activity is "permanent", then there is a rebuttable presumption, or a general rule subject to possible exceptions, that the supply for consideration is an economic activity.

27. Looking at (4) above in particular if we consider the contract between HH and HCC to be a normal commercial contract under which consideration is paid for services rendered, which we do, thus satisfying the direct link test referred to in (1) above, then, given the relatively permanent nature of the contract, there is a rebuttable presumption that the supply of those services is an economic activity.

28. Mr Conlon naturally argued that in this case there is a direct link between the services rendered and the consideration given because HH has a contract to provide services to HCC which is of a permanent nature. In contrast Miss McArdle suggested that there was no such direct link because the true beneficiaries of the services were the local community and therefore the relationship between the consideration and the benefit was broken.

29. In support of this argument she referred us to CJEU Case 102/86 *Apple and Pear Development Council v Customs and Excise Commissioners* [1988] STC 221 [C/5]. The Apple and Pear Development Council was a body established by statutory instrument whose functions related essentially to advertising and to the promotion and improvement of the quality of apples and pears grown in England and Wales. The Council was permitted to levy a mandatory annual charge in order to finance its activities which was based on a grower's area under cultivation and the number of trees. The CJEU concluded that the mandatory charges on growers did not constitute consideration having a sufficiently direct link with the benefits accruing to the individual growers since those benefits were not proportional to either their area under cultivation or the number of their trees, and indeed some growers might receive no benefit at all.

30. However, we do not consider that the facts of *Apple and Pear v CEC* are directly comparable with the current case. In *Apple and Pear* the charges were levied on the ultimate beneficiaries of the services, the apple and pear growers, but were held to be not sufficiently directly linked to the actual benefits received because the benefits bore insufficient relationship to the consideration paid. In the current case the charges are made under a direct commercial contract with HCC to provide services which HCC is required to provide by s 221(2) LGPIHA. The ultimate beneficiaries may well be the local community but the charges in question are not being made to the local community, they are being made to HCC under a legally enforceable bilateral contract.

31. Miss McArdle also referred us to *Trustees of Bowthorpe Community Trust* LON/94/1276A, a VAT Tribunal case from 1994. This case turned on whether or not monies received from Norfolk County Council to support the activities of the trust, which consisted in the provision of work experience in woodwork, pottery and other crafts, aimed at the physically and mentally disabled in the Norwich area and beyond, were consideration for supplies made to the trust or were simply grants to assist the trust in carrying on its charitable activities. The tribunal in that case held that the trust was only supplying services to the individuals who attended the workshops and that there was no contract for services with Norfolk County Council merely a grant relationship.

32. Again, we cannot see that this case is on all fours with the current case. In *Bowthorpe* there was no contract with Norfolk County Council and no promise as to what services would be delivered. The services were provided directly to the workshop attendees who were charged a non-economic price because of the subsidies received from the Council. This is not in our view comparable with the facts in the current case.

33. The next argument raised by Miss McArdle was that the services in question were "state activities" and as such could not be economic activity for VAT purposes. We are not clear as to the precise authority for this statement but consider that we should address it.

34. In support of this argument Miss McArdle referred us to CJEU Case C-364/92 *Sat Fluggesellschaft mbH v Eurocontrol* ("*Eurocontrol*"). This was a competition law case concerning a company which controlled the air space of a number of EU and non-EU territories. The company, Eurocontrol, levied charges on the airlines using its airspace. Miss McArdle referred us to para [30] of the judgement which states:

"Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition."

35. The factors which seemed to influence the CJEU in *Eurocontrol* were that the services performed were typically those exercised by the state. Specifically the state retained full powers and absolute control over the company. There was no independence of operation. The state merely chose to operate through a separate legal entity but there was no change as to how the activities were performed.

36. Miss McArdle also referred us to CJEU Case C-343/95 *Diego Cali & Figli Srl v SEPG*, which was another competition case. Diego Cali carried out certain pollution control activities in the port of Genoa on behalf of the Italian authorities and levied fees on the ships using the port. At para [17] of the judgement it states:

"It is of no importance that the state is acting directly through a body forming part of the state administration or by way of a body on which it has conferred special or exclusive rights."

37. These two cases are undoubtedly interesting cases but they are of course competition cases and were asking the question whether or not the activities in question were state activities and therefore outside the remit of normal competition law. They do not therefore seem to be addressing the right question, which is whether or not the activities in question constitute economic activity for VAT purposes. More importantly we can find nothing in those cases which indicates that simply because activities are activities of the state they cannot also constitute economic activity for VAT purposes. We do not therefore find them of much assistance.

38. We were then referred to CJEU Case C-369/04 *Hutchison 3G UK Ltd v Customs and Excise Commissioners.* This was a VAT case and therefore of more direct relevance to the appeal under consideration. It concerned the issue of 3G telecommunications licences by the UK Government, acting through the Secretary of State for Trade and Industry. The Court held that this activity was exclusively a member state competence which constituted "the means of fulfilling Community Law obligations on the effective use of the frequency spectrum and avoidance of harmful interference between various telecommunications systems". It did not therefore constitute economic activity.

39. There was a secondary issue in *Hutchison* in that the Secretary of State was clearly acting as a public body within Art 13.1 of the PVD, then Art 4(5) of the Sixth Directive, but this did not need to be addressed if the activity did not constitute economic activity in the first place.

40. We were also referred to *Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners* 398 STC [1999] ("*ICAEW*"), a decision of the House of Lords. In this case ICAEW was issuing regulatory licences to individuals and businesses to carry on investment business, and to act as auditors and insolvency practitioners. It was held that this was not an economic activity as set out by Lord Slynn, at line *b* on page 404:

"On the basis of cases like Eurocontrol and as a matter of ordinary language I do not consider that what is done here by the institute is such an economic activity. The institute is carrying out on behalf of the state a regulatory function in each of these three financial areas to ensure that only fit and proper persons are licensed or authorised to carry out the various activities and to monitor what they do. This is essentially a function of the state for the protection of the actual or potential investor, trader and shareholder. It is not in any real sense a trading or commercial activity which might justify it being described as economic and the fact that fees are charged for the granting of the licenses does not convert it into one."

41. These cases do clearly address the right question and come to the conclusion that the mere issuing of licences, whether directly by the state or indirectly via an organisation which has been given the authority to issue such licences by the state, does not constitute economic activity. Lord Slynn's judgement in *ICAEW* clearly indicates that the fact that the issuing of such licences is effectively a function of the state is a relevant factor in deciding if this constitutes economic activity, but most importantly in our view Lord Slynn also comes to the conclusion that this is not an economic activity "as a matter of ordinary language", which we take to mean that a simple objective consideration of what is being done leads one to the conclusion that the mere issuing of licences, albeit for a fee, is not an economic activity, and lacks the normal features of a being a business.

42. We were also referred to the cases of *Commission v Netherlands* and CJEU Case C-202/90 *Ayuntamiento de Sevilla v Recaudadores de las Zonas Primera y Secunda*. In the case of *Commission v Netherlands* the activity in question was that of bailiff services which were provided to the state by an independent company.

Similarly the case of *Ayuntamiento de Sevilla* concerned an independent company set up to collect taxes on behalf of the state. It is difficult to imagine a function which is more that of the state than the work of bailiffs and the collection of taxes and yet these were both held to be economic activity because of the attributes of independence of the companies providing those services. At that time the word "independently", on which the CJEU placed considerable weight was contained in Art 4(1) of the Sixth Directive but is now included in Art 9 of the PVD, see para [22] above.

43. In both cases therefore the decision of the CJEU would seem to be a clear demonstration that simply because an activity is normally carried on by the state does not automatically mean that, per se, it cannot be economic activity. We do not therefore agree with Miss McArdle's prime contention on this point.

44. We then move on to Miss McArdle's alternative argument which is that HH is a public body within Art 13.1 PVD in that it falls within the definition of being an "other bod[y] governed by public law" and therefore should "not be regarded as [a] taxable person in respect of the activities or transactions in which [it] engages as [a] public authorit[y], even where [it] collects dues, fees, contributions or payments in connection with those activities or transactions."

45. In support of this contention Miss McArdle explained that HH was subject to a number of features which were typical of a body governed by public law, in particular it was subject to the Freedom of Information Act and the Human Rights Act and that as a general rule its Board Meetings were required to be public, which features were imposed upon it by the contract with HCC.

46. She also referred us to the CJEU Case C-174/14 *Saudacor v Fazenda Publica*. This concerned a company which was set up to carry out consultancy and management services relating to the regional health service in the Autonomous Regions of the Azores ("RAA"). The CJEU held that the services provided were indeed economic activity for VAT purposes but then went on to consider whether or not Saudacor was a body governed by public law.

47. The CJEU did not come to any formal conclusion as to whether it was a company governed by public law because it felt this was better considered by a domestic Portuguese court in the context of the specific domestic legislation surrounding the formation and activities of this company. It did however make some very useful statements:

> "(49) Since this is an exception to the general rule that any activity of an economic nature is to be subjected to VAT, Art 13.1 PVD is to be interpreted strictly.
>
> (55) It must be held that the list of entities in Art 13.1 is exhaustive, the concept of 'other bodies governed by public law' constituting a residual category of bodies falling within the public authority.

(56) The court has already held that a person which, not being part of the public administration, independently performs acts falling within the powers of the public authority cannot be classified as a body governed by public law.

(57) The court has also made it clear that the status as 'a body governed by public law' cannot stem from the mere fact that the activity at issue consists in the performance of acts falling within powers conferred by public law.

(58) Nevertheless, whilst the fact that the body in question has, under the applicable national law, powers conferred by public law is not decisive for the purposes of that classification, it does constitute, in so far as it is an essential characteristic specific to any public authority, a factor of definite importance in determining that the body must be classified as a body governed by public law."

48. The court also set out a number of factors which it considered were relevant in this case:

(1) Genuine autonomy on the part of Saudacor was limited because of the fact that its capital was 100% owned by the RAA, which was its only client. Therefore the RAA was in a position to exercise decisive influence over the activities of Saudacor.

(2) Saudacor was also required to perform its services in accordance with the guidelines set by the RAA and was subject to supervision by RAA.

(3) Saudacor was governed by a Regional Legislative Decree, by Articles of Association which were annexed to that decree, by the legal regime for public undertakings and by private law. It was apparent to the court that private law was secondary in relation to the rules establishing the legal regime for Saudacor as a public undertaking.

(4) Although Saudacor had some features which implied that Saudacor operated on a market in competition with other private operators, the fact remained that the services in question were performed exclusively by Saudacor.

(5) In addition the court considered that an organisational link existed between the RAA and Saudacor, if only due to the fact that Saudacor was established by a legislative act adopted by the legislature of the RAA.

49. The court then concluded at para [68] that "subject to the verification of that information by the referring court, it cannot therefore be ruled out that, in the light of an overall assessment taking account of the provisions of national law applicable to Saudacor, that court may well conclude that Saudacor may be classified as a body governed by public law within the meaning of Art 13.1.

50. Looking at these factors in the context of the current case it is clear that although some of the factors which lead the CJEU to suggest that Saudacor might be a body subject to public law there are equally factors which do not point in the same direction. However, we are also instructed to adopt a strict interpretation of Art 13.1. The definition of public body is deliberately very narrow.

51. A key point in the favour of HH which differs from Saudacor is that HH is independently owned. It is not owned by or controlled by HCC in any way. It must report to HCC under the terms of the contract, but not to any higher degree than might be found in any similar contract in a normal commercial setting.

52. In addition there was no organisational link with HCC.

53. Very importantly, in the case of Saudacor, the CJEU concluded that although Saudacor was governed by both public law and private law, it was apparent to the court that private law was secondary in relation to the rules establishing the legal regime for Saudacor as a public undertaking. HH did operate under some features found in public law, such as the Freedom of Information Act and the Human Rights Act and the requirement to hold most of its Board Meetings in public. However, these requirements were specifically imposed under its contract with HCC. If it were already a body governed by public law there would be no need to include such provisions in the contract. In addition there is no suggestion that private law was in any way secondary to public law as regards the overall governance arrangements of HH.

54. Having considered the factors set out by the CJEU therefore, we have come to the conclusion that HH is not a body governed by public law.

55. Having come to this conclusion we do not strictly need to consider whether HH was carrying out its activities "as a public authority". However, in case we are wrong as regards whether or not HH is a body governed by public law we should also consider this question.

56. The activities carried on by HH in this case are set out in s 221(2) LGPIHA. They are therefore clearly activities prescribed by statute. The question is whether or not those activities, even if they are prescribed by statute, are activities which a public authority might carry out.

57. We have very little guidance as to what this might mean in practice and we can therefore only judge this by reference to an objective view of what is being done. In our view, even though the activities are prescribed by statute, that statute requires the local authority to enter into a contract with an independent company, because those activities include providing an independent view from the local community to the local authority and to the National Health Service. This was a clear policy decision when setting up LHOs in order that they should provide an independent view.

58. In addition, the Advocacy Services provided under the contract are not part of the services set out in s 221(2). Again they have been set up as an independent service because the objective of the service is to assist members of the community to complain about the National Health Service and local social services. We understand that prior to the changes to the LGPIHA in 2012 these Advocacy Services were provided independently but on a regional basis. On the establishment of the Healthwatch structure, the decision was taken to provide these Advocacy Services on

a more local basis. Again we cannot see that these services are such as would or should be provided by a body acting as a public body.

59. In summary therefore we do not consider that the services provided by HH are services that would be provided by a public body acting as a public body.

60. Finally, for the sake of completeness, we should consider the provisions of the final sentence of Art 13.1 PVD. This provides that:

"where [public bodies] engage in [economic activity], they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition…"

61. We were not presented with any evidence that there was an extensive market in providing Healthwatch services and clearly, since these contracts are stated to be exclusive to a local authority area, there is no question of any competition within a local authority area once a contract has been set up.

62. However the question was posed as to the difference in competitive position, specifically at the time of tendering for a Healthwatch contract, between a Healthwatch organisation which did sub-contract some activities to third parties, such as HH, and those which did not. This may be a matter of choice but Dr Sharman explained to us that in this case it was because H&C had specific expertise, built up over a number of years, which meant that it was better able to provide these services than HH itself. An LHO which did sub-contract some of its services to a third party, which would be required to charge VAT on those sub-contract services, would be at a significant financial disadvantage to one which performed all its services in-house and did not therefore suffer a significant disallowance of input VAT.

63. The case of *Isle of Wight Council v The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 1303 established clearly that "distortion of competition" included potential distortions, and was required to be evaluated by general market considerations and not by specific considerations of a limited local market.

64. It is quite clear to us that the treatment of an LHO as being non-taxable would lead to significant potential distortions in competition. Therefore, even if HH was held to be subject to public law, it should still not be treated as a non-taxable person because of the potential distortion of competition which such treatment would cause.

Decision

65. On the basis of the above we therefore decided that the appeal should be ALLOWED.

66. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2017