Neutral Citation: [2023] UKFTT 389 (TC)

Case Number: TC08803

FIRST-TIER TRIBUNAL
TAX CHAMBER

Alexandra House, Parsonage Gardens,
Manchester

Appeal references: TC/2021/01659
TC/2022/11415

VALUE ADDED TAX - Exemptions - Fund-raising events - Principal VAT Directive 2006/112/EC Article 132 - VAT Act 1994 Sch 9 Group 12 - VAT status of admission fees paid to 'Great Yorkshire Show' organised by the Appellant in 2016 and 2017 - Appeal allowed

Heard on: 16 January 2023
Judgment date: 25 April 2023

Before

TRIBUNAL JUDGE CHRISTOPHER MCNALL
MRS SHAMEEM AKHTAR

Between

YORKSHIRE AGRICULTURAL SOCIETY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Firth, of Counsel, instructed by Vatangles Consultancy Ltd

For the Respondents: Mr Daniel Hickey-Baird, a litigator, of HM Revenue and Customs' Solicitor's Office.

DECISION

SUMMARY

1. The Yorkshire Agricultural Society (**'the Society'**) organises and runs the annual Great Yorkshire Show (**'the Show'**).

2. This appeal addresses whether the Society's supply of admission to the Show in 2016 and 2017 should, in principle, be treated as an exempt supply for the purposes of the *Value Added Tax Act 1994* (**'the 1994 Act'**).

3. There are two appeals. We have decided to allow both appeals.

4. One is an appeal against an assessment.

5. We have decided that, insofar as it related to the Show (and not to anything else), the assessment in dispute in this appeal was made out of time.

6. But, even if the assessment had been made within time, we would nonetheless have found that the Show in 2016 and 2017 was an exempt event within the proper meaning and effect of the fundraising exemption in Schedule 9 Group 12 Item 1 of the VAT Act 1994, read compatibly with Title IX Articles 131 and 132 of the Principal VAT Directive.

7. The other is an appeal against a refusal to allow a claim for overpaid tax.

8. Insofar as related to the Show (and not to anything else), the claim for overpaid tax in dispute was allowable for that same reason: the Show was exempt.

THE EVIDENCE

9. We were provided with a hearing bundle of documents coming to 304 pages, and a 96 page additional bundle.

10. We read two witness statements from Mark Stoddart and heard oral evidence from him. He is the Society's Financial Controller, and has held that role since 2005. His responsibilities include all the Society's accountancy functions, as well as those of its two trading subsidiaries. He is responsible for the preparation of the management and annual accounts (which latter are subsequently audited) and its VAT returns.

11. It was striking that there was very little by way of substantive challenge by HMRC to his evidence, nor any detailed exploration of it in cross-examination. The Tribunal, which is a fact-finding jurisdiction, asked a series of its own questions to establish some facts about the Society's activities and the Show in better detail.

12. No-one from HMRC filed a witness statement or gave evidence, even though HMRC, in its application to amend its Statement of Case, had said that the decision-maker would be giving evidence. The decision-maker did not give evidence.

THE BURDEN AND STANDARD OF PROOF

13. Where it is contended that an assessment has not been made in time, then the burden is on HMRC to show that the statutory conditions as to timing have been met.

14. The Appellant bears the burden of establishing that it qualifies for the exemption.

15. In relation to disputed matters, the standard of proof is the usual civil standard - namely, the balance of probabilities, or whether something is likelier than not.

THE CLAIM AND THE ASSESSMENT

The Claim

16. The Appellant originally treated the admission income for the Show as standard-rate.

17. On 30 April 2020, the Appellant's representatives made a voluntary disclosure to HMRC of overdeclared output tax and overclaimed input tax in respect of its admission income for the 2016 Show, on the footing that the Show should have been treated as exempt under the fundraising exemption. The situation gave rise to a claim for net overpaid VAT (**'the Claim'**).

18. On 4 May 2020, the Appellant submitted an Error Correction Notice in relation to period 09/16 and claimed for a net VAT repayment of £201,949 (being made up of £285,471 over-declared output tax minus £82,022 over-claimed input tax).

19. On 24 November 2020, the Appellant confirmed that it had also treated the 2017 Show as exempt from VAT.

20. By way of a letter dated 7 May 2021, the Respondents' Officer Julie Lyddon, a Higher Assurance Officer, rejected the Claim.

21. HMRC's refusal of the Claim was appealed to the Tribunal on 17 May 2021, and was given appeal number TC/2021/01659.

The Assessment

22. Very shortly after refusal of the Claim, namely on 27 May 2021, the Respondents wrote to the Appellant asking them to calculate the VAT due for the periods from 1 April 2017 to 31 March 2021.

23. On 5 December 2021, HMRC assessed the Appellant, ostensibly under section 73(1) of the VAT Act 1994, and as a matter of 'best judgment', for VAT period 12/17 in the sum of £90,776 (**'the Assessment'**). This is said to relate to admission fees, sponsorship income, and advertising. HMRC said that the Assessment would not be enforced unless and until the Tribunal were to agree with HMRC's decision.

24. The Assessment was upheld at departmental review on 27 May 2022.

25. The Assessment was appealed to the Tribunal on 13 June 2022, and was given appeal number TC/2022/11415.

26. In summary, the grounds of appeal against the Assessment were:

(1) It was out of time;

(2) It was contrary to a legitimate expectation "that HMRC would apply the time limit as set out in section 73(6) based on the date HMRC notified the assessment and not the date on which it was made";

(3) It was not made to best judgment;

(4) It is wrong because the supplies in question were exempt from VAT under Item 1 of Group 12 of Schedule 9;

(5) The Assessment was made "irrationally and/or capriciously and/or perversely because HMRC had already accepted that a materially identical agricultural show was exempt from VAT. Accordingly, HMRC's actions breached fiscal neutrality and unequal treatment".

27. Protective VAT assessments were also made for 06/17, 09/17, and 03/18 to 12/20. Those are subject to an extended review period under section 83D of the 1994 Act, with the review period extended until 30 days after this decision is released.

28. The appeals against HMRC's dismissal of the Claim and the Assessment were consolidated on 29 November 2022.

THE FACTS

29. On the basis of the evidence which we have read and heard, we make the following findings of fact.

30. The Yorkshire Agricultural Society is a charitable company limited by guarantee and is a registered charity. It was originally founded in 1837. It was been registered for VAT since 1992, with its main business listed as "conducting an agricultural show".

31. Its charitable objects are:

> "(1) To support and promote agriculture, rural and allied industries throughout the North of England, including championing the role of farmers as providers of high quality produce and encouraging consumers to choose healthy and local produce.
>
> (2) To advance and encourage agricultural research and greater understanding and empathy with farming and the countryside amongst the general public and particularly children.
>
> (3) To advance and encourage the protection and sustainability of the environment.
>
> (4) To hold in pursuance of its main objectives an annual agricultural show."

32. The annual agricultural show referred to is the Great Yorkshire Show, which is held at the Yorkshire Showground near Harrogate (**'the Showground'**).

33. The Society also carries out a range of other activities, including other events at the Showground. The Showground includes two main exhibition halls and various pavilions. There is also a farm shop and a café operated by the Society through a subsidiary company. In addition to being used for events put on by the Society, the Showground's facilities are hired out to third parties for conferences, exhibitions and other events, both large and small.

34. The Society is a membership organisation with more than 12,000 members.

35. The Show is the highest profile event undertaken by the Society. It held in July each year at the Showground. It it widely regarded as one of England's premier agricultural shows.

36. The Society also puts on several other annual events, in particular the 'Countryside Live' show each October.

37. We were not invited to consider anything in relation to the 'Countryside Live' show, but we note that the Appellant's claim for net overpaid VAT related to overpaid VAT in respect of the admission income seems to relate not only to the Show but also to Countryside Live.

38. We do not know what the parties' position is in relation to Countryside Live. For the avoidance of doubt, our decision in this appeal relates only to that part of the Claim which arose in relation to the Show, and relates only to that part of the Assessment which relates to the Show.

39. Leaving the status of the Show on one side, it is not in dispute that the Society pursues its charitable objects through various means. For example it runs many advisory groups for farmers and it provides short courses for teachers to encourage use of the countryside as a teaching aid.

40. We were shown, and accept as accurate:

(1) Monthly Management Accounts from December 2016, and dealing with the actual year 2016. Those were contemporary, being run off from Sage on 13 January 2017;

(2) Monthly Management Accounts from December 2017, and dealing with the actual year 2017. Those were contemporary, being run off from Sage on 17 January 2018.

41. The Monthly Management Accounts are authentic contemporary documents, which were not prepared with a view to litigation, and Mr Stoddart was able to speak authoritatively about them.

42. On the basis of the above, and Mr Stoddart's evidence, which we accept, we find:

(1) The Society's activities, done pursuant to its charitable purposes, include promotion of the existence and work of the Society generally. This is increasingly important to the Society because, historically, the Society and the Show were two completely different 'brands': the Show was very well-known and high-profile, but the Society much less so. The Society was and is trying to increase its prominence and profile as a society per se, and as an organisation which does more than just run the Show;

(2) The Society's activities, done pursuant to its charitable purposes, also include the promotion of public awareness in farming, and supporting farmers;

(3) It holds the Show as one way in which to fulfil its charitable purposes;

(4) The Society undertakes fundraising. The task of fundraising is one for the Society's board of trustees. There is no fundraising committee, but Mr Stoddart attends the board of trustees;

(5) The overall budget for the Show is set by Mr Stoddart and the Society's Chief Executive;

(6) There is a planning team for the Show, led by a "Show Director", whose work is overseen by the board of trustees;

(7) One of the main tasks of the Show's planning team is to consider how to raise as much money as possible from the Show, which is part of raising as much money as possible for the Society to give away through its charitable activities;

(8) The Show is budgeted to make a surplus, and has always been managed with that in mind;

(9) For 2016, the income generated by the Show was approximately £3.463m (being principally composed of £1.483m admissions, £1.114m trade stand fees and £220,000 stock and sundry entry fees) with expenditure incurred directly or proportionally in respect of the show (being principally composed of site costs, personnel costs, displays, prizes, printing and publicity, staff costs) being approximately £2.025m, thereby generating a surplus of approximately £1.437m;

(10) For 2017, the income generated by the Show was approximately £3.814m, with expenditure incurred directly or proportionally in respect of the show being approximately £2.156m, thereby generating a surplus of approximately £1.658m;

(11) The Society pays to put the Show on, as well as paying for some of the permanent infrastructure at the Showground, which is used all-year round and not just during the Show;

(12) The Show usually runs for 3 days in mid-July, from 7.30 in the morning to 7.30 in the evening (with a 6.30 close on the last day). In 2016 it ran from Tuesday 12 - Thursday 14 July. It 2017 it ran from Tuesday 11 - Thursday 13 July.

(13) The Show is well-attended. Attendance at the Show is capped at 35,000 a day; this being about 20,000 ticket sales, and 15,000 other people on the site such as exhibitors, stewards, and other staff (such as gate staff/security, car-parking marshals, catering and sanitary staff);

(14) The whole Show is stewarded by about 300-350 unpaid volunteers who, amongst other tasks (such as helping get animals into the show-ring in the right sequence) go around helping people, and giving more information on a one-to-one basis.

(15) During the Show, the Site is split up into several 'zones';

(16) The 'Discovery Zone' is aimed at children. Its main aim is to educate people about what goes on in the countryside, and to encourage them to find out more. It holds a number of workshops, for example showing how rapeseed oil is produced from seeds, a butcher showing how meat is butchered; bread-making and other 'hands-on' activities;

(17) The showing of livestock (cattle, sheep, pigs and goats) is one of the main attractions of the Show, bringing animals from across the whole UK. It is not just a competitive exercise, but itself is something done to promote best practice in rearing animals, including animal wellbeing;

(18) Many of the activities at the Show - showing livestock, equine activities such as show-jumping, sheep-shearing, and gun-dog demonstrations - are accompanied by live commentary, which is descriptive and educative - for example, the commentary will say what is happening, why it is done, and what the judges are looking for;

(19) There are some 'trade' and rare-breed stalls. The latter are 'hands-on' and allow people to stroke the sheep (for example);

(20) The food zone includes not only things such as a cheese show, but also demonstrations of cookery in a cookery theatre;

(21) The motor zone is principally a demonstration of modern agricultural machinery such as tractors and trailers, but also has auto-dealer trade stands where it is possible to buy a vehicle;

43. The Appellant accepts - in its Grounds of Appeal - that it did not "promote" the 2016 Show as being "primarily" for the raising of money.

44. Mr Stoddart's evidence was that (i) the Society putting the Show on, and (ii) the Society spending money on its charitable aims, were 'entwined'. He said that *"you cannot do one without the other",* by which he meant (as we understand it, and to paraphrase), without the money from the Show itself, there would be no Show at all. He also said that there were two purposes to the Show: fundraising, and education.

45. We accept that evidence.

46. It is also consistent with contemporary documentary evidence.

47. The Show's 2016 and 2017 'fliers' - in almost identical formats - each say, in small but legible print, in a prominent place on the flier - below the opening times - *"The Great Yorkshire Show raises funds for the Yorkshire Agricultural Society to help support farming and the countryside".*

48. The 2017 Souvenir Programme (cost £5) sets out the details of the Society, identifies the Society as *"Organisers of the Great Yorkshire Show",* and has the exact same rubric: "*The Great Yorkshire Show raises funds for the Yorkshire Agricultural Society to help support farming and the countryside".*

49. The 2017 Schedule of livestock and sheep being exhibited has the same wording, clearly legible, in a prominent position in the document (immediately underneath the closing dates for entries).

50. The same wording is on the back of the admission tickets.

51. There is nothing ambiguous about this wording.

52. A School Parties booking form for 2017 corroborates what was said about the educational purpose of the Show. The Society has a named 'Education Co-ordinator'. There is a heavily discounted ticket price for schoolchildren, and one free teacher ticket for every 10 children. The 2017 form includes quotes from schoolchildren and schools who had visited in 2016: "..it is really interesting and it was great to go around .. and learn about the agricultural side of Yorkshire. A great day out, the animals, the stalls, and the many activities all add up to a fantastic time"... "The ... Show is a fantastic, educational, opportunity ... the children were fascinated by the range of displays and competitions and there were many hands-on opportunities in the Discovery Zone."

WAS THE ASSESSMENT OUT OF TIME?

53. It is common ground that the Assessment for period 12/17 was made more than two years after the end of the prescribed accounting period (VATA 1994 section 73(6)(a)) and less (just about) than the four year time limit contained in section 77(1)(a).

54. Accordingly, the relevant prescribed period was *"one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of an assessment, comes to their knowledge*": VATA 1994 section 73(6)(b).

55. Here, HMRC rely on the Appellant's representatives' letter of 5 May 2021 as starting the clock running on the one year period, so as to make a December 2021 assessment in-time.

56. HMRC's pleaded position is set out in Paragraph 86 of its Amended Grounds of Appeal:

> "That letter requested that HMRC issue their decision regarding the ECN. As the Appellant had [sic] no further information requested by Officer Lyddon, to demonstrate that the conditions at [sic] Group 12, Schedule 9, VATA 1994 have [sic] been met, it was clear then that the ECN would have to be rejected."

57. This is not easy to follow. Although not expressly stated, it seems to pivot on an argument, expanded on before us, that the Appellant, in effect, brought the Assessment on itself by not providing the information which HMRC wanted. That is not the same as HMRC being in possession of information which justified it in issuing the Assessment. It is an inversion of the statutory test. HMRC's departmental review of this point simply glides over this, without any real substantive engagement.

58. We have read and carefully considered the letter of 5 May 2021. Overall, it is a punchily-worded attack on HMRC's stance in relation to Article 1(c). But crucially, as we read it, and objectively, it does not contain any new information or material which would have entitled HMRC to regard the one year period as beginning to run. No such information or material was identified for us by Mr Hickey-Baird in his submissions.

59. Hence, the documentary evidence relied on by HMRC to establish its right to issue the Assessment when it did, did not, in our view, suffice to discharge the burden placed on it of showing that the Assessment had been issued in conformity with the legislation - in this instance, timeously.

60. This could - at least potentially - have been addressed had HMRC called the assessing officer. But there was no evidence, whether in writing or oral, from the assessing officer. So

the appellant had no opportunity to explore, nor the Tribunal to assess, what particular new information or material had crystallised in the assessing officer's mind on receipt of the 5 May 2021 letter.

61. In response to a question from the Tribunal, we were told by Mr Hickey-Baird that a litigation decision had been taken not to call the assessing officer. So be it. We welcome his candour, but the decision not to call the witness was one which HMRC took with its eyes open.

62. It was no answer for HMRC to say that the Appellant had brought the situation - ie., the issue of an assessment - on itself by not disclosing information to HMRC as it should have done.

63. We were not taken to any 'carve-out' in the legislation, nor any reported decision of this Tribunal, which justifies the issue of an assessment under these provisions in those circumstances.

64. The Assessment was out of time, and the appeal against it must be allowed.

65. Lest our conclusion on the Assessment should fall to be reconsidered, then what follows is on the footing that, contrary to our conclusion, the Assessment was in-time.

THE EXEMPTION GENERALLY

INTRODUCTION

66. Schedule 9 of the *Value Added Tax Act 1994* (**'the 1994 Act'**) deals with exemptions.

67. Group 12 of Schedule 9 deals with "*Fund-raising events by charities and other qualifying bodies"*.

68. Group 12 contains three items.

69. Group 12 Item 1 provides exemption for:

> "The supply of goods and services by a charity in connection with an event:
>
> (a) that is organised for charitable purposes by a charity or jointly by more than one charity,
> (b) whose primary purpose is the raising of money, and
> (c) that is promoted as being primarily for the raising of money."

70. These are presented conjunctively.

71. For present purposes, it is sufficient to note that this is not the original wording of this Item. It was introduced, by way of substitution for the earlier group wording, with effect from supplies made on or after 1 April 2000: *Value Added Tax (Fund-Raising Events by Charities and Other Qualifying Bodies) Order 2000*, SI 2000/802. Some of the Tribunal's earlier decisions about this group were made in the context of the old, now superseded, wording, and have to be read in that light.

72. The exemption in domestic legislation ultimately derives from Title IX ("EXEMPTIONS") Chapter 2 ("Exemptions for certain activities in the public interest") Article 132(1)(o) of the Principal VAT Directive 2006/112/EC ("On the common system of value added tax"), which, insofar as material, reads:

> "1. Member States shall exempt the following transactions:
>
> [...]

> (o) The supply of services and goods, by organisations whose activities are exempt pursuant to points (b), (g), (h), (i), (l), (m) and (n), in connection with fund-raising events organised exclusively for their own benefit, provided that exemption is not likely to cause distortion of competition'.

73. HMRC said that we should read the Item "strictly". But, in our view, that, baldly stated, is not the correct approach. The correct approach is that articulated by the Court of Appeal in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882; [2002] 1 WLR 1674 at Para [17] (Chadwick LJ, with whom Longmore LJ and Harrison J agreed), which was subsequently approved by the Court of Appeal (Longmore, Etherton and Pitchford LJJ) in *HMRC v Insurancewide.com Services Ltd* [2010] EWCA Civ 422) at Para [83]:

> Before leaving the case law, it is important to comment on the proper application of the numerous statements in the European cases, some of which are cited above, that the exemption in Article 13B(a), like the other exemptions in Article 13, should be interpreted strictly since it constitutes an exception to the general principle that turnover tax is levied on all services supplied for a consideration to a taxable person. As Advocate General Fennelly said, in paragraph 24 of his opinion in *Card Protection*, this does not mean that a particularly narrow interpretation will be given to the terms of an exemption. As Chadwick LJ said in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at paragraph [17], the Court is not required to give the words in the exemption the most restricted, or most narrow, meaning that can be given to them. I agree with his observation, in paragraph [17] of his judgment, that:
>
>> "A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question."

74. We apply that approach here.

75. Here, the context is that of a Society, established for charitable purposes, undertaking an activity (namely, the Show) which is within the four corners of its charitable purposes.

Item 1(a) - "organised for charitable purposes by a charity"

76. It was common ground that the Show met Item 1(a).

77. HMRC's sole reason for rejecting the Claim was clarified in a letter dated 13 May 2021, and dealt solely with Item 1(c).

78. Its review letter of 27 May 2022, in relation to the Assessment, said that the claim was rejected, as not meeting the criteria of Item 1(c), "because the events are not advertised as 'fund-raisers' and the public attending these events are unaware that the event is a 'fundraiser'".

79. HMRC's 'Points at Issue' in its Statement of Case only referred to Item 1(c). Latterly, in an Amended Statement of Case (to which the Appellant did not object) HMRC said that its case "may not be clear", and, insofar as HMRC had stated in correspondence that Item 1(b) was not issue, it was in issue.

80. Hence, the dispute before us relates to the meaning and application both of Items 1(b) and (c).

Item 1(b) - "whose primary purpose is the raising of money"

81. In relation to Item 1(b), HMRC's position was that *'the shows appear to be of a commercial nature to promote farming in the community and generate profits'*, and were not, therefore, events "whose primary purpose is the raising of money".

82. In *Loughborough Students Union and others v HMRC* ('**Loughborough**') [2018] UKFTT 357 (TC), the Tribunal (Judge Peter Kempster) remarked, at Para [85]:

> "First, the condition in Item 1(b) that the raising of money must be the primary purpose of the event. While this condition is not explicitly provided in art 132(1)(o), it follows from my conclusions on the meaning of an organised fundraising event [...] that **a primary purpose** of fundraising is a fair interpretation of the legislative wording in art 132(1)(o). Accordingly, I conclude that Item 1(b) is not ultra vires art 132(1)(o)."
>
> (emboldening is emphasis added by us).

83. At Paragraph [86], Judge Kempster considered that "main" connoted "importance".

84. We agree with Judge Kempster. We consider that Item 1(b) refers to "a" primary purpose, and not "the" primary purpose, and that a primary purpose means a purpose which is important.

85. This chimes with a purposive reading, in the context where Article 132 deals with exemptions for certain activities in the public interest. We consider that reference to a "primary" purpose does not necessarily connote a strict hierarchy of purposes, with one purpose (and, perhaps, one purpose only) at the summit, with all other purposes being necessarily subordinate to it, but simply reflects a dividing line between a purpose which is a main purpose, and a purpose which is not a main purpose. It seems to us that confining the exemption to something where fundraising is the foremost (ie, first-in-rank) purpose is both unnecessarily restrictive, and inconsistent with the Court of Appeal's guidance on the scope of exemptions, set out above.

86. This also chimes with the approach taken by other, earlier, Tribunals, which, when it came to 'fundarising events', drew a qualitative dividing line between 'the main purpose' and a 'merely incidental purpose'. For example, *Blaydon Rugby Football Club* [1995] Lexis Citation 1110, [1996] BVC 4253, was a decision of Mr James Fryer-Spedding OBE on the pre-2000 Group 12. There, the appellant rugby club, on the facts, failed to discharge the burden of showing that the main purpose of events (as varied as a 'Stag Night' and the 'New Year's Eve Do') was fundraising, even though some money was doubtless raised. In *Newsvendors Benevolent Institution* [1996] BVC 2941, another case on the pre-2000 wording, the VAT and Duties Tribunal (the judge is not named in the report) decided that a festival dinner and a carol concert which each raised funds were exempt because they had a fundraising purpose which was more than incidental: see Paragraph [25].

87. We do not think that there is anything to assist our analysis in the point that the Show is routinely organised, annually, and is therefore not - in one sense - "exceptional" in nature. In our view, in *Loughborough*, Judge Kempster was simply articulating (at Paragraph [58] of his decision) one of a number of potentially useful tools which may assist in deciding whether an event was or was not fundraising. He carefully limited himself to observing that fundraising events "are likely to be exceptional rather than routine in the life of the club". That is not establishing any 'bright-line' principle. As we read it, he was not saying anything more than whether an event was routine or exceptional was one factor to be assessed in deciding whether

an event was likelier than not to be fund-raising. Consequently, we do not agree with HMRC's argument that, if the Show is the main purpose of the Society, then, being annual (and thereby "routine", and thereby not "exceptional") it cannot be a fundraising event. That is not what Judge Kempster said.

88. In this regard, we do not consider that any allegation of evidential inadequacy can be levied against the Society so that it can be said to have failed to discharge the burden on it. HMRC's own internal guidance VCHAR9300 ("Fund-raising: Exempt charity fund-raising events") says that "advertising literature, tickets, programmes etc" should make it clear that (the Guidance says) "the main and overriding purpose of holding the event should be to raise funds". (underlined emphasis added by us).

89. Leaving aside the fact the strong element of gloss in HMRC's guidance - in its references both to "the main" and a further qualifier, "overriding" - the promotional literature and the tickets in fact do this: see the discussion above.

90. HMRC itself seems to contemplate that "the advertising literature, tickets, programmes etc" will, in most cases, suffice, because (the Guidance says) it is only "on occasion" that HMRC "may need to look at background papers, such as minutes of meetings, to confirm that the main reason for holding the event was to raise funds."

91. It is not clear to us, even now, why HMRC did not regard the advertising material and tickets as sufficient to establish the point, even on the balance of probabilities.

92. Therefore, taken overall, in our view:

(1) Fund-raising was not the exclusive purpose of the Show;

(2) The Show had two main purposes: (i) fund-raising, and (ii) education.

93. We cannot sensibly rank these in order of importance, and neither party sought to advance any analysis which would enable a ranking of purposes to be empirically, reliably and/or sustainably undertaken on the facts of this case.

94. Overall, our impression is that it could not be said that either of these purposes was more important than the other. In that sense, looked at in the round, the two purposes are of equal importance. Beyond that, it seems to us that the two purposes not only co-exist, but are interdependent, and not independent.

95. If fund-raising were not taken as a discrete purpose, but were taken as being one of two inter-dependent purposes, then, in our view, it was the main purpose of the Show, and it qualified for the exemption.

96. In fund-raising were taken as a discrete purpose, then it was a main purpose of the Show, and it qualified for the exemption.

The Westmorland case

97. Our attention was drawn to another appeal, brought by the Westmorland County Agricultural Society Ltd, under number TC/2019/04059 (**'the Westmorland Appeal'**).

98. That case did not reach a hearing, because, on 16 December 2020, an HMRC litigator wrote:

> "Having considered the evidential weight the Tribunal is likely to attach to the Appellant's witness evidence in this appeal, the Respondents have concluded the evidence is, on balance, insufficient [sic] for successful litigation. The Respondents no longer intend to defend this appeal and accordingly notify their withdrawal from proceedings and respectfully request the Tribunal allows the appeal."

99. Which the Tribunal did on the following day.

100. The witness evidence referred to was a witness statement from the Westmorland's Chief Executive, a Ms Knipe, dated 11 September 2020. It is fair to say that statement, in large measure, is very similar to the witness statement in this case. It contains one paragraph "The Show's main purpose is to raise funds for the Society without (sic) such funds the society could simply not function in the same way and would be far more restricted in what charitable activities could be undertaken". That is strikingly similar to a paragraph in Mr Stoddart's first statement. Ms Knipe's witness statement goes on to deal, in detail, with Westmorland's activities.

101. The Appellant sought to rely on HMRC's stance in the Westmorland Appeal, and its stance in this appeal, and pointed (accurately) to any absence of explanation or clarification from HMRC as to what, in HMRC's view, was materially different between the Westmorland Appeal and this one so as to have led to conceding that appeal, but not this one.

102. As the present Tribunal observed to the parties to this appeal, that was something which could potentially have been explored in ADR, had ADR taken place (it had not) and, in the absence of a negotiated settlement, could have been set out in an ADR "outcome document".

103. Whilst there is, at first blush, some attraction to the Appellant's argument, and it is tempting to treat the two cases - this one, and the Westmorland one - as materially indistinguishable, we decline to do so. We simply do not know enough either (i) about the Westmorland Appeal, nor (ii) about what particular part (or parts) of Ms Knipe's witness statement led HMRC to withdraw from the appeal so as to enable this Tribunal to assess whether the twopayers are indeed materially indistinguishable.

104. There is nothing to show (even by way of necessary inference) that the factor which drove HMRC's withdrawal from the Westmorland Appeal was Ms Knipe's assertion that her society's shows' main purpose was fund-raising. That was, on the face of it, no more than a bare assertion in a witness statement which could have been challenged or explored by HMRC in cross-examination at final hearing, had the appeal reached that far. Arguments about similarity between the two cases, or consistency of treatment, cannot realistically be explored, or decided on.

105. There are other difficulties with such an approach. In the absence of any evidence from the decision-maker in the present appeal, there was no opportunity for the similarities/dissimilarities with the Westmorland Appeal to be explored in evidence (even to extent that the same would have been permissible - it might not have been). The present Appellant did not call Ms Knipe, which it could have done. Moreover, the Westmorland Appeal, as the papers make clear, dealt with two issues, of which only one was fund-raising. Part of its appeal was focussed on Schedule 9 Group 9 Item (e) (ie, a different Group) and whether the membership subscriptions qualified for exemption.

Item 1(c) - "that is promoted as being primarily for the raising of money"

106. This is the wording of Item (1)(c), introduced in 2000. Item 1(c) also has to be satisfied.

107. In its Grounds of Appeal, the Appellant accepts that it did <u>not</u> promote the Show in 2016 as being "primarily" for the raising of money.

108. It is appropriate to go back to Article 132(1)(o) of the Principal VAT Directive 2006/112/EC which, insofar as material, reads:

> "1. Member States shall exempt the following transactions:
> [...]

(o) The supply of services and goods, by organisations whose activities are exempt pursuant to points (b), (g), (h), (i), (l), (m) and (n), in connection with fund-raising events organised exclusively for their own benefit, provided that exemption is not likely to cause distortion of competition'.

109. The Directive does not contain - either expressly, or by way of necessary implication - any requirement than an event be promoted *primarily* for the raising of money. The only qualification is that the exemption "is not likely to cause distortion of competition".

110. It is not easy to conceptualise an event which is "promoted" "primarily" for fund-raising purposes. In our experience, fund-raising events are not usually promoted in that way. The funds are raised through promising the payers something in return for their money, such as instruction, entertainment, food or drink.

111. In *Loughborough* Judge Kempster concluded that Item 1(c) was incompatible with the Directive, and, as part of an interpretative exercise, disapplied it: see Paragraph 93(3) of his decision.

112. He did this on the basis (in summary):

(1) That Group 12 did not correctly implement Article 132(1)(o);

(2) That Item 1 (and the applicable notes) were not intra vires of compliant with Article 132; and

(3) That there was accordingly as incompatibility between domestic legislation and EU legislation which could be repaired under the so-called '*Marleasing'* principle: see Paras [54] and [83-90].

113. He said:

"86. [...] the condition in Item 1(c) that the event must be promoted as being primarily for the raising of money. Again, this is not explicitly provided in art 132(1)(o). I assume (I heard no submissions on this specific point) the purpose of this condition is to ensure that persons attending (or planning to attend) a fundraising event are aware that it is such an event, and so they regard themselves as benefactors of the organisation rather than mere customers of the goods and services provided at the event. If that is the purpose behind the condition then I consider the restriction is unwarranted. If a charity organises a fundraising event (say, a jumble or nearly-new sale of donated items) then the motivation of customers (benefactors or bargain hunters) does not, I consider, affect the character of the event as a fundraiser. Accordingly, I conclude that Item 1(c) is an unwarranted restriction on the availability of the exemption, and thus is ultra vires art 132(1)(o)."

114. Judge Kempster went on to consider whether Item 1(c), being non-conforming with the Article, was "curable" under the so-called Marleasing principle.

115. That comes from the judgment of the European Court of Justice in *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1990) Case C-106/89 [1990] ECR I-4135 and requires a national court of a Member State to interpret the national law in the light and wording of the Directive.

116. It was common ground before us - accepted by both the Appellant and HMRC - that the *Marleasing* principle still applies in the United Kingdom, and in this Tribunal, when it comes to the interpretation of this Group of the VAT Act, despite the United Kingdom's departure from the European Union.

117. The Marleasing principle was examined by Arden LJ (as she then was) in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2010] STC 1251 at Paras [258]-[260] of her decision. She said:

> "[258] … [In Marleasing the] ECJ held that the national court was required so far as possible under national law to interpret its national law so as to preclude a declaration of nullity in cases other than those prescribed in the directive. In other words, the national court was required to disapply provisions of its national law.
>
> [259] The ECJ helpfully commented on the Marleasing principle in *Miret v Fondo de Garantía Salarial* (Case C-334/92) [1993] ECR I-6911, para 20 of the judgment:
>
>> '20. Thirdly, it should be borne in mind that when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. As the Court held in its judgment in Case 106/89 *Marleasing v La Comercial Internacional de Alimentación* paragraph 8, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.'
>
> [260] The obligation of our courts to interpret domestic legislation in conformity with Community law if it is possible to do so is a powerful one, requiring the court to go beyond what could be done by way of statutory interpretation where no question of Community law or human rights is involved: see *R (IDT Card Services Ireland Ltd) v Customs and Excise* [2006] EWCA Civ 29, [2006] STC 1252; *Lister v Forth Dry Dock and Engineering Co Ltd* [1989] [All ER 1134, [1990] 1 AC 546. …"

118. At this stage, we should also note that the parties agree that, in this case, and so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before the Implementation Period completion day, the Tribunal should continue to interpret and apply the 1994 Act as it would have been interpreted and applied prior to the UK leaving the EU: see the *European Union (Withdrawal) Act 2018*, section 5(2).

119. The parties also agree that domestic law is to be interpreted so as to conform with EU law: see *Vodafone 2 v HMRC* [2009] EWCA Civ 446 at Paras [37]-[38] where the Chancellor (with whom Longmore and Goldring LJJ) said (omitting citations):

> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> (a) It is not constrained by conventional rules of construction;
>
> (b) It does not require ambiguity in the legislative language;
>
> (c) It is not an exercise in semantics or linguistics;
>
> (d) It permits departure from the strict and literal application of the words which the legislature has elected to use;

(e) It permits the implication of words necessary to comply with Community law obligations; and

(f) The precise form of the words to be implied does not matter.

The only constraints on the broad and far-reaching nature of the interpretative obligation are that:

(a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment;

and

(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate.

120. In *Robertson v Swift* [2014] UKSC 50 the Supreme Court said (at Paras [20]-[21]):

> "A national court must interpret domestic legislation, so far as possible, in the light of the wording and purpose of the Directive which it seeks to implement. This is now well settled.
>
> The breadth and importance of this principle was authoritatively set out in Vodafone 2 v Commissioners for Her Majesty's Revenue and Customs [...]"

121. *HMRC v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29 is an example of such an exercise in the VAT context. There, the Court of Appeal read-in words to widen a disapplication of a disregard of consideration for phone cards.

122. All these decisions bind us.

123. At Paragraphs 89-90 of his decision in *Loughborough*, Judge Kempster said:

> "89. It is straightforward for me to read Item 1 so as to be compliant and conforming with art 132(1)(o); the only offending provision is Item 1(c) and Item 1 is coherent with the simple omission of Item 1(c). So, for completeness, I would read Item 1 after such adjustment as being:
>
> "The supply of goods and services by a charity in connection with an event—
>
> (a) that is organised for charitable purposes by a charity or jointly by more than one charity, and
>
> (b) whose primary purpose is the raising of money."
>
> 90. That reading "cures" Item 1 so that it is fully compliant with art 132(1)(o). Therefore, I do not accept the Appellants' contention that Item 1 cannot be cured under the Marleasing principle."

124. Judge Kempster decided that Item 1 was to be cured through the deletion of the entirety of Article 1(c).

125. In its submissions before us, HMRC does not accept Judge Kempster's conclusion on this point. That is a course properly open to HMRC, because, as Mr Hickey-Baird correctly pointed out, the taxpayers' appeals were dismissed in *Loughborough,* and the Court of Appeal (Underhill LJ, the then-Vice President of the Civil Division, with whom Nicola Davies and Males LJJ agreed) has read section 11(2) of the *Tribunals, Courts and Enforcement Act 2007* as not permitting 'winner's appeals': see *Secretary of State for the Home Department v Devani* [2020] EWCA Civ 612 at Para. [27]. So, in *Loughborough*, HMRC could not have taken the point to the Upper Tribunal even if it had wanted to.

126. *Loughborough* does not come from a superior court of record, and so, on that footing, does not bind us, any more than this decision will bind any subsequent composition of this Tribunal which comes to consider exemption under this Group. But, even if we are not bound by Judge Kempster's decision in *Loughborough*, we should nonetheless regard it with appropriate respect and comity, taking account of the fact that (i) it is not an extempore decision; (ii) he heard very full adversarial argument, and (iii) his reserved full reasons are carefully articulated.

127. We respectfully agree with the analysis and decision of Judge Kempster on this point, and adopt it.

128. But, and lest our conclusion on this should fall to be reconsidered, even if we were not to have adopted an identical approach to that adopted in *Loughborough*, but were similarly unconstrained as to the operation of the *Marleasing* principle, we would still have deleted the word "primarily" in Item 1(c), so that it would have read "(c) that is promoted as being ~~primarily~~ for the raising of money." (that is, "primarily" struck through).

129. In our view, there is nothing in the Directive which mandates the restriction which use of the word "primarily" ostensibly imposes on Item 1(c). Although Article 132(2) does provide that, for the purposes of Article 132(1)(o), "Member States may introduce any restrictions necessary, in particular as regards the number of events or the amount of receipts which give entitlement to exemption", Item 1(c), even if a restriction, does not seem to be a 'necessary' one.

130. As to "necessity", there is no evidence before us from HMRC of a serious risk of evasion, avoidance or abuse, let alone evidence of the appropriate "concrete, objective and verifiable" character.

131. In this appeal, Judge Kempster's reading, or our alternative reading, would each have led to an identical outcome, because the Show - as HMRC in the course of its submissions accepted - was promoted for the raising of money, even if not primarily. HMRC was bound to accept this, even if belatedly, because the preponderance of contemporary documentary evidence, including the 2016 and 2017 fliers, the schdules, and the ticket, all said so: *"The Great Yorkshire Show raises funds for the Yorkshire Agricultural Society to help support farming and the countryside."*

132. That part of HMRC's challenge which sought to focus on the word "primarily" was, in any event, very hard to understand. We were not able to readily apprehend, despite submissions, what the four corners of this challenge really were. We were not told what, in HMRC's view, compliant "primary" promotion in relation to the Show would actually have been. We were not told what the difference was between "promotion" (simpliciter) and promotion 'primarily', nor how this could be reliably identified in this, and other, cases.

133. Standing back, that absence of explanation is not entirely surprising. Despite Mr Hickey-Baird's efforts, any argument that the wording on the fliers and the ticket was not sufficiently big, or prominent, is not rationally sustainable, whether in this case (on the facts) or in others. A scheme of exemption which is ultimately made to depend on assessment of factors such as the prominence of text (which in turn engages factors such as the size, location, and colour of the font used), or the inclusion of text as a headline or a strapline, or its composition in relation to other text used, not only fails to find any support whatsoever in the Directive, or in the Explanatory Materials to the amended Group, but is self-evidently unworkable, either by taxpayers or HMRC, and gives no certainty to either.

134. HMRC's point that the wording does not say "fund-raising for" but says that the Show "contributes to [the Society's] funds" is semantic and unattractive. The test is substantial and not formal. In this regard, HMRC are seeking, wrongly, to establish a distinction where there is in reality no difference.

135. HMRC also suggested that the websites for the Show made no reference to the Show being a fund-raising event. But (even if correct) this cannot be decisive where the documents such as the fliers and tickets do.

EQUAL TREATMENT

136. Submissions were made that the EU law principle of equal treatment (as recently explained by the Upper Tribunal in *R T Rate v HMRC* [2022] UKUT 118 (TCC)) compelled allowing this appeal. It was said that Mr Stoddart's evidence "confirms that the Show is materially identical to the Westmorland show."

137. We do not consider this sufficient to establish that the Show and Westmorland are materially identical. References to 'a class' and membership of that class leave open the anterior question as to the defining characteristics of the relevant class. In this appeal, no-one ventured any analysis as to how the Yorkshire Agricultural Society and the Westmorland Society, beyond both being agricultural societies and both having shows, justified allowing this appeal.

138. Otherwise, the point is not productive because, as the Upper Tribunal pointed out, it is not enough simply to point to an allegedly different treatment of a single other taxpayer within the class: see Rate at Para [60].

CONCLUSIONS ON ITEM 1

139. Item 1(a) is met. The Show in 2016 and 2017 was organised for charitable purposes by a charity.

140. Item 1(b) is met on the footing:

(1) Fund-raising is one of two inter-dependent purposes, but was the main purpose of the Show; or

(2) Even if not, then it was a main purpose of the Show, in the proper sense of the exemption.

141. Item 1(c) is met, on the footing that the Show was promoted for fund-raising purposes:

(1) Item 1(c) in its entirety is an incorrect transposition of the Directive into UK law (*Loughborough*); or

(2) The use of the word 'primarily' in Item 1(c) is an incorrect transposition, and falls to be deleted (*Marleasing*).

OUTCOME

142. The appeals as advanced in relation to the Show for 2016 and 2017 are allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

143. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

Release date: 25th APRIL 2023