



**Appeal number FTC/81/2012**

*VAT – exemptions – cultural services – bodies managed and administered on an essentially voluntary basis - student union governed by council – salaried sabbatical officers of executive committee as voting then non-voting members of council - whether FTT entitled to find student union not managed and administered on an essentially voluntary basis – yes*

*VAT – exemptions – fund-raising – whether conditions of exemption that primary purpose of events is raising of money and events promoted as primarily for raising money necessary to ensure events not likely to cause distortion of competition – issue remitted to FTT to determine*

**UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

**LOUGHBOROUGH STUDENTS' UNION**

**Appellant**

**- and -**

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

**Respondents**

**Tribunal: Judge Greg Sinfeld  
Judge Edward Sadler**

**Sitting in public in London on 30 and 31 July 2013**

**John Tallon QC, instructed by VATangles LLP, for the Appellant**

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

**Decision corrected on 25 November 2013 under Rule 42 of  
The Tribunal Procedure (Upper Tribunal) Rules 2008**

## DECISION

### Introduction

1. The Appellant (“the LSU”) claimed repayment of VAT from the Respondents (“HMRC”). The LSU maintained that, in VAT periods ending January 2002 to July 5 2008, it had accounted for output tax on certain supplies which should have been treated as exempt. The LSU’s primary claim was that supplies of the right of admission to entertainment events were exempt under Item 2(b) of Group 13 of Schedule 9 to the VAT Act 1994 (“the Cultural Services Exemption”). The LSU also made an alternative claim that supplies of goods and services in connection with 10 certain fund-raising events, namely the annual Freshers’ Ball and Graduation Ball, organised by the LSU were exempt under Article 13A(1)(o) of Directive 77/388/EEC (“the Sixth VAT Directive”), later Article 132(1)(o) of Council Directive 2006/112/EC (“the Principal VAT Directive”), (“the Fund-raising Exemption”).

2. HMRC refused to make any repayment to the LSU. The LSU appealed to the 15 First-tier Tribunal (“the FTT”).

3. In a decision released on 8 May 2012, [2012] UKFTT 331 (TC), the FTT (Judge Richard Barlow) dismissed the LSU’s appeal. The FTT held that the Cultural Services Exemption did not apply because the LSU did not meet the condition that it should be managed and administered on an essentially voluntary basis. The FTT 20 reached that conclusion because it found that the Council of the LSU took decisions of last resort concerning the policy of the LSU and that nine sabbatical officers of the LSU executive committee (who were members of the Council and who were paid a salary) played a large part in the LSU Council’s decision-taking.

4. The FTT also held that the Fund-raising Exemption did not apply because the 25 evidence did not show that the Balls met the conditions in Item 1(b) and (c) of Group 12 of Schedule 9 to the VAT Act 1994, namely that their primary purpose was the raising of money and they were promoted as being primarily for the raising of money.

5. The LSU now appeals to the Upper Tribunal on the grounds that the FTT erred in law

- 30 (1) in relation to the Cultural Services Exemption, in that it
- (a) failed to take account, or take sufficient account, of certain facts established in evidence and made findings against the weight of the evidence; and
  - (b) concentrated on the influence of the sabbatical officers on the LSU 35 Council rather than their role in the actual decisions made by the Council.
- (2) in relation to the Fund-raising Exemption, in that it
- (a) based its conclusion solely on the provisions of Item 1 of Group 12 of Schedule 9 to the VAT Act 1994; and
  - (b) failed to address the LSU’s argument that conditions in Item 1 of 40 Group 12, relating to primary purpose, were ultra vires the directly

effective provisions of the Sixth VAT Directive and the Principal VAT Directive.

6. For the reasons given below, we have decided that, in relation to the Cultural Services Exemption, the FTT was entitled to make the findings of fact that it did and, on the basis of the facts found, to conclude that the LSU was not managed and administered on an essentially voluntary basis. In relation to the Fund-raising Exemption, we have decided that the issue of whether the conditions in Item 1 of Group 12 were ultra vires the provisions of the VAT Directives was not properly considered by the FTT. Accordingly, we dismiss the LSU's appeal in relation to the Cultural Services Exemption and remit the matter of the Fund-raising Exemption to the FTT.

### **Factual background**

7. The narrative that follows is drawn from the facts found by the FTT and documents before it, the contents of which were not disputed.

8. The LSU is the students' union for Loughborough University, Loughborough College and the RNIB Vocational College. All students of those institutions are members of the LSU, unless they have opted out. The LSU is a charity and is registered for VAT.

9. At all times, the LSU had a constitution ("the Constitution") which provided that the governing body of the LSU is a council ("the Council"). Throughout the relevant period, the Constitution provided that the Council would formulate and decide on the policy of the LSU and such decisions should be passed by a simple majority vote. The Council would take an overview of the administration and implementation of the policy of the LSU in accordance with the LSU's core objectives, by means of the receipt and approval of reports from those who sat on the Executive Committee and other bodies of the LSU. The Constitution stated that the Council "shall delegate to the Executive Committee day-to-day management of the [LSU's] affairs and the implementation of its policies".

10. The Council had approximately 70 to 75 members. The members of the Council were the members of the Executive Committee, the student officers of the LSU, and the representatives of the halls of residence and the colleges.

11. The Executive Committee was responsible for the day-to-day management of the LSU. It was answerable to the Council. Its duties included overseeing and managing the LSU's finances. The Executive Committee took on plenary powers outside term time. The Executive Committee included nine "sabbatical officers". The sabbatical officers were students (usually, but not necessarily, students who had just graduated and were pursuing post graduate studies). They were elected to the position which they occupied for 13 months so that there was always a hand-over period when new sabbatical officers were elected. The sabbatical officers had contracts of employment and were paid a salary. During the relevant period, the salary was approximately two-thirds of what might have been considered a starting salary for a graduate in his or her first employment.

12. The Constitution was amended during the period with which the appeal is concerned. Until 23 May 2005, the Constitution provided that all members of the Council had a vote at Council meetings and decisions were passed by a simple majority with a quorum of 50% of the members. From 23 May 2005, the voting rights of members of the Executive Committee were removed. This meant that the sabbatical officers no longer had a vote. Other amendments to the Constitution also limited the Executive Committee's plenary powers during the vacation by precluding it from changing the Constitution or any existing LSU policies. We discuss what happened at the meetings of the Council in more detail below.
13. The Freshers' and Graduation Balls were a regular feature of the LSU calendar. They were a celebration and were part of the student experience. The LSU tended to book well known acts for the Balls and they made money. The publicity for the Balls mainly focussed on publicising the acts that were performing but it was made clear that proceeds went to the LSU.

## 15 Cultural Services Exemption

### *Legislation and case law*

14. Article 13A(1)(n) of the Sixth VAT Directive exempts supplies of cultural services and goods closely linked thereto by bodies governed by public law or other cultural bodies recognised by the Member State concerned. Article 13A(2)(a) allows Members States to make the granting of exemption to bodies other than bodies governed by public law subject to one or more specified conditions. The Article 13A(2)(a) condition that is relevant to this appeal is:

“[the bodies] shall be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned.”

15. Article 132(1)(n) of the Principal VAT Directive exempts supplies of cultural services and goods closely linked thereto in materially the same terms. Article 133 allows Members States to impose the same conditions as were permitted by Article 13A(2)(a) of the Sixth VAT Directive.

16. Section 31(1) of the VAT Act 1994 provides that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 to the Act.

17. Item 2(b) of Group 13 of Schedule 9 to the VAT Act 1994 provides exemption for

“The supply by an eligible body of a right to admission to –

...

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

18. Note 2 to Group 13 provides –

“For the purposes of Item 2 ‘eligible body’ means any body (other than a public body) which –

...

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

19. It was common ground that Item 2(b) and Note 2 of Group 13 of Schedule 9 to the VAT Act 1994 correctly implemented the relevant Articles of the Sixth VAT Directive and, later, the Principal VAT Directive save that the word “essentially”  
10 should be read into the wording of Note 2(c) of Group 13 to give effect to the language of the condition in Article 13A(2)(a) of the Sixth VAT Directive and Article 133 of the Principal VAT Directive.

20. The leading case on the Cultural Services Exemption is the decision of the Court of Justice of the European Communities (“CJEC”) in Case C- 267/00 *Customs & Excise Commissioners v Zoological Society of London* [2002] STC 521 (“*London Zoo*”). That case was later considered by the Court of Appeal in *Bournemouth Symphony Orchestra v Customs & Excise* [2007] EWCA Civ 1281, [2007] STC 198 (“*BSO*”). Both cases were the subject of submissions before the FTT and are referred to extensively in the decision. Mr John Tallon QC, who appeared for the LSU, said  
15 that he had no particular quarrel with the FTT’s exposition of the leading cases in [15] – [18] although he was less happy with a reference to a passage from *BSO* in [19] which we discuss further below.

#### *FTT’s decision*

21. The FTT summarised the relevant conditions that must be met in order for the  
25 Cultural Services Exemption to apply at [15] as follows:

“15. [*London Zoo* and *BSO*] make it very clear that in order to qualify as an eligible body the [LSU] must show that its management at the level of the decision makers of last resort, both those who are constitutionally required to make the decisions and any others who  
30 actually do make them, do not only have no financial interest in the activities of the [LSU] but also that they are acting essentially voluntarily. So far as the latter point is concerned payment of a salary to a decision maker at the relevant level is capable of defeating a claim that an organisation is an eligible body if the salary is paid for the making of the decisions.”  
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22. It was common ground before the FTT and before us that

(1) the Council was the governing body of the LSU and the forum for decision-making of last resort concerning the policy of the LSU;

(2) the nine sabbatical officers did not have a “financial interest” in the  
40 activities of the LSU by virtue of receiving salaries of less than an open market rate; and

(3) whether the supplies of cultural services were exempt turned on whether the LSU was managed and administered on an essentially voluntary basis which, in turn, depended on the view taken of the status and role of the nine sabbatical officers.

5 23. At [16] and [17], the FTT discussed the meaning of the word “essentially” and how significant a payment must be before management and administration of a body ceased to be essentially voluntary in the following terms:

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

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

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

24. At [18], the FTT set out how it should approach the essentially voluntary issue as follows:

40 “18. It is a matter for the national court (the Tribunal) to decide the issue whether the essentially voluntary condition is complied with by making an overall assessment of the relevant facts. Lloyd LJ’s remarks in paragraph [113] of [BSO] and the use of the word  
45 “essentially” provide an indication to the Tribunal that in making that overall assessment it is relevant to consider that some, probably small, payments might not defeat the voluntariness of the actions of the decision makers. Indeed the fact that only one of eight Board members

in [BSO] was paid emphasises the fact that essentially voluntary is intended to be a rather strict test.”

25. In [19], the FTT stated:

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

10 26. The FTT set out the evidence and various findings of fact at [24] – [43] of the decision. We refer to some of those findings in more detail below when we discuss the LSU’s criticisms of them.

27. The FTT set out its conclusions (which it called findings) on the facts in relation to the Cultural Services Exemption at [44] – [48] as follows:

15 “44. Although the sabbatical officers are not paid a full salary for a new graduate I find that does not assist the [LSU’s] case for saying that the [LSU] is run on an essentially voluntary basis. The authority of the [BSO] case suggests that only a small payment would be irrelevant.

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

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

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

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

45 28. In [49], the FTT held that the LSU’s appeal in relation to the Cultural Services Exemption failed because the sabbatical officers were paid a sufficiently large

*Submissions and discussion*

5 29. Mr Tallon, for the LSU, submitted that the FTT erred in law in that it failed to take account or take sufficient account of certain facts established in evidence, namely that:

(1) the sabbatical officers were students or ex-students of the University elected by the students themselves;

10 (2) the sabbatical officers had no previous work experience or qualification (aside from their degree course which Andrew Parsons, the salaried general manager of the LSU, said in evidence would not have prepared them for the work involved);

15 (3) the only “professional” person involved in the LSU was Mr Parsons (who was not a member of the Council); and

(4) the sabbatical officers were employed at a rate equivalent to two-thirds of what they might have expected in the open market;

20 30. Mr Tallon submitted that, in the light of the above points, the sabbatical officers should have been regarded as “amateurs” working for the LSU essentially as volunteers: the position was far removed from that in the *BSO* case, where the paid member on the governing body was the experienced chief executive. That argument seems to us, with respect, to be quite hopeless. The condition for exemption is that the body is managed and administered on an essentially voluntary basis not that it is run on an amateur basis. If the body is managed and administered by paid amateurs  
25 then its cultural services are excluded from the exemption just as they would be if the body were run by paid professionals.

30 31. Mr Tallon accepted, as he had to, that the sabbatical officers were paid a salary and that it was not a nominal amount. The sabbatical officers were employees under a contract of employment for a fixed term and under which they were paid a salary. The FTT was told that the salary equated to approximately two-thirds of the starting salary for a graduate in their first employment but we were not told how much that was. It was, however, clearly more than a nominal amount or contribution towards  
35 out of pocket expenses. The salaried sabbatical officers were not volunteers. If the sabbatical officers, no matter how inexperienced in the role, were persons who were designated by the Constitution to direct the LSU at the highest level or, if not so designated by the Constitution, did in fact direct the LSU in that they took the decisions of last resort concerning the policy of the LSU, especially in the financial area, and carried out the higher supervisory tasks then the LSU’s supplies of the right of admission to entertainment events would not fall within the Cultural Services  
40 Exemption – see [23] of *London Zoo* quoted by the FTT at [11].

32. Without detracting in any way from the general point we make concerning paid “amateurs”, we add that it is reasonable to assume that the Constitution of the LSU required sabbatical officers to have the role it assigns to them, and was prepared to pay them for their services, because, as current or former students, they had experience of student matters and student concerns which were valuable to the LSU in the way in which it represented the interests of its members.

33. Mr Tallon said that [19] of the FTT’s decision, quoted above, was a selective extract or summary of what Lloyd LJ said in *BSO*. Mr Tallon submitted that this selective reading led the FTT to focus on ‘influence’ rather than decision-making. We do not consider that this criticism of [19] is well-founded. The FTT had already set out [123] of *BSO* in full at [14] of the decision and we do so below.

“[123] It might be thought that the presence of the managing director on the Board is a somewhat arbitrary factor as the criterion determining whether a body, otherwise eligible for exemption from VAT on these grounds, should or should not qualify for such exemption. That would be too narrow a view. Even if the person in the position of the managing director (whatever the title given to the post) were not a member of the Board, he could still be one of the persons by reference to whom the second indent [under article 13A(2)(a) of the Sixth Directive] has to be satisfied. That would be the case if he was, on the facts, someone who, without being designated by the constitution, does in fact direct it, in that he takes, or shares in the taking of, the decisions of last resort concerning the policy of the body, especially in the financial area, and carries out the higher supervisory tasks: see the first ruling of the ECJ in the *London Zoo* case, quoted at paragraph [89] above. If a proper examination of the facts shows that, despite not being a member of the Board, he plays a significant part in the higher decision-making processes of the body, and is not limited to implementing decisions reached without his participation, then the second indent has to be satisfied in respect of him. In other words, if the payment of a full salary to the managing director, being a member of the Board, prevents the body from fulfilling the conditions in the second indent, it would not be sufficient, in order to avoid this problem, to remove him from the Board, if he were to continue to take part in the management and administration of the activities of the body at the highest level.”

34. Mr Tallon contended that, in [123], Lloyd LJ was referring to a person who actually directs the body, such as a managing director. We agree but we do not consider that directing the body necessarily requires the person to have a vote or actually take the decisions. The example discussed by Lloyd LJ in [123] of *BSO* is of a managing director who is not a member of the Board, ie does not have a vote. He will still be a relevant person for the essentially voluntary test if, as Lloyd LJ states, he plays a significant part in the higher decision-making processes of the body and is not limited to implementing decisions reached without his participation or, to put it another way, he continues to take part in the management and administration of the activities of the body at the highest level. We consider that the FTT was well aware that it had to consider whether the sabbatical officers played a significant part in the

35. Before dealing with the LSU's specific criticisms of various findings of fact by the FTT, we set out the approach that we take to such criticisms. The basis on which an appellate court or tribunal, having a jurisdiction only to deal with points of law, may exceptionally consider a challenge to a finding of fact is set out in the judgments of the House of Lords in *Edwards v Bairstow* [1956] AC 14. That case concerned an appeal from the General Commissioners who were predecessors to the FTT. At page 29 Viscount Simonds said:

10                   “For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the [general] commissioners have acted without any evidence or upon a view of the facts that could not reasonably be entertained.”.

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36. In a well-known passage, Lord Radcliffe stated in *Edwards v Bairstow* at page 36:

20                   “When the Case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law.”

25  
37. Lord Radcliffe's formulation of the approach to be taken by an appellate court to criticisms of findings of fact by a first instance court or tribunal does not permit a general review of the decision. Lord Radcliffe said:

30                   “The [appellate] Court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the Courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.”

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38. Evans LJ dealt with the same point in *Georgiou v Customs and Excise Commissioners* [1996] STC 463. At page 476, Evans LJ said:

                  “It is right, in my judgement, to strike two cautionary notes at this stage. There is a well recognised need for caution in permitting

5 challenges of findings of fact on the ground that they raise this kind of  
question of law. That is well seen in arbitration cases and many others.  
It is all too easy for a so-called question of law to become no more than  
a disguised attack on findings of fact which must be accepted by the  
courts. As this case demonstrates, it is all too easy for the appeals  
10 procedure in the High Court to be misused in this way. Secondly, the  
nature of the factual inquiry which an appellate court can and does  
undertake in a proper case is essentially different from the decision-  
making process which is undertaken by the tribunal of fact. The  
question is not, has the party on whom rests the burden of proof  
15 established on the balance of probabilities the facts upon which he  
relies, but, was there evidence before the tribunal which was sufficient  
to support the finding which it made? In other words was the finding  
one which the tribunal was entitled to make? Clearly, if there is no  
evidence, or the evidence was to the contrary effect, the tribunal was  
not so entitled.”

39. We point out that the only issues before the FTT in relation to the Cultural  
Services Exemption were questions of fact. It follows from the cases cited above that,  
in examining the LSU’s specific criticisms of various findings of fact by the FTT, we  
20 should exercise an appropriate degree of caution. We should not interfere with a  
finding of fact by the FTT simply because we might have reached a different  
conclusion. The question for us is not would we have reached the same conclusion on  
the facts as the FTT but was there evidence before the FTT which was sufficient to  
support the finding which it made?

25 40. The LSU took issue with [43] of the decision in which the FTT recorded that:

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

Mr Tallon contended that [43] was not a finding of primary fact but a conclusion  
drawn from the FTT’s own reading of the minutes. We note that Lord Radcliffe said  
in *Edwards v Bairstow* that:

35 “I do not think that inferences drawn from other facts are incapable of  
being themselves findings of fact, although there is value in the  
distinction between primary facts and inferences drawn from them.”

41. Mr Tallon argued that the FTT was not entitled to draw the conclusion that the  
majority of proposals by the Executive Committee were adopted without much debate  
by a large majority and often without any votes against. Mr Tallon also submitted  
40 that the FTT erred in law when it found, in [46], that:

“... the sabbatical officers had an influence on the decision-making  
process of the [LSU] far in excess of their proportionate numbers. ...”

in that it failed to take account sufficiently or at all of the evidence of Mr Parsons and  
Ms Payne that the Council was not merely a “rubber stamp” but was “the boss”.

42. Mr Tallon also submitted that the FTT had taken no or no sufficient account of the evidence of Ms Payne about the reports presented to the Council and the evidence of the minutes themselves as to the format of the Council meetings. Ms Payne's evidence, corroborated by the minutes of the Council meetings, was that starred reports (that is reports from various Committees, including the Executive Committee, that were considered to require no decisions of the Council) submitted to the Council were in large part progress reports from the various committees including the Executive Committee, requiring no further action; and they could be "unstarred" by any member of the Council, which meant they would be discussed at a meeting of the Council and that this happened on several occasions. Mr Tallon also took us through most, if not all, of the minutes of the Council meetings during the period before and after 23 May 2005.

43. It is not necessary to set out the minutes in this decision. It is sufficient that we record that there were many more examples of proposals brought by sabbatical officers as members of the Executive Committee being adopted by the Council as the policy of the LSU than of them being rejected or amended by what were called "procedural motions" from other members of the Council. It was also clear from the minutes that there was very little discussion about the annual Strategic Plan proposed by the relevant sabbatical officer and often no discussion at all about matters of policy, notwithstanding that, in some cases (as with regard, for example, to the LSU's policy on drugs) policies were being adopted for a three-year period. The one subject which did seem to generate real debate was the annual increases in hall fees. Having reviewed the minutes, we consider that there was ample evidence which entitled the FTT to find, as a fact, that the majority of proposals put forward by Executive Committee members were adopted by the Council without much debate and usually by a very large majority, if not unanimously. Indeed, our view is that it is difficult to see how the FTT could have reached any other conclusion from the minutes. The evidence of Ms Payne was not inconsistent with and did not undermine that conclusion in any way.

44. We do not consider the fact that the Council could (and did) "unstar" reports from the Executive Committee meant that the members of the Executive Committee, including the nine sabbatical officers, were any less a part of the decision-making process of the Council. The process of unstarred did not mean that the Council did not subsequently accept the proposal. In any event, discussing a report or proposal and asking questions of the Executive Committee show that the Council Members were actively overseeing the Executive Committee but do not diminish the role of the members of the Executive Committee in the decision-making process.

45. As the FTT recorded, until the change in the Constitution from 23 May 2005, the members of the Executive Committee were voting members of the Council which was the body which made the decisions of last resort. The sabbatical officers were paid a salary, albeit less than a new graduate might earn. On that basis, the FTT found that the LSU was not managed and administered on an essentially voluntary basis in the period up to the change in the Constitution in May 2005. In our view, the evidence clearly showed that the nine salaried sabbatical officers who sat on the Council and voted in its meetings were, as members of the Council, designated by the

5 46. Mr Tallon submitted that the FTT erred in [46] of the decision when it focussed  
on the “influence” that the sabbatical officers had on the decision-making process  
rather than concentrating on the role of the sabbatical officers in the actual making of  
decisions by the Council. Mr Tallon said that the FTT’s error was particularly  
significant in [48] of the decision when it held that

10 “The influence and importance of the sabbatical officers appears from  
the minutes and the evidence to have continued [after the change in the  
Constitution on 23 May 2005] to be effectively the same as it was  
before the change in the voting arrangements ...”

15 because it underestimated or ignored the evidence about the role of the Council vis-à-  
vis the Executive Committee and failed to acknowledge that, from 23 May 2005, the  
sabbatical officers were no longer able to participate in the taking of decisions of last  
resort.

47. From 23 May 2005, the members of the Executive Committee (and hence the  
sabbatical officers) continued to be members of the Council but no longer had a vote  
20 at the Council Meetings under the Constitution. In relation to the period after the  
change in the Constitution, the FTT found at [48], that the influence and importance  
of the sabbatical officers remained the same and, accordingly, the LSU was not  
managed and administered on an essentially voluntary basis in the period after the  
change in the Constitution in May 2005. In our view, there was ample evidence from  
25 which the FTT could draw the conclusion that, even when they no longer had a vote,  
the sabbatical officers continued to play a significant part in the process of making  
decisions of last resort concerning the policy of the LSU and carrying out the higher  
supervisory tasks. Those were the terms in which Lloyd LJ expressed the test in [123]  
of *BSO*. We do not understand the FTT’s references to “influence” in [46], [48] and  
30 [49] to be a different test to that propounded by Lloyd LJ in *BSO*. In our view,  
“influence” is merely another term for the part played by the sabbatical officers – it  
reflects the fact that (equally after they ceased to have a vote as before) the proposals  
and policies which they put before the Council were usually adopted with little or no  
discussion, or where they were debated, were then adopted following the explanations  
35 or advocacy of the relevant sabbatical member. Lloyd LJ, reflecting the language of  
the CJEC in *London Zoo*, also referred to decisions “especially in the financial area”  
but it appears from the minutes that the majority of the items discussed by Council did  
not directly concern the finances of the LSU and thus the sabbatical officers had no  
opportunity to play a part in such decisions.

40 *Decision on Cultural Services Exemption*

48. In this case, it seems to us that the FTT was entitled to find, on the evidence  
before it, that the salaried sabbatical officers played a significant part in the higher  
decision-making processes of the LSU both before and after the change in the

5 **Fund-raising Exemption**

*Legislation*

49. Article 13A(1)(o) of the Sixth VAT Directive exempts:

10 “the supply of services and goods by organisations [including, it is agreed, the LSU] in connection with fund-raising events organised exclusively for their own benefit provided that exemption is not likely to cause distortion of competition. Member States may introduce any necessary restrictions in particular as regards the number of events or the amount of receipts which give entitlement to exemption”

15 50. Article 132(1)(o) of the Principal VAT Directive provides for exemption in the same terms save that the permission for Member States to introduce necessary restrictions is set out in Article 132(2).

51. Item 1 of Group 12 of Schedule 9 to the VAT Act 1994 exempts:

20 “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.”

25 52. Further conditions which are not relevant to this appeal are imposed by notes to Group 12.

*FTT's decision*

53. The FTT set out its conclusions in relation to the Fund-raising Exemption at [50] as follows:

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

*Submissions and discussion*

54. Mr Tallon submitted that the FTT had failed to address the LSU's argument at the hearing that the requirements in Item 1 of Group 12 that the raising of money must be the primary purpose of the event and that the event must be promoted as being primarily for the raising of money are contrary to and ultra vires the directly effective provisions in Article 13A(1)(o) of the Sixth VAT Directive and, later, Article 132(1)(o) of the Principal VAT Directive. Mr Tallon said that the FTT's decision was based solely on the terms of Item 1 of Group 12 and this amounted to an error of law. Mr Richard Chapman, who appeared for HMRC, frankly accepted that the decision did not consider whether the requirements in the UK legislation are intra vires the provisions in the two VAT Directives.

55. Mr Tallon referred us to *Newsvendors Benevolent Institution v Customs and Excise Commissioners* (1996) VTD 14343 in which the VAT and Duties Tribunal said, at [25], that:

15                    "... the exemption in Article 13A(1)(o) and in Item 1 of Group 12 is not limited to events the main purpose of which is to raise funds. Both provisions refer to 'a fund-raising event' and do not specify that fund-raising must be the main purpose of the event."

As will be obvious to the attentive reader, the version of Item 1 of Group 12 quoted above and with which this appeal is concerned does specify that fund-raising must be the primary purpose of the event. The Tribunal in *Newsvendors Benevolent Institution* was discussing an earlier version of Item 1 of Group 12. In April 2000, Item 1 of Group 12 was amended to include the primary purpose conditions. Mr Tallon relies on *Newsvendors Benevolent Institution* for the statement that the exemption in Article 13A(1)(o) is not limited to events the main purpose of which is to raise funds.

56. Mr Tallon also referred us to *Cheltenham & Gloucester College of Higher Education Students Union v Customs and Excise Commissioners* (1998) VTD 15727 in which a differently constituted VAT and Duties Tribunal followed the line taken by the Tribunal in *Newsvendors Benevolent Institution*.

57. Mr Tallon's submission was that the UK could only impose such restrictions on the exemption as were necessary which meant that they must be restrictions that ensure that the exemption of the events is not likely to distort competition. Mr Chapman agreed that the restrictions must be necessary to avoid distortion of competition.

58. The LSU did not accept that the conditions that the "primary purpose" of the events must be to raise money and that such events must be "promoted as being primarily for the raising of money" made the Balls less likely to cause distortion of competition. Mr Tallon contended that the Balls put on by the LSU were not events that were likely to distort competition nor did they do so.

59. Mr Tallon submitted that it is for HMRC to establish that the restriction is necessary to prevent distortion of competition. If they could not do so, the LSU

60. Mr Chapman submitted that the primary purpose and promotion requirements are necessary in order to avoid distortion of competition. Mr Chapman gave the example of a charity New Year's Eve Ball. Competition would be distorted if the charity were able to charge less as a result of the VAT exemption.

61. We consider that Case C-288/07 *HMRC v Isle of Wight Council and others* [2008] STC 2964, which was not cited to us, is relevant. The issue in that case was whether the existence of distortions of competition should be assessed on a case by case basis or at a more general level. In *Isle of Wight*, local authorities claimed repayments of VAT on the basis that their supplies of off-street parking were outside the scope of VAT because they engaged in the activities as local authorities and not as taxable persons. HMRC refused the repayment on the ground that Article 4(5) of the Sixth VAT Directive provided that the local authorities should be considered to be taxable persons in relation to such activities where treatment as non-taxable persons would lead to significant distortions of competition. The CJEU held, at [53], that:

“... the significant distortions of competition, to which the treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead, must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular.”

62. Article 4(5) referred to activities that “would lead to” distortion of competition whereas in this case the relevant Articles use the phrase “not likely to cause distortion of competition”. The CJEU in *Isle of Wight* held, at [65], that:

“... the expression ‘would lead to’ is, for the purposes of the second subparagraph of Article 4(5) of the Sixth Directive, to be interpreted as encompassing not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical.”

63. Mr Chapman referred us to Joined Cases C-259/10 and C-260/10 *HMRC v Rank Group plc* [2012] STC 23. The issue that reached the CJEU in that case was whether the fact that HMRC treated essentially similar slot machines differently for VAT purposes breached the principle of fiscal neutrality. The CJEU considered whether it must be established that the services in question were actually in competition or that the difference in treatment caused distortion of competition before it can be held that there has been an infringement of the principle of fiscal neutrality. The CJEU in *Rank* held, at [32] – [35], that (case references omitted):

“32. According to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes.

33 According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.

5 34 Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer.

35 That consideration is also valid as regards the existence of distortion of competition. The fact that two identical or similar supplies which meet the same needs are treated differently for the purposes of VAT gives rise, as a general rule, to a distortion of competition.”

10 64. We consider that *Isle of Wight* and *Rank* show that whether there is distortion of competition must be determined by reference to the nature of the activity and without regard to the particular market in which it is supplied. It is not necessary to show that there is actual competition between the two activities provided that the potential competition is a real and not purely hypothetical possibility. If the two activities are  
15 identical or similar from the point of view of the consumer and meet the same needs of the consumer then they are in competition with each other. If, further, the two activities are treated differently for the purposes of VAT then, as a general rule, that will be regarded as giving rise to a distortion of competition.

20 65. Since the FTT dealt with the issue of the Fund-raising Exemption solely by reference to the UK legislation, it seems to us that it implicitly decided that the restrictions in Item 1 of Group 12 of Schedule 9 to the VAT Act 1994 were intra vires the provisions of the VAT Directives. Unfortunately, the matter was not discussed in the decision and no reasons were given for the implicit answer to the ultra vires issue so that we cannot be confident that the FTT properly considered the issue. If this  
25 were simply a matter of analysis of the EU and UK legislative provisions then we could decide the point but we consider that the issue also raises questions of fact.

66. Our view is that, in order to decide whether the conditions in Item 1 of Group 12 of Schedule 9 are ultra vires the provisions of the VAT Directives, it is necessary to determine:

- 30 (1) applying the *Isle of Wight* and *Rank* cases, whether the exemption of the Balls organised by the LSU gives rise to distortion of competition; and, if so,  
(2) do the conditions make the exemption of such events unlikely to cause distortion of competition?

35 We consider that the first question cannot be answered without determining whether the LSU Balls and commercial events were sufficiently similar that they must be regarded as in competition with each other. That is a question of fact. The effect of the conditions on removing or reducing competition between fund-raising events and comparable commercial events is also a question of fact.

#### *Decision on Fund-raising Exemption*

40 67. The FTT’s decision proceeded on the basis that the restrictions in Item 1 of Group 12 of Schedule 9 were not ultra vires the provisions in the Directives. In some circumstances, an implicit decision on such a point might be enough but, in this case,

5 68. We have attempted to indicate the approach which the FTT might adopt in considering this issue, but we would not wish to be too prescriptive: the matter was not argued in depth before us, and further, and detailed, argument by the parties before the FTT may indicate that the issue should be approached with reference to different, or additional, factors.

10 69. There are some advantages to a further hearing before the same judge, and some to a fresh hearing before a differently-constituted tribunal. In its application to the FTT for permission to appeal, the LSU asked the judge to review the decision on the Fund-raising Exemption but he decided not to do so. In the circumstances, we consider that it would be more appropriate to remit the matter to a differently  
15 constituted tribunal.

70. For the reasons given above, we remit the matter to the FTT to determine whether the conditions in Item 1 of Group 12 of Schedule 9 to the VAT Act 1994, that the raising of money must be the primary purpose of the event and that the event must be must be promoted as being primarily for the raising of money, are ultra vires the  
20 provisions in Article 13A(1)(o) of the Sixth VAT Directive and, later, Article 132(1)(o) and (2) of the Principal VAT Directive.

### **Disposition**

71. For the reasons set out above, we dismiss the LSU's appeal against the FTT's decision in relation to the Cultural Services Exemption.

25 72. We remit the LSU's appeal in relation to the Fund-raising Exemption to the FTT to be heard again by a differently constituted tribunal.

**Greg Sinfield**  
**Upper Tribunal Judge**

**Edward Sadler**  
**Upper Tribunal Judge**

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**Release date: 21 October 2013**