

The Charity Law & Practice Review

MEMBERS, NON-MEMBERS AND VAT

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After considerable campaigning by amateur sportsmen, the provision of sports facilities by non-profit making organisations became exempt supplies following the Value Added Tax (Sport, Physical Education and Fund Raising Events) Order 1994.² The operation of that exemption is but one example of the way in which the law relating to value added tax can influence the way in which charities are structured and provide their services.

Sports and Charities

Although the encouragement and promotion of sport simpliciter is not a charitable purpose,³ the provision of sports facilities may be a charitable purpose as part of a wider purpose which is itself charitable. Thus a trust to encourage sport among young people at school and university is charitable⁴ as is a trust to promote sport in a specified regiment.⁵ More importantly, a large number of organisations providing sports facilities are charitable under the Recreational Charities Act 1958. The wide application of the 1958 Act was confirmed by the House of Lords in *Guild v IRC*⁶ when considering a gift to a sports centre in North Berwick. Lord Keith of Kinkel⁷ stressed that the provision of sports facilities was charitable under

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² 1994 SI No 687.

³ See, for example *Re Nottage* [1895] 2 Ch 649, *Re Patten* [1929] 2 Ch 276; [1989] Ch Comm Rep paras 48-55 rejecting Birchfield Harrier's application for registration.

⁴ *IRC v McMullen* [1981] AC 1 (The Football Association Youth Trust).

⁵ *Re Gray* [1925] Ch 362 cf (1993) 1 Ch Comm Dec p 4 (rifle clubs not connected to a particular regiment not charitable).

⁶ [1992] 2 All ER 10.

⁷ *Ibid* 18.

the Recreational Charities Act 1958 if the facilities were provided with the object of improving the conditions of life for members of the community generally; there was no need for the facilities to be provided with the object of improving the conditions of people who suffered some form of social disadvantage.⁸ Thus the VAT regime in relation to sport and physical education affects a considerable number of charities.

The Legislation

The relevant legislation is now contained in Schedule 9 to the Value Added Tax Act 1994 which defines supplies which are exempt from VAT. Item 3 of Group 10 provides as follows:

"The supply by a non-profit making body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part."

Note (2) provides:

"An individual shall only be considered to be a member of a non-profit making body for the purpose of Item 3 where he is granted membership for a period of three months or more."

Item 3 to Group 10 was introduced to implement Articles 13A1(m) and 13A2(b) of the Sixth Directive.⁹ Article 13A is as follows:

"A. *Exemption for certain activities in the public interest.*

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the current and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

(m) certain services closely linked to sport or physical education supplied by non-profit making organisations to persons taking part in sport or physical education;

⁸ i.e., a liberal interpretation should be taken of s.1(2) of the 1958 Act. See *IRC v McMullen* [1979] 1 WLR 130, 142 per Bridge LJ and cf *IRC v McMullen* [1978] 1 WLR 664, 675 per Walton J.

⁹ EEC/77/388.

2(b) The supply of services or goods shall not be granted exemption as provided for in 1...(m)...above if:

it is not essential to the transactions exempted,

its basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax."

The policy adopted by the Commissioners of Customs and Excise to avoid distortion of competition between commercial enterprises and non-profit making bodies and to give effect to Article 13A2(b) was to tax supplies to non-members as that income could be regarded as 'additional income'.¹⁰

The definition of 'member' and 'membership scheme' is thus crucial to the liability to VAT. If a charity does not have a membership scheme its supplies of sports facilities to anyone are exempt, whereas if it has a membership scheme, it must charge VAT to anyone who is not a member.

Basingstoke and District Sports Trust Ltd

Basingstoke and District Sports Trust Ltd, a charitable company limited by guarantee, supplies facilities for recreational, physical education and other leisure time occupation in Basingstoke. At the relevant time there were 16 members of the company under the terms of the Articles of Association. The charity ran a privilege card scheme under which card holders were entitled to certain benefits in relation to the facilities run by the charity, for example, priority booking. Privilege card holders, however, had no rights in relation to the running of the charity. The charity disputed the decision of the Commissioners of Customs and Excise that they ran a membership scheme and that value added tax should be charged to non-holders of privilege cards.

In the course of the tribunal case, *Basingstoke and District Sports Trust Ltd v Customs and Excise Commissioners*¹¹, the Commissioners submitted that a "member" should be defined as "one within a category of persons subject to common entitlements" and "a membership scheme" as "the arrangement by which those entitlements are decided upon and within which they are provided". The Chairman, Theodore Wallace, rejected such definition as too wide, holding that the

¹⁰ See [1994] STI 221 and VAT Notice 701/45/94.

¹¹ [1995] STI 1273, (1995) Decision No 13347.

concept of "membership scheme" and "member" involved some element of participation in or belonging to the body in question. He reached this conclusion partly on the basis that Note (2) to Item 3 of Group 10 refers to "a member of a non-profit making body" which made it difficult to construe "membership scheme" as anything other than membership of the body itself.

Implications

The liability of a charity providing sports facilities to VAT clearly depends upon whether the charity has a membership scheme or not. If an existing charity decides it wishes to encourage the use of the facilities by offering additional benefits to regular users, careful thought needs to be given to the form those benefits take. A "membership card" which offers reduced rates for certain activities or at certain times, or advance booking or access to special promotions, will not affect the VAT position. The use of the word "member" is not crucial; the tribunal will look to the reality of the situation.¹² If the additional benefits offered to regular users include the right, for example, to attend and vote at the annual general meeting of the charity, there will probably be a membership scheme and the charity will have to charge VAT on supplies to non-regular users.

If a charity is being set up to provide sports facilities, the definition of member set out in *Basingstoke and District Sports Trust Ltd* can affect the choice of the legal structure to be adopted by the charity. A charitable trust, in its usual form, does not have members; the persons who participate in or belong to the body are the trustees and no-one else. Accordingly, supplies of sports facilities by a charitable trust, to whomsoever they are made, will be exempt from VAT. Care needs to be taken where a form of membership has been engrafted onto a trust, for example to allow a wider constituency to elect trustees. In that situation, if the members also use the sports facilities provided by the trust, supplies to other persons would probably be subject to VAT on the grounds that there is a membership scheme.

Charitable companies do have members. What would appear to be crucial for the purposes of VAT is the membership structure operated by the Articles of Association. Where the number of members is restricted the position is akin to that of a trust and supplies to other than members would appear to be exempt. *Basingstoke and District Sports Trust Ltd*, for example, had 16 members and its supplies were exempt. If the number of members is larger, and particularly when those using the facilities are expected or encouraged to become members, then there would appear to be a membership scheme and supplies to non-members would be subject to VAT.

¹² See *Southend United Football Club v Customs and Excise Commissioners* [1994] STI 1273, (1994) Decision No 11919.

A charitable unincorporated association has members and by virtue of its structure as "an association of persons bound together by identifiable rules and having identifiable membership"¹³ has a membership scheme within Item 3 of Group 10 to Schedule 9 of the 1984 Act. Any supplies to non-members would not be exempt. This factor would clearly have to be balanced against the wish for democracy and participation by users when choosing the legal structure for the charity. For many small charities, however, the problem may not arise as their turnover may be below the present registration limit of £46,000 a year.

Conclusion

Charities providing sports facilities are now added to the long list of charities who must remember the Value Added Tax Act 1994 when planning their activities. They must also remain alert. It is possible that the present exemption may be challenged on the grounds that it is not compatible with the Sixth Directive in that the test in Item 3 may not have objective connection with the restriction required by Article 13A2(b).¹⁴

¹³ See *Re Koepler's Will Trust* [1985] 2 All ER 869, 874 per Slade LJ.

¹⁴ See the doubt expressed by the Chairman in *Basingstoke and District Sports Trust Ltd v Customs and Excise Commissioners* [1995] STI 1273, (1995) Decision No 13347.