TC07909

VAT *– Local authority – sports and leisure facilities – whether economic activity – Art 9 PVD – whether engaging as a public authority - Art 13 PVD – Note 3 Group 10 sch 9 VATA 1994*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2011/7816

BETWEEN

CHELMSFORD CITY COUNCIL **Appellant**

-and-

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

TRIBUNAL: JUDGE PETER KEMPSTER
JUDGE ANNE SCOTT
JUDGE ALASTAIR RANKIN

Sitting in public at Taylor House, London on 23-26 September 2019

Amanda Brown and Adam Rycroft, KPMG LLP for the Appellant

Raymond Hill of counsel (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Respondents

DECISION

BACKGROUND

1. A dispute has arisen between local council authorities across the UK and the Respondents ("**HMRC**") concerning the VAT liability of charges paid by members of the public for access to sports and leisure facilities provided by those authorities. HMRC contend that the charges should bear VAT at the standard rate; the local authorities disagree.

2. In case management of the appeals (of which there is a large number) it was directed that:

(1) Consideration may need to be given to the statutory provisions relating to local authorities in the constituent parts of the UK, which vary by jurisdiction.

(2) A single lead case (Tribunal Procedure Rule 5(3)(b) refers) should be identified for each of the three territorial jurisdictions: England & Wales, Scotland and Northern Ireland.

(3) The nominated lead cases were the Appellant for England & Wales; Midlothian Council (TC/2011/7844) for Scotland; and Mid Ulster District Council (formerly Magherafelt District Council) (TC/2011/687 & TC/20102/9253) for Northern Ireland.

(4) The Tribunal panel to hear all three lead appeals would consist of three Judges, together qualified in the three jurisdictions. The then Chamber President confirmed the panel as constituted, and nominated Judge Kempster as the presiding member (Senior President's Practice Statement of 10 March 2009, paras 7 & 8, refers).

(5) For administrative reasons, the appeal of Mid Ulster District Council would be heard first, followed by a hearing of the other two lead cases together. The Tribunal's decisions on the three appeals would be released together.

INTRODUCTION

3. By a voluntary disclosure submitted in December 2010 the Appellant ("**the Council**") (previously called Chelmsford Borough Council) claimed repayment of VAT allegedly overpaid in VAT accounting periods between 2006 and 2010, totalling around £0.9 million.[1] The claim was rejected by HMRC, and the Council appeals to the Tribunal.

4. In brief summary, the Council contends (and HMRC disputes) that the charges in dispute do not attract VAT on three alternative grounds:

(1) Its supplies of sporting and leisure activities to members of the public are not "economic activities", and are therefore outside the scope of VAT;

(2) Its supplies of sporting and leisure activities to members of the public are provided by the Council in its role as a public authority acting under a special legal regime, and therefore it is not a taxable person in respect of those supplies; or

(3) Its supplies of sporting and leisure activities to members of the public are provided by the Council in its role as a public authority, and therefore it is not a taxable person in respect of those supplies, by virtue of Note 3 Group 10 sch 9 VAT Act 1994.

[1] There are also disputed claims (on the same basis) proceeding under separate appeals before the Tribunal for periods between 2010 and 2018.

LEGISLATIVE PROVISIONS

VAT Legislation

5. Article 2 Principal VAT Directive (2006/112/EC) ("**PVD**"), provides, so far as relevant:

> "1. The following transactions shall be subject to VAT: …
>
> (*c*) the supply of services for consideration within the territory of a Member State by a taxable person acting as such; …"

6. Article 9 PVD provides, so far as relevant:

> "1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity. …"

7. Article 13 PVD provides, so far as relevant:

> "1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. …
>
> 2. Member States may regard activities, exempt under Articles 132, …, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities."

8. Article 132 PVD provides, so far as relevant:

> "*Exemptions for certain activities in the public interest*
>
> 1. Member States shall exempt the following transactions:
>
> …
>
> (m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education; …"

9. Article 133 PVD provides:

> " Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must 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;

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

Member States which, pursuant to Annex E of Directive 77/388/ EEC, on 1 January 1989 applied VAT to the transactions referred to in Article 132(1)(m) and (n) may also apply the conditions provided for in point (d) of the first paragraph when the said supply of goods or services by bodies governed by public law is granted exemption."

10. The relevant UK VAT legislation, which (save as below) does not need to be quoted here, is in ss 1, 4, 5(2), 24, 41A, and 42 VAT Act 1994 ("**VATA**").

11. Section 33 VATA provides, so far as relevant:

"Refunds of VAT in certain cases.

(1) Subject to the following provisions of this section, where—

(a) VAT is chargeable on the supply of goods or services to a body to which this section applies, …, and

(b) the supply, … is not for the purpose of any business carried on by the body,

the Commissioners shall, on a claim made by the body at such time and in such form and manner as the Commissioners may determine, refund to it the amount of the VAT so chargeable.

(2) Where goods or services so supplied to … the body cannot be conveniently distinguished from goods or services supplied to … it for the purpose of a business carried on by it, the amount to be refunded under this section shall be such amount as remains after deducting from the whole of the VAT chargeable on any supply to … the body such proportion thereof as appears to the Commissioners to be attributable to the carrying on of the business; but where—

(a) the VAT so attributable is or includes VAT attributable, in accordance with regulations under section 26, to exempt supplies by the body, and

(b) the VAT attributable to the exempt supplies is in the opinion of the Commissioners an insignificant proportion of the VAT so chargeable,

they may include it in the VAT refunded under this section.

(3) The bodies to which this section applies are—

(a) a local authority …"

12. Group 10 sch 9 VATA provides, so far as relevant:

"*Sport, sports competitions and physical education*

Item No …

3 The supply by an eligible body to an individual of services closely linked with and essential to sport or physical education in which the individual is taking part.

NOTES

…

(2A) Subject to Notes (2C) and (3), in this Group "eligible body" means a non-profit making body …

…

(3) In Item 3 "an eligible body" does not include (a) a local authority; …"

Local Authority Legislation

13. Section 19 Local Government (Miscellaneous Provisions) Act 1976 ("**LGMPA**") provides, so far as relevant:

"*Recreational facilities*.

(1)A local authority may provide, inside or outside its area, such recreational facilities as it thinks fit and, without prejudice to the generality of the powers conferred by the preceding provisions of this subsection, those powers include in particular powers to provide—

(a)indoor facilities consisting of sports centres, swimming pools, skating rinks, tennis, squash and badminton courts, bowling centres, dance studios and riding schools;

(b)outdoor facilities consisting of pitches for team games, athletics grounds, swimming pools, tennis courts, cycle tracks, golf courses, bowling greens, riding schools, camp sites and facilities for gliding;

(c)facilities for boating and water ski-ing on inland and coastal waters and for fishing in such waters;

(d)premises for the use of clubs or societies having athletic, social or recreational objects;

(e)staff, including instructors, in connection with any such facilities or premises as are mentioned in the preceding paragraphs and in connection with any other recreational facilities provided by the authority;

(f)such facilities in connection with any other recreational facilities as the authority considers it appropriate to provide including, without prejudice to the generality of the preceding provisions of this paragraph, facilities by way of parking spaces and places at which food, drink and tobacco may be bought from the authority or another person;

and it is hereby declared that the powers conferred by this subsection to provide facilities include powers to provide buildings, equipment, supplies and assistance of any kind.

> (2)A local authority may make any facilities provided by it in pursuance of the preceding subsection available for use by such persons as the authority thinks fit either without charge or on payment of such charges as the authority thinks fit.
>
> (3)A local authority may contribute—
>
> > (a)by way of grant or loan towards the expenses incurred or to be incurred by any voluntary organisation in providing any recreational facilities which the authority has power to provide by virtue of subsection (1) of this section; and
> >
> > (b)by way of grant towards the expenses incurred or to be incurred by any other local authority in providing such facilities;
>
> and in this subsection "voluntary organisation" means any person carrying on or proposing to carry on an undertaking otherwise than for profit. …"

14. In relation to swimming facilities, s 221 Public Health Act 1936 provides, "A local authority may provide public baths and washhouses, either open or covered, and with or without drying grounds; or any of those conveniences." Section 222(1) *ibid* provides "a local authority may make such charges for the use of, or for admission to, any baths, or washhouse under their management as they think fit."

15. Section 3(1) Local Government Act 1999 mandates a general duty for best value: "A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness."

16. Section 111 Local Government Act 1972 states the subsidiary powers of local authorities thus:

> "(1)Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.
>
> …
>
> (3)A local authority shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively. …"

CASE LAW AUTHORITIES

17. The following cases were cited, and those referred to in this decision notice use the marked abbreviations:

> *Bromley LBC v GLC* [1982] 1 All ER 129 **("*Bromley*")**
>
> C-89/81 *Staatssecretaris van Financiën v Hong-Kong Trade Development Council*
>
> C-102/86 *Apple and Pear Development Council v Customs and Excise Commissioners* [1998] STC 221

Joined cases C-231/87 and C-129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino and Ufficio Provinciale Imposta sul Valore Agtgiunto di Piacenza v Comune di Rivergara and others* [1991] STC 205 ("***Carpaneto No 1***")

C-4/89 *Comune di Carpaneto Piacentino and others v Ufficio provincial imposta sul valore aggiunto di Piacenza* [1990] ECR I-1869 ("***Carpaneto No 2***")

Credit Suisse v Allerdale Borough Council [1996] 4 All ER 129 **("*Credit Suisse*")**

C-155/94 *Wellcome Trust Ltd v Customs and Excise Commissioners* [1996] STC 945 ("***Wellcome Trust***")

C-230/94 *Enkler v Finanzamt Homburg* [1996] STC 1316

C-247/95 *Finanzamt Augsburg-Stadt v Marktgemeinde Welden ("**Marktgemeinde**")*

Halki Shipping Corp v Sopex Oils Ltd [1998] 2 All ER 23

C-216/97 *Gregg v Customs and Excise Commissioners* [1999] STC 934

Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners [1999] STC 398 ("***ICAEW***")

C-446/98 *Fazenda Pública v Câmara Municipal do Porto* [2001] STC 560 ("***Fazenda Pública***")

C-142/99 *Floridienne SA v Belgium* [2000] STC 1044 ("***Floridienne***")

*Edinburgh Leisure & others v CCE (*2004) VAT Tribunal Decision 18784 **("*Edinburgh Leisure*")**

C-284/04 *T-Mobile Austria GmbH and Others v Republic of Austria [*2008] STC 184 ("***T-Mobile***")

C-288/07 *Revenue and Customs Commissioners v Isle of Wight Council and others* [2008] STC 2964 ("***Isle of Wight***")

C-554/07 *Commission v Ireland* [2009] ECR I-128 ("***Ireland***")

C-246/08 *Commission v Finland* [2009] ECR I-10605 ("***Finland***")

C-102/08 *Finanzamt Düsseldorf-Süd v SALIX Grundstücks-Vermietungsgesellschaft mbH & Co. Objekt Offenbach KG ("**SALIX**")*

C-180/10 & C-181/10 *Jarosław Słaby v Minister Finansów* and *Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie* ("***Słaby***")

CEC v Yarburgh Children's Trust [2002] STC 207

C-378/02 *Waterschap Zeeuws Vlaanderen v Staatssecretaris van Financiën*

CEC v St Paul's Community Project Limited [2005] STC 95 **("*St Paul's*")**

C-255/02 *Halifax plc & others v CEC* [2006] STC 919

C-262/04 *Meilicke & others v Finanzamt Bonn-Innenstadt*

C-369/04 *Hutchison 3G UK Ltd & others v CEC* [2008] STC 218 ("***Hutchison***")

C-408/06 *Landesanstalt für Landwirtschaft v Franz Götz* ("***Götz***")

Boyle v Secretary of State for Northern Ireland [2010] NICA 5

C-263/11 *Ainārs Rēdlihs v Valsts ieņēmumu dienests* ("***Rēdlihs***")

Prudential Assurance Co Ltd & another v RCC [2014] STC 1236 ("***Prudential***")

C-174/14 *Saudaçor—Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública* [2016] STC 681 ("***Saudaçor***")

C-263/15 *Lajvér Meliorációs Nonprofit Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Foigazgatósága* ECLI:EU:C:2016:392 ("***Lajvér***")

R. (on the application of Durham Company Limited (trading as Max Recycle)) v Revenue and Customs Commissioners [2017] STC 264 ("***Durham Company***")

HMRC v Longridge on the Thames [2016] STC 2362 ("***Longridge***")

C-520/14 *Gemeente Borsele v Staatssecretaris van Financien* [2016] STC 1570 ("***Gemeente Borsele***")

C-344/15 *National Roads Authority v The Revenue Commissioners* ECLI:EU:C:2017:28 ("***NRA***")

C-633/15 *London Borough of Ealing v Commissioners for Her Majesty's Revenue and Customs* [2017] STC 1598 ("***Ealing***")

Newey (trading as Ocean Finance) v RCC [2018] STC 1054

R. (on the application of Durham Company Limited (trading as Max Recycle)) v Revenue and Customs Commissioners [2018] UKUT 188 (TCC) ("***Durham PTA***")

Wakefield College v HMRC [2018] STC 1170 ("***Wakefield College***")

Pertemps Limited v HMRC [2018] SFTD 1410 ("***Pertemps***")

RCC v Frank A Smart & Son Ltd [2019] STC 1549

EVIDENCE

18. The Tribunal approved the taking of a transcription of the proceedings, with copies thereof made available to all parties and the Tribunal.

19. We had documentary evidence contained in three volumes, and two volumes of authorities.

20. We took oral evidence from the following witnesses for the Council:

(1) Mr Jonathan Lyons is the Council's Leisure & Heritage Services Manager. He adopted and confirmed (with a minor amendment) a formal witness statement dated 16 September 2016.

(2) Mr Philip Reeves is the Council's Principal Accountant. He adopted and confirmed a formal witness statement dated 15 September 2016; he updated certain facts and figures, which are mentioned in his evidence below as relevant.

21. **Mr Lyons's evidence** included the following:

(1) He has been with the Council for 30 years in various roles in sports development and sports and leisure management. Prior to that he had at one time briefly worked in a privately operated health and fitness club. During the period covered by the appeals he was Sport and Recreation Manager, and is currently Leisure & Heritage Services

Manager. He is responsible for the Council's four leisure centres and the Community Sport & Wellbeing Team.

(2) The Council's designated area of responsibility has a population of around 174,000. The area extends beyond the city of Chelmsford, incorporating both rural areas, containing small villages and hamlets, and the town of South Woodham Ferrers which is 13 miles away from Chelmsford. North to south the area extends to around 22 miles.

(3) The main fee generating leisure activities provided by the Council are swimming, ice skating, tennis, squash, table-tennis, badminton, football, gym and exercise classes, athletics and children's soft play. The Council offers a range of paid-for activities for children during school holidays. The Council also provides pitches for hire in its parks and gardens for the playing of football, rugby, hockey, netball, cricket, tennis and bowls. The services are provided through the Council's four leisure centres at Riverside Ice & Leisure Centre ("**Riverside**"), South Woodham Ferrers Leisure Centre, Dovedale Sports Centre and Chelmsford Sport & Athletics Centre, and in the Council's parks, gardens and pavilions. Most people using swimming and fitness facilities were local residents; those using the ice rink came from a wider area.

(4) The services provided through the leisure centres are offered on a 'pay for play' basis, meaning the public can turn up, without having any prior membership, and pay for access to swimming, ice skating, tennis, squash, table tennis, badminton, football, gym and exercise classes, athletics and children's soft play for one session. The only exception to this is the gym where it is necessary to have undertaken an induction for which there is a fee. The price of some activities, such as swimming, varies between sites due to differences in the facilities on offer. The Council operates price concessions for groups such as the under-16s, the over-60s, those on benefits, students in full time education, persons registered as disabled, those on apprenticeships, and foster carers.

(5) From 1 April 2011 the Council introduced the 'Leisure Plus Card', to help ensure that participation in sport and the arts remains affordable to local people; the main benefit of a Leisure Plus Card is a discount of £1 on pay-per-play prices. The Council also operates membership schemes which give access to a range of the Council's facilities for a monthly subscription; this reduces the cost for regular customers of pay-per-play prices; the membership schemes encourage healthy lifestyles as members are encouraged to come as often as they like; the Council aims to encourage those on membership packages to use them fully; attendance is monitored and if attendance is low then the individual is contacted to encourage them to attend by offering a consultation or assistance.

(6) The Council provides the services in view of the social benefits brought by participation in sport and leisure activities. The participation by the local population is recognised as providing wider benefits in terms of health and wellbeing, education, reduction in crime and tackling social exclusion. All of the decisions made by the Council in relation to sport and leisure take into account these social benefits. The social objectives are reflected in the Corporate Plan, which is the Council's high level statement of intent which sets out the corporate priorities; the current Corporate Plan identifies six key objectives for the area and its residents including 'Promoting

healthier and more active lives'. The objectives are also reflected in the Council's Community Plan "Chelmsford Tomorrow 2021" dated April 2008, which outlines how the Council will work with partner organisations to achieve its objectives; these included increasing adult participation in sport from a baseline of 21.1% to 24.1% by 2011 (as measured by Sport England); a figure of 26.8% was secured by 2011 which represented the highest increase in Essex.

(7) The social objectives are also reflected in the Council's strategy documents relating to leisure. During the relevant period the Council had two different strategies: "A Strategy for Sport & Recreation in Chelmsford 2006-2010" and "Be Moved - A Strategy for the future of Sports and Arts in the heart of Essex - Chelmsford 2012-2016". The 2006-2010 document identifies five key aims being to: (1) improve the physical, social and mental wellbeing of individuals and the community as a whole; (2) target those groups that participate the least; (3) promote social inclusion; (4) encourage lifelong learning; and (5) increase the percentage of the population actively benefiting from the Council's leisure facilities. The key decisions such as pricing and capital investment are made with a view to achieving the social objectives.

(8) Because the Council is directed to social objectives, it cannot measure its performance purely on a financial basis. The Council does not provide the services with a view to profit. A service operating at a significant loss can be identified as very successful if it is achieving its social objectives. It used to be that the Council had to justify its spending decisions in what were termed 'best value' reviews; those reviews would take into account the social value for providing the services. More recently the cuts in central government grants have acted as the spur to reducing costs; the challenge has been to reduce costs without impacting service levels.

(9) One of the key decisions the Council makes is setting its fees for the services. The fees are set at a level that will allow for participation in sport and leisure across the whole of the population. The level of participation is one of the key performance indicators the Council measures itself against, as the more people participate in sport and leisure, the more they and the area stand to gain. The number of customer sports visits is recognised as a key indicator of performance; according to a survey carried out in around 2013, Chelmsford had a 9% higher than average increase in adult participation in sport and exercise.

(10)Other providers provide activities of swimming, ice skating, tennis, squash, table tennis, badminton, football, gym and exercise classes, athletics and children's soft play:

(a) *Swimming* - Swimming is provided by for profit ("**FP**") and not-for-profit ("**NFP**") providers. The most common FP's are gyms and hotels. Gyms (eg Virgin Active in Chelmsford) tend not to provide access to swimming on a pay-per-play basis but only as part of a membership package. Hotels typically provide access to guests as part of their room charge and do not offer pay-per-play prices. Hotels may also provide membership packages to allow local residents to use the facilities – for example, Pontlands Park Hotel has a leisure centre known as Reflections within its grounds offering swimming and gym facilities; this offers various membership packages rather than operating a pay-per-play system for accessing the facilities; the facilities are marketed and run to provide an exclusive spa type feel for the customer. The swimming

provided by FP's is not directed to social need; it is highly unlikely that a gym or hotel would provide swimming sessions for the disabled or provide free swimming to the over-60's. Gyms and hotels tend to operate shorter and shallower pools that are less expensive to run; for example, Virgin Gym offers a four lane 20 x 10 metres pool with a uniform depth of 1.2 metres and a smaller children's pool of 5 x 5 metres. At Riverside the Council offers a six lane 33 x 13 metres pool which ranges in depth from 0.9 metre to 3.3 metres, a 20 x 10 metres Learner Pool and a diving pit with 1 metre, 3 metres and 5 metres diving boards. The deeper pools are typical of local authority activities; the depth allows for the pools to be used for a range of activities including competitive swimming, diving, canoeing, scuba diving, aqua fitness classes and synchronised swimming. The Council also provided an outdoor pool up until September 2014 which was open four months of the year and attracted people who would not normally swim; outdoor pools are not commonly provided by FP operators. There are some FP operators who block book and use facilities to provide swimming and coaching – for example, AquaAcademy which is a swim school for children and adults operated by an FP out of facilities at three schools in Chelmsford. There are also NFP's providing regular swimming using block bookings – for example, Chelmsford Swimming Club ("**CSC**") operates on this basis out of Riverside; the Council sees organisations such as CSC as partner clubs providing access to a range of experienced coaches, many of whom are volunteers, who can help develop the sport and act as a bridge between amateur and professional levels of sport. The Council has worked with CSC to develop its programme of Swim Fit sessions which is aimed at those who wish to develop their swimming but do not wish to compete or to make a large commitment of their time. NFP swimming clubs can also operate out of other venues such as schools or colleges. Finally, there is another category of provider in the form of leisure trusts which are NFP providers independent from local authorities; a significant proportion of local authorities in England & Wales now provide leisure services to the local population through these trusts; one advantage over provision by a local authority is that the trust will be exempt from VAT and so will not have to charge VAT on its leisure services. Neighbouring local authorities use this model - eg Rochford District Council provides public leisure facilities in partnership with Fusion; the overall activity will remain loss-making and Fusion will effectively be funded by its partners by being granted use of the local authority's facilities to deliver the services at very low or nominal rates.

(b) *Ice skating* - Ice skating is provided by both FP and NFP providers. An example of an FP provider is Silver Blades, whose nearest centre is based in Gillingham; as Silver Blades is an FP it will apply VAT to its general access charges, but will not charge VAT on block bookings in line with the exemption referred to in HMRC guidance. An example of an NFP provider is Lee Valley Leisure Trust which operates an ice rink in Hertfordshire in participation with Lee Valley Regional Park Authority; as Lee Valley Leisure Trust is an NFP its supplies of ice skating will be exempt from VAT.

(c) *Tennis, Squash and Badminton* – There are some FP's such as racquet clubs and gyms offering racquet sports as part of the package of membership benefits. Some hotels will also offer racquet sports such as a tennis court and

less commonly badminton or squash – for example, Down Hall Country House Hotel offers two outdoor tennis courts free of charge to its guests; it is not common for these to be provided on a pay-per-play basis. There are also a number of NFP sports clubs (eg Marconi Social Club, The Grove Tennis Club and Danbury Tennis Club) offering racquet sports; some of those will have their own facilities, otherwise they will block book facilities from the likes of schools. As those clubs are NFP's their provision to members will be exempt from VAT. Previously there was also provision by NFP leisure trusts such as Fusion from a health and racquet sports club called Clearview Health and Racquets Club in Little Warley, Chelmsford; however this has since been taken over by an FP provider, Virgin Active.

(d) *Football* - There are a number of FP providers of football pitches typically directed towards the playing of five-a-side football in the local area – eg Futuresoccer, Leisure Leagues and Power Play (Power Play uses school facilities). Again, the FP providers will provide block bookings on a VAT exempt basis in accordance with HMRC guidance, while individual bookings will be standard rated for VAT. There are no known FP providers of eleven-a-side football pitches though those facilities will be available for hire through NFP organisations such as schools or small community football clubs. There is also provision by NFP leisure trusts such as Fusion, which identifies that five-a-side pitch hire is provided in Rochford at Clements Hall Leisure Centre.

(e) *Gym and exercise classes* - There are a number of FP gyms operating in the local area - eg Nuffield Health. A gym will typically contain running machines and the like directed to cardio-vascular fitness and weights directed toward strength. Private gyms do not generally offer access on a pay-per-play basis. Increasingly, particularly during the last five years, low-cost gyms have been starting up which offer membership for around £15 per month – eg The Gym Group; those gyms differ in having much lower staff levels than the high end gyms like Virgin. There are very few NFP providers offering gym facilities; there is a gym provided at Anglia Ruskin University which is largely aimed at students but is available to both students and the public; the University is an NFP organisation and membership subscriptions should be exempt from VAT. There is also provision by NFP leisure trusts such as Fusion in both Braintree and Southend which provide gym facilities at Braintree Sport and Health Club and Southend Leisure and Tennis Centre.

(f) *Athletics* – There are no FP providers of athletics facilities operating independently of local authorities. There are other NFP providers such as NFP leisure trusts and also providers such as Chelmsford Athletics Club which uses the Council's facilities at the Chelmsford Sports and Athletics Centre.

(g) *Children's soft play* - There are a number of FP providers of soft-play which can be accessed on a pay-per play basis – eg Mayce Playce Soft Play Centre. NFP providers in the form of leisure trusts like Fusion will also provide soft play – eg Edmonton Leisure Centre in Enfield.

(11) The Council does not act as a business would because it does not aim to make a profit in its provision of leisure services. The Council is interested in financial performance and so its net expenditure, but that is to be weighed against social

benefits achieved from participation in sport. The Council, year on year, will incur substantial net expenditure in respect of its provision of leisure services; this ranged from funding of £4,924,820 in 2006-07 to £2,501,000 in 2013-14. The Council cannot provide leisure services as a trading activity as it does not have power to do so - a local authority can only undertake a trade through a subsidiary company.

(12)In some instances the social benefit of providing a particular service will be assessed as being so high that the services will be provided free of charge or for nominal fees. The weekly block booking of the swimming pool and the Athletics Centre is provided for free for use by the disabled swimming and athletics clubs. The Council also provides a scheme for free swimming to the over-60's between 6:30am and 2pm Monday to Friday although participants have to pay a £10 annual administration charge. The Council provides a free programme of guided walks branded as 'Heart and Sole' and free two hour multi-activity play sessions for children during school holidays. Free access is a way of reaching out to vulnerable groups, or a way of increasing participation in under-represented parts of the community. Many activities are also provided at low rates - for example the Council provides a range of activities on a Sunday night aimed at 12 to 18 year olds which cost £1 to attend; these low rates are justified in view of specific social objectives such as the reduction of crime; this particular scheme is funded through a grant provided by Essex County Council. The Council also provides a range of leisure facilities to the public on an open access basis - so members of the public are free to use the tennis courts, outdoor gyms, BMX track, skate parks and basketball courts in the Council's parks and gardens.

(13)The Council does not expect a market return on its capital funding of leisure services. Capital funding is considered by reference to a range of different factors including the availability of grant funding from outside bodies, the public demand for a specific site and social benefit. Some of the Council's previous capital projects have benefitted from substantial funding from Sport England. The Sports and Athletics Centre received grant funding of approximately £2,200,000, whilst the South Woodham Ferrers swimming pool received a grant of approximately £2,300,000. The Athletics centre attracted funding partly because of its location in a deprived ward; the Council recognises that siting a leisure centre in an area of deprivation is likely to bring higher social benefits. The Council will fund capital projects in areas where public demand is not met by private operators – eg swimming in South Woodham Ferrers.

(14)The Community Sport & Wellbeing Team is made up of around six officers who are responsible for promoting and developing the Council's leisure services. Their remit is, amongst other things, to advise and support local sports clubs and coaches, work with schools and implement schemes aimed at promoting health or increasing participation amongst vulnerable groups. The Council runs its leisure department in a way which actively promotes other organisations.

(15)Leisure services are provided by the Leisure and Cultural Services Department under authority delegated from the Council. Mr Lyons manages affairs on a day to day basis. Any price rises for leisure services in excess of inflation have to be considered and approved by the Council. The Council maintains a level of oversight through the Overview and Scrutiny Committee.

(16)The Council also has regard in providing the services to statutory obligations. The 'best value' reviews were undertaken to ensure the Council was meeting its statutory obligations. The Council must also now have regard to obligations arising under the Health and Social Care Act 2012, which established health and wellbeing boards to take on the statutory function of public health from the government with effect from April 2013; the Council is part of the Essex County Council Health and Wellbeing Board Structure. The Council recognises that the promotion of health is one of the key benefits to be derived from participation in sport and leisure pursuits; as well as the general effects of such participation the Council has specific initiatives such as a GP exercise referral scheme, and the Bodycare programme aimed at children and teenagers, which are focused on improving the health and wellbeing of the population.

(17)If VAT were not to be charged on the services then it would not lead to any differences in prices charged, which are set at a level designed to increase participation. VAT is not generally identified as a separate item to customers save in relation to the hire of sports pitches (where the VAT is passed back as it is considered fair to community sports organisations such as sports clubs as the Council benefits from their commitment to a longer booking). The approach would be different if all prices were to be exempt. Any VAT saving arising from these claims would be used by the Council to make up deficits in other areas. It is not a case of the Council taking the saving away from Leisure and Heritage Services; the department will not keep any surplus on the account at the end of the year. Mr Lyons did not believe there is any correlation in the industry between VAT and the price charged; NFP organisations like Fusion already provide services on an exempt basis, but the prices charged by Fusion are comparable to those of the Council.

(18)In recent years the Council has been subject to cuts in the grants received from central government. That has put pressure on budgets including the budget for sport and leisure facilities. The Council has not sought to reduce the budget by increasing prices but by finding schemes to bring about savings in costs. Despite the reduction in costs the core prices have remained largely unchanged save for the standard inflationary increases.

(19)If a resident tried the Council facilities but then joined another provider then Mr Lyons regarded that as a success – it was another person taking up sport because of the Council.

(20)In reply to questions in cross-examination:

(a) During the periods under appeal the Council's net expenditure on sports and leisure facilities was in the region of £4.4 million to £9.9 million, before central government support. In 2005-06 expenditure on sports and leisure facilities was £9.97 million with income of £5.53 million (of which £3.25 million was fees and charges).

(b) Sports and leisure was one of the major operational functions of the Council.

(c) The "Be Moved" 2012-2016 strategy document stated that the sports and leisure facilities (being the four leisure centres plus community activities such as healthy walks and children's play schemes) received 1.3 million visits per annum. A similar number of visits was reported for 2015-16; Riverside

would account for the largest share of these (around 0.75 million). The total borough population was about 175,000, including about 110,000 in the City itself and about 20,000 in South Woodham Ferrers. That was proof of engagement with the community, in that there were over 8.000 visits per thousand of population.

(d) In setting charges for swimming and ice skating consideration was taken of peak and off-peak sessions; for exercise classes and badminton, longer sessions cost more; canoeing was more expensive than swimming, and ice discos more expensive than ordinary skating; higher quality facilities cost more (eg the 3G pitches at Riverside). There were additional charges for skate hire, racket hire etc. A slight discount was offered for booking a series of sessions. The charges took into account the customer's perception of value but not the cost of provision – for example, swimming was more expensive to provide than squash, but court charges were greater than pool charges; also the crèche was costly to provide but the charge was cheap.

(e) There was always a balancing exercise between cost of provision and charges made. In Mr Lyons's 30 years with the Council the overriding factor had always been to encourage participation; charges would be held if it was felt that an increase would deter participation; in recent years, increases had been only inflationary.

(f) On memberships, people would choose based on the activity and frequency of attendance; membership included a Leisure Plus Card, which reduced the cost of pay-per-play sessions; full membership involved no extra fees for the activities covered by the membership. Most users were pay-per-play. It was correct that private providers such as Virgin Active offered membership packages.

(g) On concessions, there was no formal means-testing; instead they were by reference to targeted categories, eg over-60s, or GP referrals; this was common practice for local authority service provision.

(h) Facilities which were provided free of charge were the adiZone basketball court (but a full size court would be paid for); BMX; unbooked tennis courts; health-walking; and skateboarding. Parks facilities were under a separate budget. Over-60s swimming was promoted as free but it required a Leisure Card and payment of an administration fee (about £10); it was very good value and attracted around 2,500 visits each month from around 1,000 users.

(i) The Council offers a range of discounts, for example, to those referred from the NHS or talented young sports people called sports ambassadors.

(j) Marketing of the facilities was important to establish what users wanted, and to reach groups who do not usually attend. It was important to encourage people to come in the first place, and then attend more often; that got more people exercising and encouraged a healthy lifestyle.

(k) For children's parties, the Council's facilities offered a different experience – eg trampoline parties. These represented only a tiny fraction of

total income, and were only held at times when facilities were underused. It was also another way of getting people through the doors to participate.

(l) It was correct that there was an overlap with other providers (both FP and NFP) for some services. Although the charges of such providers might appear similar to those of the Council, the facilities were often very different (eg staffing and equipment). It was a matter of customer choice. The Council prioritised pay-per-play, while other providers insisted on memberships. The Council aimed to provide something for everyone, and ensure that customers knew that they would be looked after.

(m) People not using the Council's facilities might look to Rochford (which uses Fusion, an NFP leisure trust), or Maldon (a private operator). For tennis there were a number of clubs with varying facilities (eg floodlighting); tennis players tended to go where their friends went.

22. **Mr Reeves's evidence** included the following:

(1) He has over 20 years' experience of local government finance, including 13 years with the Council, and is currently the Council's Principal Accountant. He is responsible for producing the Council 's budget reports and medium term financial strategy.

(2) At the start of the relevant period the executive functions of the Council were arranged into nine directorates each reporting to the Chief Executive. The relevant services were provided through the directorate for Leisure and Cultural Services; that directorate was principally responsible for leisure centres but also for theatres, museums, special events and arts development.

(3) Every year the Council prepares a budget in advance of the financial year. The budget must be approved by the Council's highest decision making body which is a full Council meeting of all 57 elected members. The Council is required by law to set a balanced budget. The Chief Finance Officer has a duty to make a report to the Council if the budget has illegal expenditure or is unbalanced. The Council is not allowed to borrow to finance revenue expenditure; borrowing is only permitted for capital expenditure.

(4) The budget identifies the net amount of revenue expenditure that needs to be financed after taking account of any use of balances; that net budget requirement is then funded in part from the formula grant from central government (around half); the remainder is funded through Council Tax. The budget is broken down by reference to each directorate, including Leisure and Cultural Services. Revisions are made to the budgets during the course of the year. The Leisure and Cultural Services budget is broken down by reference to sites, such as the leisure centres, and also in some cases by reference to activities such as "Arts Development". Estimated expenditure is identified against each of the leisure centres.

(5) The actual expenditure for Leisure and Cultural Services is substantial and is significant in the overall finances of the Council; for 2004/05 it was £4.94 million. In the same year the Operational Services directorate incurred similar expenditure (£4.92

million), and the only directorate with higher expenditure was Strategic Housing and Environmental Services (£5.83 million).

(6) A summary of the actual expenditure on sports and leisure across the period is:

YEAR	EXPENDITURE on Sports & Leisure Activities (£)
05/06	3,095,000
06/07	2,581,940
07/08	2,707,850
08/09	3,878,120
09/10	3,151,570
10/11	3,409,960
11/12	2,820,000
12/13	2,681,000
13/14	2,729,000

(7) In 2007/08 responsibility for museums, accounting for around £750,000 of the budget, was taken out of the Leisure and Cultural Services directorate.

(8) The funding requirement of the Council is identified in terms of it representing "expenditure" and not as a "loss". The reason the Council is willing to expend money from the budget to fund these services is because the Council recognises that expenditure on leisure services achieves its objectives in terms of wider social benefits; these include health and wellbeing, inclusion, equality and education. The fact that the Council has to pay for the services, after taking into account fees and charges, is not viewed in negative terms.

(9) The Council financially appraises any new leisure services (eg Melbourne Park Athletics Centre) but it will not require a surplus of income over expenditure as a condition for undertaking a new activity. All services are provided within the context of the responsibility the Council has for dealing with public funds and therefore the Council minimises expenditure by maximising the financial position of the provision of any services to the extent that does not conflict with the Council's other objectives. Where the two are in conflict then financial considerations are generally recognised as secondary; for example, the Council would not agree to increase fees to reduce expenditure on a service if the result of that increase was expected to exclude vulnerable groups from accessing the services.

(10) Where the cost of providing particular services changes to any material degree then it is for the Council to decide how to address those changes. The Council can decide to reduce/increase Council tax, to cut/increase the existing services, or to increase/reduce fees. The Council is not restricted in making these decisions to use money saved in Leisure and Cultural Services in that Directorate; it can notionally use money saved in one area in any way it considers appropriate. The same cannot be said of all savings; in some cases fees, such as those for Building Control, are linked to the costs; if savings were achieved in those areas the Council would have to either reinvest those savings to provide enhanced services or reduce the fees for those services.

(11)During the period covered by these appeals the Council has been subject to substantial reductions in the support from central government and the consequent need to make savings efficiencies, spend-to-save schemes and additional income so as to keep any overspend to a minimum. The reduction in funding from central Government has been significant: whilst in 2005/6 the Council received £8.53 million in grant from central Government, in 2014/15 that had reduced to £6.44 million. If any saving had arisen in those years then it would have been used by the Council to support its existing expenditure in other areas; the Council would not use any savings from reduced costs in providing the services to fund a reduction of the fees.

(12)The capital scheme for Leisure and Cultural Services is stated in an annual capital budget, which identifies items of planned capital expenditure and any ongoing capital expenditure projects. For example:

(a) In 2005-06 there was significant planned capital expenditure of £1.3 million in relation to Phase 4 of the Melbourne Park Athletics Centre; also Phase 2 of the Melbourne Indoor Athletics Centre and South Woodham Ferrers Swimming Pool.

(b) In 2009 a capital scheme commenced for the undertaking of essential repairs to Riverside which was budgeted for £1.44 million.

(c) In 2010 an improvement programme commenced for Riverside which was budgeted to cost £1.57 million.

(d) In 2011 a capital scheme was set up for track resurfacing works at the athletics centre budgeted for £102,000.

(e) In 2012 capital schemes were introduced for the athletics centre for replacement equipment (£100,000) and replacement plant (£98,000). Capital schemes were introduced for Riverside comprising replacement of equipment (£225,000), plant replacement (£490,000) and a combined heat and power system (£200,000). Capital schemes were introduced for South Woodham Ferrers comprising replacement of equipment (£100,000), replacement of the all-weather pitch (£150,000) and plant replacement (£196,000).

(13)New capital expenditure must be justified against the Council's stated Corporate Values. These corporate values reflect the social objectives sought to be achieved by the Council in providing leisure services; financial issues, such as the need to minimise costs, rank as secondary considerations. For example, in the 2005/06 budget the capital spend for the South Woodham Ferrers swimming pool is identified as corresponding with the values of "Working in partnership", "Delivering quality services which meet local needs" and "Enhancing healthy living". There is no expectation by the Council of a return on the capital expenditure on leisure centres. The financial appraisal of projects is with a view to minimising costs, at least where that can be achieved without compromising the objective of providing the services.

(14)In the private sector it would be typical to produce and analyse costs and expenditure by reference to particular activities; also, to identify the capital expenditure and to assess the return on capital as part of financial monitoring. The Council operates differently from the private sector as it does not allocate costs to activities but operates on a broader level, aggregating costs to locations. Such private sector information is not of significant value to the Council's management as profit on

an activity is not an objective. The Council does not require a positive return on capital invested whilst a private sector business will only undertake the investment if it produces a positive return on capital. For example, the Council is currently developing proposals to spend £40 million on a replacement swimming pool complex; there are many requirements for the scheme but none are that it should produce a return on capital; the Council expects to minimise the cost of leisure services but not to profit from them.

(15)A significant proportion of local authorities now provide their sport and leisure services through sport and leisure trusts or private providers. The trusts are charitable organisations and so their provision of sport and leisure services are exempt from VAT. Local authorities such as the Council will consider from time to time alternative structures for providing leisure services and, in particular, the provision through a trust. In 2015 Sport England published "Leisure Management Delivery Options Guidance", which refers to the various delivery options available to local authorities as being in-house management, outsourcing to an existing trust or private contractor, establishing a new trust, mutual or other form of social enterprise, transfer of assets, or establishing a new joint venture. One of the disadvantages of outsourcing to an existing leisure trust, as stated in that document, is that "The Local Authority loses direct control of services and manages through a lease and contract" but it "retains ultimate liability for the operational performance and capital liabilities of the services".

(16)The Council constantly strives to deliver savings. In this respect the Council has obligations in relation to the spending of public money and is required to reduce costs if that can be achieved without compromising services. The Council has previously reviewed its own leisure services and considered externalising them. In the course of that assessment the Council considered the potential savings that could be delivered. The main reason for retaining the services was that the Council would lose control by externalising them which could impact the Council's ability to meet its objectives.

(17)If, during the course of a year, VAT ceased to be due on leisure services, or a substantial repayment was made in that respect, then it would give rise to an expectation of a surplus on the budget. That would in turn cause the Council to revise the budgeted expenditure for Sport and Leisure downwards. The difference may be used first to offset any unplanned expenditure of the Council. Any unused surplus is carried into the general pool of funding for the next year. In no circumstances would the repayment be carried forward for use by the Sport and Cultural Services directorate.

(18)In reply to questions in cross-examination:

(a) The figures used in evidence were for the whole Leisure and Cultural Services Directorate and so included non-sports facilities such as museums and theatres; those amounts would be outside the disputed claims.

(b) While it was difficult to give an accurate figure for the percentage of costs covered by fees charged (because that was not how the Council analysed matters), an estimate of one third was reasonable.

(c) While no figures were available (again, because that was not how the Council analysed matters), it was reasonable to say that the full costs of a major facility were unlikely to be recouped over its lifetime.

APPELLANT'S CASE

23. For the Council, Ms Brown and Mr Rycroft submitted as follows.

Background

The Ealing case and exemption

24. In *Ealing* the CJEU held that sports and leisure activities provided by a local authority fall within the scope of the exemption in art 132(1)(m) PVD which relates to "the supply of certain services closely linked to sport or physical education by non-profit making organisations to persons taking part in sport or physical education". The question of whether those supplies are or otherwise should be treated as non-taxable activities is antecedent to that of exemption which can only apply to supplies falling within the scope of VAT. The terms of arts 9 and 13 were not considered by the Court in *Ealing* in which the referral was on the basis that neither party claimed that the local authority taxpayer was acting as a public authority.

25. The Council continues to plead its case by reference to arts 9 and 13 rather than relying on the exemption afforded by art 132. That is because different consequences may flow for some local authorities due to the application of purely national law provisions in s 33 VATA 1994 which may, depending on the circumstances, place a local authority relying on exemption in a disadvantaged position, as compared to if the same services were to be treated as non-taxable. The Council has previously operated on the basis that VAT incurred by it and relating to its exempt supplies was insignificant. HMRC's guidance (in Notice 749) is that VAT attributable to exempt activities is insignificant only if it amounts to less than one of (a) £7,500 per annum; or (b) 5% of the total VAT incurred on all purchases in any one year. If the Council were to rely on the direct effect of art 132(1)(m) to treat the disputed supplies as exempt, then the VAT relating to them will cease to be insignificant, giving rise to a requirement for the Council to restrict the VAT recovered relating both to its pre-existing exempt supplies and the relevant supplies. The Council has concluded that if it were to rely on art 132(1)(m) then its claim would be extinguished, as the restriction on recoverable VAT would then exceed the VAT declared on the leisure supplies. However, the Council reserved the right to rely on art 132(1)(m) if it lost the current appeal.

Local Government provisions

26. The Council operates under the 'two-tier' system of local government in which other legal powers and responsibilities, in particular those relating to education and health and social care, are held by Essex County Council.

27. The Council, as a local authority, is a statutory body whose objects and powers are as prescribed by Parliament (either expressly or impliedly). A local authority is empowered to provide public leisure services in England & Wales by virtue of s 19(1) LGMPA: "a local authority may provide, inside or outside its area, such recreational facilities as it thinks fit". Under s 19(2) LGMPA a local authority may make those facilities available for use "by such persons as the authority thinks fit either without charge or on payment of such charges as the authority thinks fit". Furthermore, under s 19(3) LGMPA a local authority may contribute

"by way of grant or loan towards the expenses incurred or to be incurred by any voluntary organisation in providing any recreational facilities which the authority has power to provide by virtue of s 19(1)".

28. S19(1) LGMPA overlaps, so far as public swimming is concerned, with the earlier s 221 of the Public Health Act 1936 under which a local authority may provide "(a) public baths and washhouses, either open or covered, and with or without drying grounds". Section 222 PHA 1936 also provides that a "local authority may make such charges for the use of, or for admission to, any baths or washhouse under their management as they think fit".

29. The Council is required to make discretionary decisions concerning the range of activities and charges with regard to the wider benefit of those activities to the population in the area of the Council's responsibility. The wider legal obligations of the Council are in s 3 Local Government Act 1999, which requires the Council to "make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness". Also relevant are the Council's obligations as regards state aid arising from art 107 of the Treaty on the Functioning of the Economic Union which outlaws state aid which is incompatible with the internal market. Whilst state aid is generally outlawed, art 107(2)(a) expressly recognises "aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned" as being compatible.

The Council's activities

30. The witness evidence described how the Council has exercised its discretion to provide fee-generating sport and leisure activities, and the Council's objectives in providing leisure activities.

31. The Council's objectives have not, at any time, included the objective of making a surplus on either the provision of the disputed supplies or of leisure activities more generally (the making of a surplus could be a consequence of pursuing the Council's objectives but is not an aim in and of itself).

32. The Council provides some services for free or on an open access basis. The Council provides activities which are specifically targeted at improving health (the GP exercise referral scheme and the Bodycare programme).

33. The Council does not expect any return on capital expenditure – the capital expenditure is not recognised in the form of any charge to depreciation. The decision making as regards capital expenditure is by reference to the expected social benefits which may justify siting a leisure centre in an area of deprivation. The nature of the facilities provided is also driven by the Council's objectives – facilities are provided with a view to allowing a wide range of uses. The nature of any investment is also made with regard to the needs of the local population.

34. The Council measures success in providing the leisure activities by reference to its objectives. The fact that the Council incurs net expenditure in respect of the disputed services and in connection with leisure activities more generally is not viewed in negative terms – the net expenditure is weighed against the social benefits achieved from participation in sport.

35. The fees for the disputed supplies are set at a level to allow participation across the whole of the population. The supplies are generally available on a pay-per-play basis without any prior need for membership. The Council's services contrast with those provided

elsewhere, in particular the private commercial sector, which commonly provides sports leisure activities as part of a membership package.

36. The disputed supplies, throughout the period at issue in this appeal, gave rise to significant net expenditure, which was in each year planned for in advance when the Council set its budget for the year. The net expenditure is funded in part from a formula grant from central Government but also through Council Tax.

37. The provision of leisure activities more generally by local authorities may be organised differently. In particular, the local authority may arrange their affairs such that their objectives are achieved through the means of a leisure trust. The leisure trust will typically be funded through a payment made by the local authority which, it is recognised, falls within the scope of VAT in light of the decision in *Edinburgh Leisure*. HMRC's guidance to local authorities (in RCB 28/7) states: "any VAT charged to the local authority by a contractor acting as principal in respect of the management fee or deficit funding will be recoverable in full by the authority subject to the normal rules". It is understood that by this HMRC accept that a local authority will not, in these circumstances, be recognised as acting in the course of a business in providing funding to third parties to discharge their leisure functions.

The issues for determination

38. The issues for determination by the Tribunal are whether in undertaking the activities the Council:

(1) is undertaking economic activity within the meaning of art 9(1); or

(2) is to be recognised as engaging in that activity as a public authority within the meaning of art 13(1), which it is agreed falls to be determined by the tests as laid out by the Court which requires that an assessment be made as to whether the activity is undertaken pursuant to a 'special legal regime'; or

(3) if the Council is not recognised as engaging as a public authority for the purpose of art 13(1), whether the terms of Note 3 to Group 10 VATA operates as an exercise of the discretion permitted under art 13(2) so as to treat the supplies made by the Council as carried out by it as a public authority.

Article 9 - No economic activity

39. The Council accepts that it is supplying "services for consideration" but not that it is "a taxable person" for the purposes of art 2. In those circumstances, the Council as a local authority has a right of refund under s 33 VAT Act 1994.

40. In referring to "any economic activity" art 9 is only intended to cover activities which essentially concern financial or monetary considerations. That is underlined by the terms of the second sub-paragraph which identifies that the "exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as economic activity". Whilst that wording is linked to the exploitation of property, it has been recognised by the Court as applying to all of the activities referred to in art 9 - see *Götz* at [18].

41. In referring to "purpose" art 9 requires assessment of the underlying rationale for the activity as a whole determining whether it is undertaken for the purposes of obtaining income or for other purposes. Whilst it is necessary to seek to identify the reason for which the activity is being undertaken, the case law of the Court is clear in recognising that the activity

has to be considered per se and without regard to its purpose or results - see for example *Finland* at [37].

42. The legislative purpose of art 9, as it applies to public authorities, is set out in the Opinion of the Advocate General ("**AG**") in *Gemeente Borsele*. In general, there is no imperative to imposing VAT on services provided by the state as it operates only to reallocate revenue at a national level (between different departments of state) – Opinion at [23]. However, the very structure of arts 9 and 13 recognise that at least some activities of public authorities are considered, in principle, as capable of falling within the scope of VAT as economic activities – Opinion at [24]. There are two reasons for taxing those transactions: the first is to prevent distortions of competition within a relevant and identified market; and the second is to ensure, in accordance with the principle set out in the fifth recital to the PVD, that final consumption is effectively taxed such that if the state provides services culminating in final consumption then such consumption is taxed. The examination of whether a public activity constitutes an economic activity pursuant to art 9(1) "is subject to manifestly stricter criteria than would apply in the case of an activity carried on by a private individual" – Opinion at [27]. In the current appeal taxation of the Council's supplies is not justified either on the grounds of distortion of competition or final consumption. There is no particular reason, with regard to the PVD, as to why treating leisure activities as not being economic activities should give rise to distortions in competition - the treatment of the activities as exempt or non-taxable gives rise to essentially the same results so far as concerns the PVD; that is reflected in the terms of art 13(2) which make it clear that Member States can treat exempt activities as non-taxable activities. Neither is there any imperative to capture and recognise the value of those activities as representing final consumption by the users of the facilities; activities which are in principle exempt from VAT at European level (as has been established in *Ealing*) are assimilated to acts of final consumption, exemption, non-economic activities and final consumption, all having the same chain breaking effect on recovery of VAT paid on supplies received.

43. *Wakefield College* concerned the correct VAT characterisation of further education courses provided to students paying fixed fees representing only 30-35% of the costs of providing the courses. The courses were provided at below cost due to grant funding provided by the Learning and Skills Council. Those activities were considered against the wider factual background in which the college provided the same courses to some students, representing the majority, for no fee, and other courses where no remission was available and the fees were designed to cover the full costs ('full cost courses'). The agreed position of the parties in that appeal, in respect of those other activities, was that the services provided for no consideration did not amount to the carrying on of a business, but the provision of 'full cost courses' did. The Court of Appeal identified (at [51] to [59]) the factors relevant to identifying whether the activities fall within the scope of art 9.

44. The concept of 'market participation' is in some respects an overarching test. In *Gemeente Borsele* (at [30]) the Court stated: "Comparing the circumstances in which the person concerned supplies the services in question with the circumstances in which that type of service is usually provided may therefore be one way of ascertaining whether the activity concerned is an economic activity". The AG (Opinion at [65]) notes that the fact that only a small percentage of the costs are recovered is not typical conduct of a market participant. The relationship between income and expenditure was also considered relevant in *Finland* in which the Court considered whether VAT should be applied to payments made by individuals to the public legal aid office in return for the provision of representation. In *Hutchison* the

Court (at [35 - 36]), considering whether the grant by the government of mobile telecommunications licences to private corporations, recognises that activity as essentially amounting to the grant to economic operators to access the market (as distinguished from actual participation in that market). That is also reflected in the judgment in *ICAEW* in which the House of Lords considered whether VAT should be applied to registration fees charged by the ICAEW as a 'recognised professional body' to its members in discharge of a statutory regulatory function; their Lordships recognised (at 402j to 405a) that the activity was not economic activity with regard in particular to the fact that it was essentially exercising powers of the state.

45. A precondition for determining whether an activity is an economic activity is the identification of the activity itself. In *Gemeente Borsele* the transport provider charged in full to parents whose children travelled less than 6km, for those travelling 6-20km parents paid a price equivalent to taking public transport for a distance of 6km, and over 20km the charge was set taking account of the parent's income. As a result, two thirds of parents did not pay any contribution. The AG stated (Opinion at [71]), "… the requirement of market participation on the part of a public activity must in principle be assessed in relation to the activity as a whole and does not necessitate the analysis of each individual transaction". The Court's judgment proceeds on the basis that both activities fall to be assessed together – (at [33]): "[t]he contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds". A similar analysis was applied in *Finland* in which, in having accepted the relevance of the general income and expenditure relating to the activity, the Court considered that the activity falling to be assessed included both paid for and unpaid for activities. The activities being undertaken by the Council include both the activities which are provided in return for consideration and those which are provided without any charge; that approach is consistent with the approach of the Court in *Borsele* and *Finland,* where it was accepted that the same paid-for and unpaid-for activities should be considered as a whole.

46. In *Wellcome* the Court concluded that the activities in that case, which concerned the buying and selling of shares, did not amount to an 'economic activity'. In coming to that conclusion the Court relied on the fact that the trust had no power to engage in trading activities and was also precluded from taking majority holdings in other companies. The approach of the Court in *Wellcome* was considered by Patten J in *Yarburgh* (at [22]-[23]) – whilst he accepts the submission on behalf of HMRC that the motive of the person supplying the services is not relevant, he also states 'the exclusion of motive or purpose in that sense does not require, or in my judgment, allow the tribunal to disregard the observable terms and features of the transaction in question and the wider context in which it came to be carried out'. In *Floridienne* (at [28]) the Court held that an economic activity had to have a "commercial purpose, characterised by, in particular, a concern to maximise returns on capital investments". That would appear to be a relevant factor on the facts of the present case in which capital investment is made by the Council with no expectation of return. A similar approach was taken by Evans-Lombe J in *St Paul's* which considered whether a charity was in business in providing the activity of a day nursery which had been undertaken for social reasons to support disadvantaged children. In giving judgment in favour of the charity the judge (at [54]) identifies the factors which weighed heavily in his assessment including that the fees charged were significantly lower than those charged by commercial nurseries and pitched at levels designed only to cover the costs after grants and donations were taken into account.

47. In the current appeal, the Council's provision of the activities does not represent market participation:

> (1) The Council incurs substantial net expenditure in its provision of both the disputed supplies considered in isolation and in connection with the provision of leisure activities taken as a whole and that such expenditure is planned for in advance. A loss is not of itself sufficient to identify an activity as falling outside the scope of economic activity and thereby 'non-taxable'; however, the fact that the loss is habitual and planned for with no expectation of any return provides a wider context indicating that the Council is not involved in market participation.
>
> (2) There is an absence of any account of capital expenditure which goes to make up the facilities – that represents an approach which is at odds with market participation where capital outlay is made in anticipation of reward.
>
> (3) The Council receives income in the form of grants such as those from Sport England. The existence of grants is indicative that the activities do not represent 'market participation' – grants do not represent the ordinary operation of a market;
>
> (4) A substantial proportion of the activities are provided for free such as the facilities provided in the Council's parks and gardens and free swimming provided to the over 60s. The existence of free leisure facilities serves, objectively, to demonstrate that the activity is not dependent upon the stimulus of income.
>
> (5) The activities are provided in the context of the law as it applies to public authorities – whilst on the face of it a local authority has wide discretion as to what leisure facilities it provides and as to the charges to be made for those services that discretion must be exercised in view of the legitimate and stated objects. The activities cannot be pursued with the primary objective of making profit and as outlined in the evidence, the Council does not recognise surplus as being a measure of success. The Council has identified the legitimate objects it seeks to achieve through the provision of leisure services – those objects are directed towards social purposes such as the use of sport to improve the health and welfare of the population.
>
> (6) As identified in the evidence, the manner of provision varies greatly with that available in the for-profit sector – the Council is providing leisure services in a manner which seeks to make provision which is not met by the market – capital expenditure is directed towards areas of relative deprivation which are not served by the market.
>
> (7) The central facilities are configured in a manner to facilitate a range of different uses. The facilities are made available to a range of different organisations who operate as partners in achieving the Council's objectives, in particular its objective in increasing participation in sport in the area. The fees are set with a view to ensuring that the facilities are accessible to the wider population and so set at an affordable level and allowing 'pay-per-play' access.

48. Where a local authority chooses to exercise its statutory powers through a third party, such as in *Edinburgh Leisure*, then it is clear that the activity undertaken is essentially 'noneconomic'. That is consistent with HMRC's view that such authorities are entitled to recover VAT on the associated third party supply. There is no reason, from the perspective of a local authority, why that activity should fall to be assessed any differently whether undertaken 'in house' or by a third party.

Article 13 - Public authority acting under a special legal regime

49. Article 13 PVD provides that local government bodies are not to be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection those activities or transactions. Article 13 in referring to 'activities' is essentially referencing the 'economic activity' as referred to in art 9 and, in referring to 'transactions' is referencing the terms of art 2 relating to the identification of a supply.

50. In order to be acting as a public authority the Council must, in accordance with *Fazenda Pública* be acting pursuant to a 'special legal regime'. In the AG's Opinion it is stated that it is the legal way in which the activity is carried out which is relevant, although the attendant factual circumstances may be taken into consideration as an indication as to the classification of an underlying legal relationship. The Court (at [21]) suggests that it is necessary to "analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators". The Court (at [22]) accepts that "the fact that the pursuit of an activity such as that at issue in the main proceedings involves the use of public powers, such as authorising or restricting parking on a public highway or penalising by a fine the exceeding of the authorised parking time, shows that this activity is subject to a public law regime".

51. In *Finland* the AG (at Opinion [55] to [67]) noted that:

(1) bodies engage in activities 'as public authorities' when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders, they do not engage in such activities;

(2) the fact that businesspeople or private practitioners are present in the same sphere of activity does not preclude a finding that a body is acting 'as a public authority', and that the term 'as a public authority' must be given a broad interpretation, encompassing both tasks which are essentially public, which private persons are prohibited from carrying out, and those in which a competitive situation arises with the private sector;

(3) having considered the claim made by the Commission that the public legal aid offices and private practices were operating under the same legal regime on the basis that the same legislation applied to them, the AG rejected this, relying on an assessment that 'the private operators work, by special authority of the law, within a legal framework applicable to public bodies and not the reverse, as the Commission appears to suggest' – the AG essentially concludes that private operators are, in this respect, acting within the scope of the public law.

52. In *T-Mobile* the AG recognised (at Opinion [115, 117 & 122]) that:

(1) a body is not precluded from being recognised as acting within a legal regime simply by reason of the fact that the activities involve the application of civil law procedures;

(2) it is the manner in which the activities are carried out which is crucial and that assessment "depends primarily on whether private individuals can engage in any comparable activity at all on the basis of the relevant legislation"; and

(3) it is not inconsistent for the wider legal context of an activity to be taken into account.

53. It is irrelevant that the activities are pursued in view of essentially social objectives – per *Carpaneto* (at [13]) the "subject matter or purpose of the activity is not relevant for the purpose of Article 13". The amount of revenue that is derived from the activity is largely irrelevant (*T-Mobile* per AG Opinion at [123]).

54. Whilst an assessment is made as to whether the application of a special legal regime is different than that applying to private traders, it is not a requirement that a 'special legal regime' should operate so as to take those supplies wholly out of the scope of competitive activity. That follows from a structural review of art 13 which is subject to the second sub-paragraph which excludes from its scope supplies made pursuant to a special legal regime where "their treatment as non-taxable persons would lead to significant distortions in competition". Article 13 pre-supposes, therefore, that supplies made pursuant to a special legal regime are capable of giving rise to distortions in the market.

55. In *Durham Company* Warren J stated (at [103]): "I have no doubt that section 45(1)(b) Environmental Protection Act 1990 [under which a waste collection authority has a duty if requested by the occupier of premises in its area to collect any commercial waste from the premises, to arrange for the collection of the waste….] is, or at least is capable of being, a 'special legal regime'. This is demonstrated by consideration of a LA [ie local authority] which provides a commercial waste collection service only if requested to arrange for such collection by an occupier of premises and does so for a reasonable charge which, taking the provision of the service to occupiers generally, results only in cost recovery and no surplus". The reference there to "reasonable charge" reflects the wording of s 45(2) Environmental Protection Act 1990 ("**EPA**") which provides that a person shall be liable to, and a collection authority is required to recover, a reasonable charge for such collection and disposal.

56. It is necessary to identify legal rules which apply to the activity and which are exclusive to the public authority (i.e. which do not apply to the private sector). Having identified those rules it is then necessary to consider whether the effect of those rules is such that those supplies cannot be recognised as being made under the same legal conditions as apply to private traders.

57. Under LGMPA the Council enjoys a statutory power to provide the facilities and to charge for use; it exercises those rights and powers as a public authority. The powers are statutory, not derived from the body's constitutional documents, as in *Saudaçor*. The statutory powers exist to combat market failure (per *Edinburgh Leisure*); if that action was not necessary then the Council would spend the money elsewhere. Whilst s 19 LGMPA undoubtedly confers a discretion on a local authority, that does not extend to a discretion to provide recreational facilities for a commercial purpose; a local authority is not, in general, empowered to trade.

58. When a power is conferred on a local authority then it must act both within the width of that power and also for the purpose for which that power was conferred. This was the approach adopted in *Credit Suisse* where the Court of Appeal considered facts relating to the establishment by a local authority of a subsidiary company to operate a leisure facility which

included time-share units. That raised two issues: (1) whether the authority was acting outside the scope of its powers under s 19 LGMPA; and (2) whether the authority had, in any event, acted outside the purpose of s19 LGMPA. The CA determined the appeal on the basis the authority had acted outside the width of its s19 LGMPA powers; however, the Court of Appeal also went on to conclude that the judge at first instance was correct to find that the local authority had also purported to exercise its powers for an improper purpose - in that case to get around restrictions applying to raising capital funds.

59. An obligation to set charges as the Council "thinks fit" encompasses a legal obligation to consider the level of charge in view of the fiduciary duties to ratepayers and the legitimate objectives against which that expenditure is made. The relevance of such fiduciary duties in setting charges was considered by the House of Lords, albeit in a different context, in *Bromley*. It is not necessary to define the precise scope of the boundaries of a Council's legitimate objects – the absence of case law concerning the issue might imply that local authorities act well within the boundaries of their legitimate objects in their provision of public leisure services.

60. The interests of the residents in having to fund expenditure have to be balanced against the benefits of providing funded leisure services. The Council sets prices so as to encourage participation in sport across the area of the Council's responsibility but with regard to the fact that the net expenditure is to be funded by ratepayers. That creates a legal requirement, as regards selecting services and setting prices, which is materially different from that applying in a market where the nature of the supply and the price determined is driven by the financial return. The legal obligation on the Council is to consider both the financial cost and the social return.

61. The "best value" rules form part of the wider context in which those legal obligations are exercised. The criteria referred to in the 'best value' obligation are 'economy, efficiency, and effectiveness'. This is consistent with the underlying legal obligations – economy equates to the cost to taxpayers, efficiency to the relative cost of supplies, and effectiveness to the legitimate social benefits that derive from that activity.

62. The existence of a 'special legal regime' cannot be defined simply by the volume of legislation or the strictness or detail of the provisions laid out – a detailed legal scheme may give rise to supplies which are in substance the same or substantially similar to those in the general market. In *Durham Company* it appears to have been accepted that the requirement for a 'reasonable charge' on face of it gave rise to a requirement to set charges at or around the cost of providing the services. A legal regime which requires charges to be set at a level so as to recover costs share some similarities with the wider market in the sense that price is often set in the general market by reference to cost (albeit in that case there would also be an additional notional 'profit cost'). On the facts of this case the legal obligation to set such charges as the Council "considers fit", and which carries with it the requirement to undertake a wider assessment of benefits accruing to those living within the area of the Council's responsibility, is further removed from the ordinary operation of the market.

63. It is agreed between the parties that the question of whether, if the Tribunal finds that the supplies do fall within the first subparagraph in art 13(1), the supplies then fall to be excluded by reason of the second sub-paragraph, which applies where non-taxation is likely to give rise to distortions of competition should be excluded from the scope of the present hearing. However, the Council reserves its position as to whether that issue requires any (or any substantial) evidence on the basis of its provisional assessment that non-taxation cannot

be recognised as giving rise to distortions of competition in circumstances where similar supplies, made by non-profit making organisations, already qualify for non-taxable status.

Note 3– Supplies treated as made by a public authority

64. The Note 3 Issue is relevant only if the Tribunal determines that the Council is engaged in an economic activity, and does not operate under a special legal regime.

65. Item 3 Group 10 Sch 9 VATA 1994 exempts the supply of sports services by an 'eligible body'. Eligible body is defined in Note (2A); on the face of note (2A), a local authority would fall within the general description of an 'eligible body'. However, Note 3 specifically excludes local authorities from the scope of the definition of eligible body and thereby from the exemption.

66. The UK initially applied taxable treatment to supplies of sporting services (i.e. services of a kind now falling within art 132(1)(m) PVD), at the time adopted pursuant to a permitted derogation, but subsequently conferred exempt status, with effect from 1 January 1994, in the same terms as now set out in Item 3 to Group 10 Schedule 9.

67. In *Ealing* the Tribunal referred three questions to the CJEU. The AG (at Opinion [31] to [38]) had difficulty in reconciling the legislative background, as presented, to the questions referred. The Tribunal had essentially asked the Court to consider whether the UK was entitled to apply the exemption as it applied to public bodies subject to the condition as set out in art 133(d), which provides that Member States may make the granting to bodies other than those governed by public law of the exemption provided for in art 132(1)(m) subject, in each individual case, to the condition that the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT. However, the UK legislation did not in its terms operate so as to apply the competition condition to the exemption as it applied to the individual case of public bodies. There is no indication of the intention or rationale for the provisions of Note 3, simply a statement that local authorities are excluded from the exemption. There is no evidence that the UK intended Note 3 to relate to the competition condition; rather, the desire was to preserve recoverability for local authorities under s 33.

68. The Court stated that the structure of art 133 is not designed to place non-profit-making bodies governed by public law in a more favourable position than other non-profit-making bodies. The Court then goes on, in answering the hypothetical question referred, to answer that art 133 must be interpreted as precluding national legislation which applies the competition condition to supplies by organisations governed by public law whilst failing to apply that same condition to those same organisations who are not so governed.

69. The referral to the Court was made on a mistaken premise: that Note 3 had taken effect so as to exclude public bodies from the scope of art 132(1)(m) pursuant to art 133. That interpretation cannot hold at any level – the UK legislation does not in its terms apply that condition to public bodies but, even if it did, it is clear that it would not be entitled to do so unless it also applied that condition to other non-profit-making organisations. Following *Ealing* it is clear that art 132(1)(m) cannot form the basis for taxation of the disputed supplies. The question that then arises in this appeal, in light of *Ealing*, is as to what the effect is of Note 3? The Council contends that Note 3 represents the de facto exercise by the UK of the derogation provided to it under art 13(2), which operates so as to treat services which are exempt, such as those identified in art 132(1)(m), where provided by public bodies,

as being excluded from exemption in favour of treatment as activities of a public body acting as such. HMRC, in their internal manual, state that they have not exercised the option open to them under art 13(2).

70. The terms of UK law are consistent with the art 13(2) derogation insofar as they do not require that Note 3 activities be treated as taxable supplies. Section 4(2) VATA defines a taxable supply as a supply of goods or services made in the United Kingdom other than an exempt supply. The disputed services do not fall to be treated as taxable under the terms of s 4(2) as the services remain exempt (those exempt services are deemed or treated as non-taxable activities).

71. In *Marktgemeinde* the Court held (at [19]) that "Member States are authorised to exclude from treatment as taxable persons bodies governed by public law which carry out activities exempted under Article 13 of the directive, even if they are performed in similar manner to those of a private trader." In *SALIX* the Court noted that (i) the provisions of the Directive need not be incorporated verbatim into domestic law provided that the domestic provisions in context are sufficiently clear and precise (at [40] – [42]) with the Member State choosing the legislative technique it regards as most appropriate (at [56]); (ii) as the exception is optional for Member States, the State must choose to exercise the exception (at [52] and [55]) to thereby exclude certain activities performed by a public authority as from the scope of an economic activity (at [53]); and (iii) as the exception is thereby a derogation from the general rule, it should be strictly construed.

72. Accordingly, where the derogation is implemented the effect is to take economic activities undertaken by a public authority which fall within the scope of the exemption and deem them, nevertheless, to be activities undertaken by a public authority acting as such. The only restriction on such treatment then being that it must not result in significant distortions of competition either against or in favour of the public authority concerned. The Member State must legislate so as to implement the derogation, such legislation arising as a result of a choice to rely on the derogation. The principle of declaratory effect of judgments of the Court means that the judgment in *Ealing* has effect as if the relevant provisions were so understood at the time they came into force (in 1994). When Note 3 is read in light of the judgment in *Ealing* it cannot be recognised as having the effect of requiring the taxation of such supplies for which there is no basis in the PVD. In light of the judgment Note 3 can only fall within the framework of art 13(2) PVD. Further, on the basis that Parliament is presumed not to legislate for no purpose and/or not deliberately to enact legislation which is ultra vires, this Tribunal should seek to determine an interpretation of Note 3 which is compliant with the provisions of the Directive and otherwise achieves the legislative intent of Parliament, in this case excluding local authorities from the exemption.

73. UK legislation must be interpreted so far as possible in conformity with the requirements of EU law – the *Marleasing* principle - see, for example, *Prudential* at [101]. The Council contends that the words used in Note 3, simply read and with no need to stretch their language, can be interpreted to be in conformity with the provisions of the PVD if construed as the exercise of the art 13(2) discretion. Such interpretation gives the statutory provision meaning and relevance rather than concluding it is otiose. Further, to interpret it in this way also achieves the outcomes which appear to have underpinned the decision to exclude local authorities from exemption, i.e. recovery of input tax associated with the provision of sporting services – see the 2017 parliamentary review of the sports exemption following a concern raised by the commercial or proprietary golf sector concerning distortions of competition. In light of s33, interpreting Note 3 as the exercise of the

discretion in art 13(2) achieves a result compliant with the PVD, gives meaning to the provisions of Note 3, and achieves the outcome sought by local authorities otherwise concerned as to the recovery of the VAT paid to suppliers in connection with the provision of sports services. The UK has left Note 3 on the statute book, despite *Ealing*.

74. Section 41A(1) provides the general vires for non-business treatment under art 13(1) and addresses the treatment of certain activities as explicitly taxable under the terms of the PVD. Sporting services are explicitly exempt and Note 3 is the enactment of the discretion exercised under art 13(2) so far as it relates to sporting services. Note 3 excludes exemption in favour of treatment of those same activities, where provided by the bodies mentioned in Note 3, as 'non-economic' activities.

RESPONDENTS' CASE

75. For HMRC, Mr Hill submitted as follows.

76. Following the CJEU decision in *Ealing* HMRC accepted that the sporting services exemption (art 132(1)(m) PVD) applied to sports centre entrance fees charged by local authorities. Therefore, the Council could reclaim overpaid output VAT wrongly charged on those fees. The Council had decided to pursue its appeal on other grounds before the Tribunal – presumably because it considered that more advantageous than an *Ealing* reclaim (with attendant impact on input tax and de minimis aspects).

The economic activity argument

77. From the caselaw it was established that in determining whether there was an economic activity the following matters were *not* relevant:

(1) Whether the activities were carried out with a business or commercial motive, or intention of profit – see *Finland, Gemeente Borsele* and *Longridge*.

(2) Whether the activities were carried out in the public interest – see *Finland*.

(3) Whether the activities are duties conferred by law – see *Finland* and *Saudaçor*.

(4) How the activities are financed – see *Lajvér*.

78. In *Wakefield College* the Court of Appeal (at [52]) drew a distinction between consideration for the purposes of art 2 and remuneration for the purposes of art 9. The Council has conceded that it receives art 2 consideration. The Court stated, "A supply for consideration is a necessary but not sufficient condition for an economic activity."

79. The Tribunal was required to look widely at the circumstances of the case (per Arden LJ in *Longridge*) and conduct a wide-ranging, fact-sensitive, entirely objective enquiry (per David Richards LJ in *Wakefield College*). Factors may assume different relative importance in different cases (*Wakefield College* at [58]).

80. In *Finland* the Court of Justice noted that only about a third of the users of the Finnish legal aid offices paid even the basic contribution – and the contributions covered less than 8% of the operating costs of the legal aid offices – and held that, in those circumstances, there was no economic activity. The link between the services and the payment was not sufficiently direct for the services to be regarded as economic activities, since the link between the part payment made by recipients and the actual value of the services provided varied in strength according to the recipient's circumstances. This suggested that the part payment borne by recipients should be "regarded more as a fee". Importantly though, the

Court indicated that an economic activity for the purposes of VAT "does not necessarily have to be a business activity designed to make a profit" and could be an activity carried out "without any business or commercial objective".

81. This was supported by Arden LJ in *Longridge* where she stated (at [94]) that the fact that Longridge's predominant concern in carrying out its activities and setting prices for them was to further its charitable objectives and "its considerable use of volunteers" which allowed it to reduce costs were irrelevant to whether its activities were economic. This was because "economic activity is assessed objectively and so the concern of Longridge, which is its reason for providing the services which it does provide, is not enough to convert what would otherwise be economic activity into an activity of a different kind for VAT purposes". The calculation of the charges supported the existence of an economic activity, since "the amount of the charge was more than nominal in amount and was directly related to the cost of the activity. … The concessionary charges were also not an indicator against the existence of an economic activity because the economic activity springs from the receipt of income, not profit." Arden LJ took into account, in deciding that Longridge's activities were economic, not just "the fact that it operated in a market where similar services were supplied on a commercial basis", but also the fact that Longridge conducted its activities on a "substantial" scale, applying "prudent financial management".

82. The Court of Justice in *Gemeente Borsele* said (at [31]) it was relevant to look at "the number of customers and the amount of earnings." The Court noted in that "the municipality of Borsele recovers, through the contributions that it receives, only a small part of the costs incurred. The contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds. Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration". The Court did not adopt the factors discussed by AG Kokott (at [68-69] of her Opinion) that it would not make sense to tax activities carried out by public bodies unless there was either a risk of distortion of competition or that there was a possibility of untaxed final consumption.

83. In *Wakefield College,* David Richards LJ noted (at [75]) "in *Finland* and, to an extent, in *Borsele,* the charges paid were fixed by reference to the means of the recipients. Second, and as a necessary corollary, the charges were only partly fixed by reference to the cost of the service. Third, the total amount raised by charges was insubstantial, both in absolute terms and relative to the cost of the service". The college charged fixed fees which were significantly less than the cost to the college of providing the courses; the Court of Appeal (at [81-84]) took into account that the fees "made a significant contribution to the cost of providing courses to the students paying those fees, to the extent of some 25-30%". The fees paid by the group of students paying subsidised fees were "significant in amount", their level was fixed by reference to the cost of the courses and was "not fixed by reference to the means of the students or employers or others paying the fees". Although the college might have "charged less than it was entitled to, as a response to prevailing economic circumstances in its local catchment area, … that is a factor that any economic activity must take into account and is not comparable to an individual means-tested basis for fixing fees". There was a market in the provision of further and higher education and there was "no reason to suppose that the College [was] other than a typical participant in that market or that it provides courses to students paying subsidised fees on anything other than a typical basis". That was so, even

though the College was itself a charity and its viability was underpinned by a combination of grant aid and fees.

84. The position of the Council can be distinguished from that of the municipality in *Gemeente Borsele* on four grounds:

(1) *Most of the users of the Council's sports and leisure facilities pay something.* In both *Gemeente Borsele* and *Finland* only a third of users were required to make any contribution; the present case is more similar to *Longridge,* where Longridge charged for the majority of its courses, but offered discounts or waived charges where it considered it justified.

(2) *The relevant charges are based on the leisure or sports activity chosen by the participant and the number of times that they wish to undertake that activity.* In *Gemeente Borsele* the parental contribution to the transport costs was not linked to either the number of kilometres travelled per day, the cost price per journey for each pupil transported, or the frequency of the journeys. In *Finland*, the Court commented (at [48]) that the charges for legal representation depended not on the complexity of the case concerned or the number of hours worked by the legal advisor in question, but on the recipient's income and assets. In contrast, the charging structure adopted by the Council is similar to that adopted by Longridge, which depended on the activity chosen by the participants and whether it was a single activity or course that was chosen. It is true that the Council has various concessionary rates for activities carried out by individuals and groups, but that was also the case in *Longridge*.

(3) *It is relevant (though not conclusive) to look at the percentage contribution of users of the service towards the cost of providing the service* – see *Gemeente Borsele* (at [33]). It would appear that a high proportion of the Council's expenditure on leisure and cultural services was recovered through customer charges. This is far above the 3% contributions received by the municipality in the *Gemeente Borsele* case. In taking into account the percentage contribution by users of the relevant services, the relevant question is whether the Council was exploiting its facilities in order to obtain income therefrom. As the Court of Justice stated in *Lajvér* (at [35]), "it is irrelevant whether the exploitation is intended to make a profit". The Council obtained very substantial income from providing leisure and sports facilities – its income from leisure and cultural services in 2015/2016 was over £6 million. The facilities attracted around 1.3 million visits. It is irrelevant whether the Council was subsidised through grants – see the Court of Justice in *Lajvér* (at [38]).

(4) *The Council offers its leisure and sports services on the general market* – see *Gemeente Borsele* (at [35]). Anyone who wants to take part in sport or leisure activities can choose to use the facilities offered by the Council or can choose to use the facilities offered by commercial entities. Nor are the Council's services excluded from being provided on the general market on the basis that they are a precondition for the access of economic operators to the market, rather than participation in the market (see *T-Mobile* at [42] and *Hutchison 3G* at [36], which AG Kokott referred to in footnote 41 of her Opinion in *Geemente Borsele*). The Council operates on the general market for sports and leisure services in the sense that (a) selling access to sports and leisure facilities is inherently a market activity, which is capable in principle of being carried out by economic operators; (b) it has very substantial numbers of customers and derives very substantial income from its sporting and

leisure activities; and (c) it has taken active steps to manage and market its sporting and leisure services, including via its Internet webpages (see *Słaby* at [39], and *Rēdlihs* at [36]). The fact that the Council offers leisure and sporting services on the general market in fulfilment of statutory powers is not relevant in assessing whether those services are offered on the general market (see *Finland* at [40]). Nor does it matter that the services are provided in the specific context of the law applied to public authorities or in a manner which seeks to make provision where the activity is not in fact met by the market. In *Götz* the Court held that the nature of the activities, in which farmers could buy and sell milk quota, a price could be struck and payments could be effected, was an economic activity since that activity "does appear to be capable, as a matter of principle, of being carried out by economic operators".

Accordingly, the present case is not in the exceptional category of cases, such as *Finland* and *Gemeente Borsele*, where the amounts paid by users of the relevant services were to be regarded as symbolic amounts which had an insufficient link with the services provided. Rather, as in *Wakefield College* and *Longridge,* the financial contribution made by users of the services in the Council's case is consideration for the services in question – and those services are an economic activity.

Public authority acting under a special legal regime

85. From the caselaw on art 13 the following principles could be drawn:

(1) Any economic activity is normally taxable and thus the PVD has a wide scope – see *Ireland* at [39], *Isle of Wight* at [28] and *Saudaçor* at [48].

(2) A public law body is normally taxable – see *Ireland* at [39].

(3) Article 13 is a derogation from that general rule and so must be interpreted strictly – see *Ireland* at [40-41] and *Saudaçor* at [38-39].

(4) It is not an objection to the existence of a special legal regime that private bodies can carry out similar activities – see *Isle of Wight* at [33].

(5) A special legal regime is not created simply by operating within a statutory framework – see *Ireland* at [49].

(6) The activity in question must be carried out in exercise of rights and powers of the public authority – see *Fazenda Pública* (at [22]).

(7) The subject-matter or purpose of the relevant activities are irrelevant in deciding whether they were carried out by a body governed by public law under a special legal regime applicable to it - see *Saudaçor* (at [70]).

86. The Council relies particularly on the CJEU judgment in *NRA*. That case does not provide the Tribunal with any assistance on the special legal regime issue. In that case, it was common ground, not just that the NRA was a body governed by public law (at [9]), but also that the NRA was such a body "acting as a public authority as regards the activity of making road infrastructure available on payment of a toll" – and was thus prima facie not to be regarded as a taxable person (at [22]). Indeed, the Court rejected an attempt by the European Commission to reopen that issue (at [30-34]). Thus, there was no issue in that case whether the NRA operated under a special legal regime. The only issue (as set out in the questions referred by the national court (at [29 & 35]) was whether treating the NRA as non-taxable

would lead to significant distortions of competition, applying the second sub-paragraph of art 13(1) - and not whether the NRA should prima facie be regarded as a taxable person, applying the first sub-paragraph of art 13(1). That is confirmed by the Court's answer to the questions referred (at [52]).

87. *Durham Company* was a judicial review concerning the lawfulness of treating local authorities which collected and disposed of trade waste as being non-taxable persons under art 13(1). Warren J applied *Fazenda Pública, Isle of Wight* and *Saudaçor* (at [12-21]). Therefore, *Durham Company* does not purport to establish any new legal test of the existence of a special legal regime, but simply to apply the test laid down by the CJEU in those previous authorities to the particular facts of the case. Furthermore, Warren J's decision was that the relevant statutory provision – section 45(1)(b) EPA (which required a local authority to arrange for the collection of any commercial waste which the occupier of premises in its area requested it to collect) was "at least … capable of being … a "special legal regime"" (at [103]). Warren J expressly stated that "whether any particular LA is acting as a public authority" will depend on the facts relevant to that local authority (at [104]).

88. The Council argues that it provides its sports facilities pursuant to a special legal regime, relying on the power under section 19 of the Local Government Miscellaneous Provisions Act 1976 to provide, inside or outside its area, such recreational facilities as it thinks fit, whether or not for payment. The fact that the Council provides such services under a statutory discretion does not mean that engaging in its activities "necessarily involves the exercise of rights and powers of public authority". In *Ireland* the member state made the same point– that Irish local authorities act only pursuant to powers conferred on them by statute and cannot engage in commerce in competition with private traders. Therefore, Ireland argued that they "necessarily act in their capacity as public bodies" (at [11 and 38]). On that basis, Ireland argued that there was no need for it to make provision for any services provided by local authorities to be taxable – since none could be. Nevertheless, the Court held that, despite the statutory derivation of all of the powers of Irish local authorities, it was nevertheless possible for their services to be taxable – and therefore Ireland had to make provision for the taxation of economic activities provided by its local authorities. Therefore, it is not enough for the Council to say that it acts in accordance with powers conferred upon it by statute. Rather, what is necessary is that the pursuit of the sporting activities involves the exercise of the rights and powers of a public authority. Those rights and powers have to "amount to an instrument" which are used by the Council in order to carry out the sporting activities (per *Saudaçor*).

89. The Council does not use the relevant statutory provisions as an instrument in order to carry out the relevant sporting activities. The situation is not like *T-Mobile* where only the public authorities could carry out the activities in question (auctioning mobile phone spectrum) and nor are they like *Fazenda Pública*, in which the public authorities exercised public powers in order to carry out activities where comparable activities were also provided by private operators (car parking) but in which the specific activity in question was both authorised by and delimited by the use of public powers (on-street car parking). So the Council's situation is not a case in which the exercise of public powers was necessary to create or carry out the specific activity in question - any organisation could in law provide sports and leisure facilities similar to those provided by the Council, without recourse to public powers.

90. Whether or not the purpose of the Council in providing sports and leisure facilities differs from that of other organisations providing similar facilities is irrelevant in assessing whether they are acting as public authorities – see *Fazenda Pública* and *Saudaçor*.

91. With reference to the two other test cases before the Tribunal (Mid Ulster District Council in relation to Northern Ireland, and Midlothian Council in relation to Scotland) it was irrelevant that under the legislation applicable to local authorities in Scotland and Northern Ireland there was an *obligation* to provide facilities, whereas for local authorities in England & Wales there was a *power* to provide them.

The Note 3 Issue

92. This is a new argument, first set out in detail in Ms Brown's skeleton argument.

93. In *Ealing* the Court held that the UK was not entitled to rely on the risk of distortion of competition under art 133(d) PVD to exclude sporting services from the art 132(1)(m) exemption where they are provided by local authorities but not to apply the same condition to other non-profit making organisations.

94. The Council appears to be arguing that, since the UK was not entitled to legislate so as to single out sporting services provided by local authorities for exclusion from the exemption, Note 3 must be interpreted as being an election by the UK to rely on art 13(2) PVD, under which Member States have a discretion to regard activities by public bodies which would otherwise be exempt under art 132 as falling within art 13(1) (i.e. as not being provided by a taxable person).

95. However, the effect of the Court's judgment in *Ealing* is clear. The UK should not have singled out local authority sporting services for exclusion from the exemption. In those circumstances, local authorities have a directly effective right to rely on the exemption under art 132(1)(m) PVD; they do not need to rely on a conforming interpretation of national law under the *Marleasing* principle, as they are asserting their rights under the Directive against the State.

96. The Council has chosen not to rely on its directly effective right to exemption of its sporting services; but that does not mean that Note 3 has to be interpreted as being a UK election to rely on art 13(2). If that were the case, then Note 3 would have to be interpreted in the way suggested by the Council in every case involving a local authority claiming overpayment of output tax during the relevant period. Therefore, Ealing and any other local authority which wished to rely on direct effect to claim the exemption under art 132(1)(m) would not be able to do so. All local authority sporting supplies during the relevant periods would be treated as falling within art 13(1) and not art 132(1)(m) – despite the fact that the services in question were economic activities, did not otherwise fall within art 13(1) and despite the fact that the local authorities in question have a directly effective right to rely on art 132(1)(m) to claim exemption. The *Ealing* judgment most certainly does not require the UK courts to deny Ealing and other local authorities which wish to claim exemption for their sporting services the chance to do so. Indeed, it would be wholly contrary to legal certainty now to regard Note 3 as being an election by the UK to rely on art 13(2). In *SALIX*, on which the Council relies, the Court of Justice stated (at [42]):

> "Each Member State is bound to implement the provisions of directives in a manner that fully meets the requirements of clarity and certainty in legal

> situations imposed by the Community legislature, in the interests of the persons concerned established in the Member States. To that end, the provisions of a directive must be implemented with unquestionable legal certainty and with the requisite specificity, precision and clarity".

97. The Court went on to point out (at [51 to 55]) that, because the transposition of art 13(2) was not obligatory, it followed that, "in order to use the option provided for by that provision, the Member States are required to make a choice to rely on it". Because the exercise of the option was a derogation from the general rules of the Directive, the Court held that it fell to be strictly construed and accordingly "in order to rely on the option … the Member States must make a specific choice to that effect". In the present case, the UK made no such specific choice to rely on the derogation in art 13(2). Indeed, as the Council itself submits (in paragraph 9 of Ms Brown's skeleton) the UK only expressly implemented art 13 PVD by introducing a new section 41A VATA through the Finance Act 2012.

98. Note 3 makes no attempt to specify that local authorities are to be treated as non-taxable persons – rather they are excluded from the exemption – the effect of which is therefore that the default position applies and their sporting services are treated as taxable.

99. As the passage from the 2017 Review cited by the Council makes clear, "It had been intended that exemption would be extended to supplies made by local authorities, but in May 1995 Customs confirmed that these supplies would *continue* to be standard rated", following lobbying by local authorities themselves. That is confirmed by the Hansard passages referred to in footnote 27 of the Review. In those circumstances, it is simply impossible to say that the UK made a specific choice to rely on art 13(2). To construe Item 3 as being the exercise of such a choice would amount to a retrospective amendment of the VATA, which would be wholly contrary to legal certainty.

CONSIDERATION AND CONCLUSIONS

100. We find as fact the witness evidence of Mr Lyons and Mr Reeves set out above.

101. The Council advances three alternative arguments why its supplies of sporting and leisure activities to members of the public do not attract VAT.

102. First, the supplies do not constitute an economic activity within art 9 PVD; therefore the Council is not a taxable person within the meaning of art 9; therefore there is no vatable supply under art 2 PVD. We shall call this "**the Article 2 Argument**".

103. Secondly, the supplies are made by the Council in its role as a public authority for the purposes of art 13 PVD; it operates as such under a special legal regime; and its consequent treatment as a non-taxable person does not lead to significant distortions of competition. We shall call this "**the Article 13 Argument**".

104. Thirdly, the terms of Note 3 to Group 10 sch 9 VATA 1994 operate as an exercise of the discretion permitted under art 13(2) so as to treat the supplies made by the Council as carried out by it as a public authority, and thus by a non-taxable person ("**the Note 3 Argument"**).

The Article 2 Argument

105. Article 2 PVD subjects to VAT "the supply of services for consideration within the territory of a Member State by a taxable person acting as such". Article 9 PVD defines "taxable person" as "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity … Any activity of … persons supplying services … shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

106. These provisions were considered by the Court of Appeal in *Wakefield College* where David Richards LJ reviewed the relevant caselaw (which we cover in more detail below) and analysed the current legal position as posing two separate questions:

> **"[52]** Whether there is a supply of goods or services for consideration for the purposes of art 2 and whether that supply constitutes economic activity within art 9 are separate questions. A supply for consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient: see, for example, the judgment in *Borsele* at para 24. That is what is meant by 'a direct link' between the supply of the goods or services and the consideration provided by the recipient: see *Borsele* at para 26 and contrast *Apple and Pear Development Council v Customs and Excise Comrs*. There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied. This requirement was satisfied in both *Finland* and *Borsele*.
>
> **[53]** Satisfaction of the test for a supply for consideration under art 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity. However, as Mr Puzey for HMRC pointed out, the Advocate General remarked in her opinion in *Borsele* at para 49, 'the same outcomes may often be expected'."

107. On the Court of Appeal's first question, the Council accepts (and we agree) that the fees the Council receives do constitute consideration for the purposes of art 2. Moving to the Court of Appeal's second question:

> **"[54]** Having concluded that the supply is made for consideration within the meaning of art 2, the court must address whether the supply constitutes an economic activity for the purposes of the definition of 'taxable person' in art 9. The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made 'for remuneration'. The important point is that 'remuneration' here is not the same as 'consideration' in the art 2 sense, and in my view it is helpful to keep the two terms separate, using 'consideration' in the context of art 2 and 'remuneration' in the context of art 9.
>
> **[55]** Whether art 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in *Borsele* at para 29. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to make a profit. Although a supply 'for the purpose of obtaining income' might in other

> contexts, by the use of the word 'purpose', suggest a subjective test, that is clearly not the case in the context of art 9. It is an entirely objective enquiry.
>
> **[56]** In describing the relationship between the supply and the charges made to the recipients in the context of art 9, the CJEU has used the word 'link'. In *Finland* at para 51, the court concluded that 'it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct … for those services to be regarded as economic activities'. Likewise, in *Borsele* at para 34, the court adopted precisely those words in concluding that the provision of the school transport was not an economic activity.
>
> **[57]** Mr Prosser QC for the College submitted that whether there was 'a sufficiently direct link' between the services and the charge made was an important circumstance, while Mr Puzey submitted that 'direct link' does not feature in the analysis.
>
> **[58]** I regard this as a largely semantic point. The word 'link', whether 'sufficient' or 'direct', is used as no more than shorthand to encompass the broad enquiry as to whether the supply is made for the purpose of obtaining income. It is not a separate test, or one of the factors to be considered when addressing the central question. For my part, I think it is apt to cause some confusion to use the same word for both art 2 and art 9 and I have not myself found it particularly helpful or illuminating in considering whether there exists an economic activity.
>
> **[59]** Each case requires a fact-sensitive enquiry. While cases concerning the supply of legal aid services or school transport will provide helpful pointers to at least some of the factors relevant to the supply of subsidised educational courses, there is not a checklist of factors to work through. Even where the same factors are present, they may assume different relative importance in different cases. The CJEU made clear in *Borsele* at para 32 that it was for the national court to assess all the facts of a case."

108. We look first at the CJEU cases referred to by the Court of Appeal in the passages quoted above. In *Finland* the CJEU summarised the position of the caselaw of the Court (at [37]):

> "… the scope of the term economic activities is very wide and … the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results … An activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity …"

109. Finnish law provided for provision of legal aid financed out of public funds, and for charging a contribution to the recipient of the legal services. The payment made to the public office by the recipient of the services was a contribution limited to 20%-75% of the amount of fees on the case (there was provision for additional contributions but these were unlikely to be levied) and was further means tested by reference to the income and assets of the recipient.

> "48 … Thus, it is the level of the [recipient's income and assets] – and not, for example, the number of hours worked by the public offices or the complexity of the case concerned – which determines the portion of the fees for which the recipient remains responsible.

> 49 It follows that the part payment made to the public offices by recipients of legal aid services depends only in part on the actual value of the services provided – the more modest the recipient's income and assets, the less strong the link with that value will be.
>
> 50 … that finding is borne out by the fact that … the part payments made in 2007 by recipients of legal aid services provided by the public offices (which relate to only one third of all the services provided by public offices) amounted to EUR 1.9 million, whilst the gross operating costs of those offices were EUR 24.5 million. Even if those data also include legal aid services provided other than in court proceedings, such a difference suggests that the part payment borne by recipients must be regarded more as a fee, receipt of which does not, per se, mean that a given activity is economic in nature, than as consideration in the strict sense.
>
> 51 Therefore, in light of the foregoing, it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct for that payment to be regarded as consideration for those services and, accordingly, for those services to be regarded as economic activities …"

110. In *Geemente Borsele* a Dutch municipality was required to meet stated transport costs of school pupils. For shorter journeys parents paid a price equal to the cost of public transport, and for longer journeys the charge was means tested (at [10]). The Court emphasised (at [29]) that all circumstances must be considered, and stated:

> "30. Comparing the circumstances in which the person concerned supplies the services in question with the circumstances in which that type of service is usually provided may therefore be one way of ascertaining whether the activity concerned is an economic activity …
>
> 31. Other factors, such as, inter alia, the number of customers and the amount of earnings, may be taken into account along with others when that question is under consideration …
>
> 33. …first, … the municipality of Borsele recovers, through the contributions that it receives, only a small part of the costs incurred. The contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds. Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration …
>
> 34. It therefore follows from that lack of symmetry that there is no genuine link between the amount paid and the services supplied. Hence, it does not appear that the link between the transport service provided by the municipality in question and the payment to be made by parents is sufficiently direct for that payment to be regarded as consideration for that service and, accordingly, for that service to be regarded as an economic activity …
>
> 35. … second, that the conditions under which the services at issue in the main proceedings are supplied are different from those under which passenger transport services are usually provided, since the municipality of Borsele … does not offer services on the general passenger transport market, but rather appears to be a beneficiary and final consumer of transport

> services which it acquires from transport undertakings with which it deals and which it makes available to parents of pupils as part of its public service activities."

111. In *Wakefield College* the Court of Appeal provided a helpful summary of the factors taken into account in those two CJEU cases:

> "[75] Turning to the contentious issue of economic activity, both parties drew attention to factors taken into account in *Finland* and *Borsele*, while accepting that ultimately each case depends on its own facts. Those factors were, first, that in *Finland* and, to an extent, in *Borsele*, the charges paid were fixed by reference to the means of the recipients. Second, and as a necessary corollary, the charges were only partly fixed by reference to the cost of the service. Third, the total amount raised by charges was insubstantial, both in absolute terms and relative to the cost of the service. Fourth, in *Borsele*, the municipality did not offer services on the general passenger transport market and appeared more to be the final consumer of the transport services provided by the transport undertakings engaged by it. Fifth, other factors mentioned in those cases were a comparison of the supply in question with the circumstances in which the relevant type of service is usually provided, and the number of customers."

112. From the passages quoted above from *Wakefield College* we understand that the approach we are to adopt to the question whether the Council makes the supplies for remuneration, is to make a wide-ranging (not a narrow) fact-sensitive enquiry, examining all the objective circumstances in which the services are supplied; it is an entirely objective enquiry, and does not include subjective factors; there is not a checklist of factors to work through, and even where the same factors are present, they may assume different relative importance in different cases.

113. We consider that the relevant factors in the current appeal for the purposes of arts 2 and 9 are as follows, and we give our findings on each:

(1) *The supply to local residents of facilities for leisure, sporting and physical recreation is a core activity of the Council.* See the evidence of Mr Lyons ([21(20b)] above) and Mr Reeves ([22(5)] above). That is in contrast to the provision of school transport by the municipality in *Geemente Borsele*, and the provision of legal aid by the public office in *Finland*, which in each case was very much ancillary to the respective body's principal activities.

(2) *The number of customers and the total revenue raised by the Council for the supply of facilities for leisure, sporting and physical recreation are both significant.* See the evidence of Mr Lyons ([21(20a & 20c)]) above) and Mr Reeves ([22(5) & (6)] above). The CJEU in *Geemente Borsele* said (at [31]) it was relevant to look at "the number of customers and the amount of earnings."

(3) *Although concessionary fees are available to qualifying users, (almost) all users pay something for use of the facilities.* In contrast, in *Geemente Borsele* (at [33]) only one-third of transport users paid contributions, and in *Finland* (AG Opinion para [50]) only 34% of users paid any contributions.

(4) *Although the cost of providing the facilities exceeds the fees received from users, the fees do make a significant contribution to the costs of provision.* Fees collected accounted for around one third of costs - see the evidence of Mr Lyons ([21(20a)]

above) and Mr Reeves ([22(18b)] above). That is in contrast to the position in *Geemente Borsele* (at [33]) where the charges covered only 3% of costs, and in *Finland* (at [50]) where the charges covered only around 8% of costs. It is more in line with the situation in *Wakefield College* where, after noting (at [75]) that in both *Geemente Borsele* and *Finland* "the total amount raised by charges was insubstantial, both in absolute terms and relative to the cost of the service", the Court of Appeal (at [82]) stated: "the subsidised fees made a significant contribution to the cost of providing courses to the students paying those fees, to the extent of some 25–30%."

(5) *The fact that the Council does not aim (and has never aimed) to break even (let alone make a profit) on the provision of the facilities does not matter.* That is a subjective factor only and must be ignored – see, for example, *Wakefield College* at [55], *Longridge* at [84], and *Lajvér* at [35].

(6) *The fact that many users pay concessionary rates does not matter.* Per Arden LJ in *Longridge* (at [93]): "The concessionary charges were also not an indicator against the existence of an economic activity because the economic activity springs from the receipt of income, not profit."

(7) *The fact that the costs of providing the facilities for leisure, sporting and physical recreation are subsidised in large measure by grants from UK central government (see the evidence of Mr Lyons ([21(13)] above) and Mr Reeves ([22(11)] above)) does not matter.* Per the CJEU in *Lajvér* (at [38]):

> "… the fact that the investments were largely financed by aids granted by the Member State and the European Union cannot have a bearing on whether or not the activity pursued or planned by the applicants in the main proceedings is to be regarded as an economic activity, since the concept of "economic activity" is objective in nature and applies not only without regard to the purpose or results of the transactions concerned but also without regard to the method of financing chosen by the operator concerned, which also holds true in relation to public subsidies."

(8) *The fact that the leisure, sporting and physical recreation facilities are provided in fulfilment of statutory duties does not matter.* Per the CJEU in *Finland* (at [40]):

> "It must first of all be stated that, in view of the objective character of the term 'economic activities', the fact that the activity of the public offices consists in the performance of duties which are conferred and regulated by law, in the public interest and without any business or commercial objective, is in that regard irrelevant."

114. Taking together all those factors and our findings, we conclude that the provision of the leisure, sporting and physical recreation facilities by the Council constitutes the supply of services for remuneration, and thus that supply constitutes economic activity within art 9 PVD.

115. Accordingly, we do not accept the Article 2 Argument advanced by the Council.

The Article 13 Argument

116. Article 13 PVD provides, so far as relevant:

> "1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even

> where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. …"

117. The Council submits that its supply of leisure, sporting and physical recreation facilities constitutes activities in which the Council engages as a public authority. Further, that its consequent treatment as a non-taxable person would not lead to significant distortions of competition in respect of those activities.

118. In *Carpaneto No 2* at [10] the CJEU emphasised that art 13 did not apply to activities engaged in by the body as a body governed by private law rather than by public law; thus it is essential to identify the legal regime applicable under national law in relation to the activities:

> "According to [*Carpaneto No 1* at [15]], it is the manner in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons. In so far as that provision makes such treatment of bodies governed by public law conditional upon their acting 'as public authorities', it excludes therefrom activities engaged in by them as bodies governed not by public law but by private law. Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law."

119. The Courts have since expressed this as requiring a "special legal regime". Per *Fazenda Pública*:

> "21. The national court must, in accordance with the case law …, analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators."

120. In *Ireland* the CJEU stated (at [49]):

> "… bodies governed by public law act as public authorities when they engage in activities which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority (*Isle of Wight Council and Others*, paragraph 31). …"

121. In *Saudaçor* the CJEU stated:

> "69. … only activities carried out by a body governed by public law acting as a public authority are to be exempted from VAT.
>
> 70. The court has consistently held that such activities are activities carried out by those bodies under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators. The court has also made it clear that the subject matter or purpose of the activity is in that regard irrelevant and that the fact that the pursuit of the activity at issue in the main proceedings involves the use of powers conferred by public law shows that that activity is subject to a public law regime (see to that effect, inter alia, judgment in *Fazenda Pública v Câmara Municipal do Porto* (Case C-446/98) [2001] STC 560, [2000] ECR I-11435, paras 17, 19 and 22).

> 71. In that context, the court has stated that the exemption provided for in the first subparagraph of art 13(1) of Directive 2006/112 covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of powers conferred by public law (judgment in *Revenue and Customs Comrs v Isle of Wight Council* (Case C-288/07) [2008] STC 2964, [2008] ECR I-7203, para 31)."

122. It is clear from those cases, and the other authorities cited to us, that the decision whether art 13 applies in particular circumstances is highly fact-specific. The Council referred us to two cases where it was held that a public body *was* engaging in activities under a special legal regime. The first is the CJEU case of *NRA*; we do not find this case of assistance as the parties there had agreed as common ground that the special legal regime test was met: at [22]. Any comments by the Court (eg at [50]) concerning the test were made against the backdrop of the test already being accepted as satisfied; the meat of the case concerns the second paragraph of art 13 – whether treatment as a non-taxable person would lead to significant distortions of competition in respect of those activities.

123. The second case is *Durham Company* which was an application for judicial review before Warren J sitting in the Tax & Chancery Chamber of the Upper Tribunal. The applicant, TDC, was a commercial company which carried on business as a provider of commercial waste services, including "trade waste collection" services, consisting of emptying wheelie bins used by occupiers of non-residential premises. TDC charged VAT to its trade waste collection customers. Local authorities did not charge VAT on similar services and TDC applied for judicial review against HMRC (and HM Treasury) concerning the lawfulness of the VAT treatment afforded to local authorities carrying out certain trade waste services. The preliminary issue to be determined was, where a local authority that was a waste collection authority (for the purposes of the EPA) was making supplies of trade waste collection services to entities occupying non-residential property in its area, whether those supplies by the local authority were activities in which it was engaged as a public authority, within the meaning of art 13 (and/or the domestic legislation in s 41A VATA). HMRC, opposing the application, contended (at [77]) that the legal basis on which local authorities provide commercial waste collection services is contained in s 45 EPA, and that is not only the legal basis on which the services are provided but is also a special legal regime.

124. The Upper Tribunal determined the preliminary issue:

> **"[109]** The preliminary issue is to be answered in the sense that, where an LA [local authority] is making supplies of trade waste collection services to business customers in its area and does so in the performance of its duties under s 45(1)(b) EPA 1990, the supplies are 'activities in which it is engaged as a public authority' within the meaning of s 41A(a) VATA 1994 and art 13(1). Whether an LA is in fact providing its commercial waste collection services under s 45(1)(b) is a matter to be determined on the facts of each case."

125. Warren J explained:

> **"[103]** I have no doubt that s 45(1)(b) EPA 1990 is, or at least is capable of being, a 'special legal regime'. This is demonstrated by consideration of an LA which provides a commercial waste collection service only if requested to arrange for such collection by an occupier of premises and does so for a reasonable charge which, taking the provision of the service to occupiers generally, results only in cost recovery and no surplus. It would appear that

this is the position with North Lincolnshire Council. Indeed, TDC itself does not deny that an LA that is actually arranging a collection in response to a request under s 45(1)(b), and then levying a charge under s 45(4) for the reasonable costs of that collection, may be 'acting as a public authority'.

[104] Since it cannot be said that s 45(1)(b) is not ever capable of constituting a special legal regime, it must follow, even on TDC's case, that whether any particular LA is acting as a public authority will depend on the facts relevant to that LA. As I have already observed, I do not know the detailed facts in relation to any particular LA to say which of the factors relied on by [TDC's counsel] … might even arguably apply quite apart from the responses to those factors …. I do not even have the relevant details in relation to the activities of the LAs in whose areas TDC operates. Although this is not a matter relevant to the preliminary issue, I would have thought that, if TDC is to succeed in an application for judicial review of HMRC and HMT, it is essential for it to show that it is affected by the activities of those LAs. For all I know, each of those LAs is one where commercial waste collections are carried out only following a request and for a reasonable cost reflecting cost recovery and no surplus.

[105] It is therefore impossible, even on TDC's case, to answer the preliminary issue with the answer 'No' (so that the VAT derogation does not apply) since there are at least some, and may be many, LAs who are not to be regarded as taxable persons in relation to supplies of commercial waste collection services. The answer, on TDC's case, would have to be 'it all depends'.

[106] However, once it is accepted, as it must be, that s 45(1)(b) EPA 1990 is capable of constituting a special legal regime in some cases, then in my view any activities carried out by an LA pursuant to that special legal regime fall within the VAT derogation, subject always to the competition proviso. As the cases show, the only criterion making it possible to distinguish with certainty between activities as a public body and activities subject to private law is 'the legal regime applicable under national law'. I accept, of course, that not every activity carried on by an LA is subject to a special legal regime simply because some statutory basis has to be found for that activity. But once a legal regime has been identified as a special legal regime in accordance with the case law, it would defeat the purpose of that clear criterion—namely to provide a clearly and readily applicable test—to require national courts to enter into a further inquiry as to whether particular activities within that legal regime are entitled to the benefit of the VAT derogation. In the present case, the difficulty in drawing lines between what would, and would not, qualify for exemption is, I suggest, obvious. It is no answer for TDC to say (without any, or any adequate, evidence I add) that, wherever lines are to be drawn, there are many cases which exhibit all of the factors identified by [TDC's counsel] … and which should not, on his approach, attract the exemption. …"

126. We also have the benefit of the decision of Nugee J refusing TDC permission to appeal to the Court of Appeal against Warren J's decision (*Durham PTA*):

"6 … The first, Ground 1, is that the Upper Tribunal erred in law in concluding that Waste Collection Authorities that chose to engage in providing trade waste collection services in competition with private sector

providers are (or at least may be) performing their duty under section 45(1)(b) of the EPA 1990.

7 It is pointed out in support of this ground that section 45, as I will refer to it, does not require local authorities to collect waste themselves. All that it requires of them is, on request, to arrange for the collection of commercial waste and it is then under a statutory duty to levy a reasonable charge for doing so. Mr Bates [for TDC] says that what local authorities are doing when they are going into competition with private sector providers is something quite different from that statutory regime.

8 I have had great difficulty in understanding this point. It does seem to me, and I think Mr Bates accepted this, that it is a possible response to the section 45 duty for a Waste Collection Authority not only to wait until it is requested on each occasion to arrange for the collection of waste, but to arrange in advance with a business that wants its commercial waste collected to do so under a contract for, say, the next 12 months and that there is nothing incompatible with section 45 for the local authority to specify in the contract the reasonable charge that it proposed to charge under that contract. That seems to me to be an example of premises within the local authority area requesting the local authority to collect its waste for the next 12 months and the local authority making a charge for doing so. The fact that it chooses to do that through the means of a contract does not, I think, and I did not understand Mr Bates to suggest it necessarily would, take the matter outside section 45. Once that is accepted, it is difficult to see why the sort of arrangements which are referred to in the decision could not be arrangements by which the local authority was discharging its statutory duty under section 45.

…

11 … I see no error in Warren J's conclusion that local authorities who provide collection services in their area may, depending on the facts, be operating under section 45 and since that is what he decided, I do not myself see that there is a reasonable prospect of success in challenging that in the way that Ground 1 seeks to do.

12 Ground 2 is as follows: Even if and insofar as the Upper Tribunal was correct that local authorities' supplies of waste collection services constitute a discharge of the duty imposed by section 45, the Upper Tribunal erred in law in deciding that authorities providing such supplies were doing so under a "special legal regime". In relation to this ground, Mr Bates's argument was that what the European jurisprudence requires is an analysis of the way in which the activities are carried out.

13 I do however, for my part, think that Warren J was entirely right and that there is no real prospect of challenging the analysis he adopted which is that if local authorities are operating under section 45, then that is a special legal regime which is applicable to them in their capacity as public authorities exercising public duties and which is different from the legal regime which applies to private sector businesses such as the claimant even though, from the point of view of the consumer, the services provided may be indistinguishable. That is because, as Warren J sets out, the section 45 power is hedged around by a number of constraints.

14 The ones he identified were that, firstly, a local authority is obliged to make an arrangement in relation to any commercial waste from any premises

within its area, an obligation which does not apply to those who are operating in the private sector; secondly, that there are constraints in the charges that can be made because section 45(4) imposes the limitation that the charge must be reasonable, which does not apply to private sector operators; and thirdly, that there are obligations in relation to disposal under section 48; see what he says as to the flexibility available to a private operator in this regard at [41], which refers to some evidence which he had which I have not seen and which is not set out in his decision. Mr Peretz [for HMRC] also relied on one other matter, the environmental obligations, which Warren J deals with at [39] of his decision.

15 Mr Bates says that none of these things necessarily has any practical impact on the way in which local authorities are able to compete with his client and other operators and therefore they do not amount to a special legal regime, but they do seem to me to be exactly what the European jurisprudence is referring to, namely, that the legal conditions under which the local authorities are providing services are different, because of their function as public authorities, from the legal conditions under which their private sector counterparts are providing what may, as I say, from the point of view of the consumer, be indistinguishable services. In those circumstances, I do not regard Ground 2 as having a reasonable prospect of success either."

127. Turning to the current appeal, the approach we adopt is that stated by the CJEU in *Fazenda Pública* (summarising the Court's own caselaw):

"16. … it is the way in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons (see *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino* (Joined cases 231/87 and 129/88) [1991] STC 205 at 235, [1989] ECR 3233 at 3275, para 15, and *Comune di Carpaneto Piacentino v Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza* (Case C-4/89) [1990] ECR I-1869 at 1886, para 10).

17. It is thus clear from the settled case law of the court that activities pursued as public authorities within the meaning of [art 13] are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators (see in particular *EC Commission v France* (Case C-276/97) (2000) Transcript (Judgment) (Eng), 12 September, para 40, *EC Commission v Ireland* (Case C-358/97) (2000) Transcript (Judgment) (Eng), 12 September, para 38, *EC Commission v United Kingdom* (Case C-359/97) [2000] STC 777 at 787–788, para 50, *EC Commission v Netherlands* (Case C-408/97) (2000) Transcript (Judgment) (Eng), 12 September, para 35, and *EC Commission v Greece* (Case C-260/98) (2000) Transcript (Judgment) (Eng), 12 September).

…

19. In determining whether such an activity is engaged in by [the taxpayer] as a public authority, it must be noted, first, that this cannot depend on the subject matter or purpose of the activity (see *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino* [1991] STC 205 at 235, [1989] ECR 3233 at 3275, para 13).

…

> 21. The national court must, in accordance with the case law referred to in paras 16 and 17 above, analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators."

128. In determining whether an activity is being engaged in under a special legal regime, the following factors are irrelevant:

(1) the subject matter of the activity (*Fazenda Pública* at [19]);

(2) the purpose of the activity (*ibid*); and

(3) the fact that private providers carry out similar activities (*Isle of Wight* at [33]).

129. The first step is to identify the applicable legal regime under which the Council engages in the activities. In *Durham Company* HMRC maintained that the local authorities provided commercial waste collection services pursuant to the legislation in s 45 EPA. Warren J (at [97-99]) agreed with that analysis, holding that "the only available power is to be found in s 45(1)(b) EPA 1990."

130. In the current appeal, the Council maintains that it provides the sports and leisure facilities pursuant to s 19 LGMPA. Section 19 confers wide powers on local authorities to provide the facilities – see [13] above. It was never put to the witnesses that there were alternative legislative powers for local authorities in England & Wales to provide such facilities, and we understand that is not part of HMRC's case. The witness evidence (which we accept) was that the Council's provision of the sports and leisure facilities arose from the Council's social objectives in its formal strategies (see Mr Lyons at [21(6-7)] above and Mr Reeves at [22(8)] above), and that the Council has regard to its statutory obligations (see Mr Lyons at [21(16)] above). Mr Lyons's evidence (see [22(11)] above) was that the Council could not provide leisure services as a trading activity as it did not have power to do so, and a local authority could only undertake a trade through a subsidiary company. That is confirmed by the requirements of s 95 Local Government Act 2003 and s 4 Localism Act 2011.

131. We understand what had irked the applicant in *Durham Company* was that a local authority could charge a fee without VAT, thereby apparently under-cutting TDC for the business, but then subcontract the job and so not do the work itself. That, said TDC, was really just the local authority "going into business as a matter of choice" rather than complying with its duties under EPA (see [91a]). As already stated at [129] above, Warren J rejected that argument and concluded that "the only available power is to be found in s 45(1)(b) EPA 1990." Nugee J then determined that there was no reasonable prospect of challenging that conclusion (*Durham PTA* at [11]).

132. We reach a similar conclusion in the current appeal. The Council's provision of the facilities is not done because it is "going into business as a matter of choice". We find that the Council's provision of the sports and leisure facilities during the period under appeal was all made pursuant to the powers conferred on it under s 19 LGMPA, and thus the applicable legal regime under which the Council engages in the activities is s 19.

133. The second step is to determine whether s 19 LGMPA constitutes a special legal regime. Warren J in *Durham Company* dealt with this briefly; his view (at [103]) was that as

the activities were engaged in under s 45 EPA then that was a special legal regime and the local authorities were acting as public authorities for the purposes of art 13. Nugee J went into more detail when considering the permission to appeal application (*Durham PTA* at [13-15]):

> "13 I do however, for my part, think that Warren J was entirely right and that there is no real prospect of challenging the analysis he adopted which is that if local authorities are operating under section 45, then that is a special legal regime which is applicable to them in their capacity as public authorities exercising public duties and which is different from the legal regime which applies to private sector businesses such as the claimant even though, from the point of view of the consumer, the services provided may be indistinguishable. That is because, as Warren J sets out, the section 45 power is hedged around by a number of constraints.
>
> 14 [Nugee J sets out those constraints]
>
> 15 Mr Bates [for TDC] says that none of these things necessarily has any practical impact on the way in which local authorities are able to compete with his client and other operators and therefore they do not amount to a special legal regime, but they do seem to me to be exactly what the European jurisprudence is referring to, namely, that the legal conditions under which the local authorities are providing services are different, because of their function as public authorities, from the legal conditions under which their private sector counterparts are providing what may, as I say, from the point of view of the consumer, be indistinguishable services. In those circumstances, I do not regard Ground 2 as having a reasonable prospect of success either."

134. A point which has concerned us is that in *Durham Company* the trade waste collection activities were engaged in pursuant to a statutory *duty* under s 45 EPA, while the Council engages in its sports and leisure activities pursuant to a statutory *power* under s 19 LGMPA. Ms Brown for the Council submitted that this made no difference in the analysis of whether a special legal regime existed; however, we consider this is a distinction which needs to be addressed.

135. The relevant provision in s 45 EPA was (emphasis added), "*It shall be the duty* of each waste collection authority … If requested by the occupier of premises in its area to collect any commercial waste from the premises, to arrange for the collection of the waste …". Warren J's judgment proceeds on the understanding that s 45 "imposes a duty" (at [50]); although the discussion in the judgment does refer to "powers" (at [97-101]), in the disposition (at [109]) the basis is clearly stated that a local authority "does so in the performance of its duties under s 45(1)(b) EPA 1990". The point is clarified by Nugee J who refers consistently (eg at [7, 8 & 18] *Durham PTA*) to requirements, statutory duty, and public duties.

136. The relevant provisions in s 19 LGMPA confer powers, rather than impose a duty: a local authority "may provide …", "may make …", "may contribute …".

137. Can the exercise by the Council of what is, in effect, a statutory discretion to undertake permitted activities amount to a special legal regime? Having carefully considered the point, we conclude that conducting activities pursuant to a statutory power can constitute carrying them out under a special legal regime, for the purposes of art 13. We draw that conclusion

primarily from two CJEU authorities (both already cited). First, the analysis in *Fazenda Pública* is expressly framed by reference to "the use of public powers": (emphasis added)

> "21. The national court must, in accordance with the case law referred to in paras 16 and 17 above, analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators.
>
> 22. The fact that the pursuit of an activity such as that at issue in the main proceedings *involves the use of public powers*, such as authorising or restricting parking on a public highway or penalising by a fine the exceeding of the authorised parking time, shows that this activity is subject to a public law regime.
>
> 23. In view of the nature of the analysis to be carried out, however, as the court has already held, it is for the national court to classify the activities at issue in the light of the criterion adopted by the court …
>
> 24. The answer to the first question must therefore be that the letting of spaces for the parking of vehicles is an activity which, where it is carried on by a body governed by public law, is carried on by that body as a public authority within the meaning of the first sub-paragraph of art 4(5) of the Sixth Directive if it is carried on under a special legal regime applicable to bodies governed by public law. *That is the case where the pursuit of the activity involves the use of public powers.*"

138. Secondly, that is reiterated in *Saudaçor* (see [121] above) by the CJEU (emphasis added): "the fact that the pursuit of the activity at issue in the main proceedings *involves the use of powers conferred by public law* shows that that activity is subject to a public law regime"; and "activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, *are closely linked to the exercise of powers conferred by public law*".

139. We would also note that similar language is used by the CJEU in, for example, *Ireland* (at [49]) and *Isle of Wight*.

140. Having disposed of that concern, we must (in the words of *Fazenda Pública*) analyse all the conditions laid down by national law for the Council's provision of sports and leisure facilities, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators. The conditions under which the Council exercises its s 19 powers to provide the facilities include the Council's policy documents described by Mr Lyons (see [21(7)] above); the Sport and Recreation Strategy for Chelmsford for 2006-2010 sets these main objectives:

> "Objective 1: Provide a range of new and improved sporting facilities by working with partners where appropriate and in response to the identified needs of the local community.
>
> Objective 2: Ensure that the whole of the community is able to access and participate in sport and recreation and that sport is used as a vehicle for promoting social inclusion.

> Objective 3: Develop initiatives with partners where appropriate, to ensure that physical activity and exercise makes a valuable contribution to the health and well being of the local community.
>
> Objective 4: Ensure that co-ordinated, sustainable sports development frameworks are supported and developed within sports centres and through partners to enable those with an interest and ability in sport to reach their full potential.
>
> Objective 5: Provide education and training opportunities for volunteers, coaches and staff wishing to get involved in or progress in, coaching, administering and officiating within sport.
>
> Objective 6: Ensure that resource is are used effectively & efficiently and that new funding streams are maximised and utilised through creative means."

141. We accept the witness evidence that in providing the facilities the Council acts to achieve those objectives, as refined by the Council's Corporate Plans, including aspects such as pricing (including setting of concessions) and location and scope of facilities – see Mr Lyons's evidence generally (but in particular at [21 (6, 7, 13, 14, 16 & 20e)] above), and Mr Reeves at [22(9 & 13)] above.

142. Any private sector business providing sports and leisure facilities in the Council's area – even ones indistinguishable to the consumer from the Council's facilities – would be doing so not under the s 19 regime but instead under the general legal regime applicable to all facilities operators. Accordingly, the legal conditions under which the Council is providing services are different, because of its function as a public authority, from the legal conditions under which its private sector counterparts are providing perhaps indistinguishable services. Thus the Council's provision of the facilities is being engaged in under a special legal regime applicable to a body governed by public law.

143. For completeness, we note that the CJEU in *Ireland* (at [49]) and *Saudaçor* (at [71]) stipulated that the activities should be "closely linked to the exercise of rights and powers of [the] public authority". We consider that is self-evident here; it is the subject matter of s 19 itself.

144. For those reasons we determine that the first paragraph of art 13 is satisfied in relation to the Council's provision of the sports and leisure facilities.

Significant distortions of competition

145. Moving to the second paragraph of art 13, this provides an exclusion from the non-taxability of public authorities:

> "However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. …"

146. Both parties acknowledged that if consideration of this point arose then it may be necessary for the Tribunal to hear further evidence and submissions thereon. We agree, and so we reach no conclusions here on the applicability of the second paragraph of art 13. That will require a continuation hearing dedicated to evidence and submissions on that point. We GRANT leave to the parties to apply for such a continuation hearing, any such application to

be accompanied by proposed case management directions (agreed, if possible) to facilitate such hearing.

The Note 3 Argument

147. The Note 3 Argument is relevant only if the Tribunal determines that the Council is engaged in an economic activity but does not operate under a special legal regime. As we have concluded (at [144] above) that the Council *does* operate under a special legal regime, the Note 3 Argument is not relevant to our determination of the appeal. However, as we heard full argument from both parties, we give our views below, in case they should become relevant at any later stage of these proceedings.

148. The Note 3 Argument is put as: whether the terms of Note 3 operate as an exercise of the discretion permitted under art 13(2) PVD so as to treat the supplies made by the Council as carried out by it as a public authority.

149. We have set out above (at [64-74] above) the Council's submissions on this point. In summary, the argument is: The national legislation (Note 3) must be read so as to conform with the directly applicable EU legislation. Note 3 is clear and specific; it excludes local authorities from the exemption provided by Item 3 Group 10. The only PVD-compliant way of doing that is via art 13(2), with the UK regarding the otherwise exempt activities as being engaged in by the Council as a public authority; and the result is that the Council has no economic activity.

150. Having carefully considered those arguments (and HMRC's contrary position) we have determined that they do not support a conclusion that the Council's supplies of the relevant services are not exempt supplies for VAT purposes.

151. The background, context and effect of Note 3 were exhaustively considered in *Ealing*. The legislative background to the *Ealing* referral is set out by AG Wathelet in his Opinion as follows:

> "23. Under art 132(1) of Directive 2006/112, member states are required to exempt a large number of cases, in favour of certain activities of general interest, including, in point (m) of that provision, sporting services, where they are supplied by non-profit-making bodies. The objective sought by the EU legislature is to encourage involvement in sport and physical activity, owing to the benefits which these provide for the population in terms of physical development and health.
>
> 24. By way of derogation from the rule laid down in art 132(1)(m), the first paragraph of art 133 of that directive confers on member states the option to make the grant of the exemption to non-profit-making bodies other than those governed by public law subject to four different conditions, including, in point (d) of that provision, the condition relating to competition. According to that condition, 'the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT'.
>
> 25. All member states may apply that derogation.
>
> 26. In only the member states which, pursuant to Annex E to the Sixth Directive, on 1 January 1989 applied VAT to sporting services, the second paragraph of art 133 of Directive 2006/112 offers the possibility of an additional derogation, whereby those states may make the grant of the exemption to non-profit-making bodies governed by public law subject only to the condition

relating to competition, namely the condition set out in point (d) of the first paragraph of art 133 of that directive. It is true that the other conditions set out in that provision and, in any event, the conditions set out in points (a) and (b) are addressed more naturally to non-profit-making bodies governed by private law.

27. It follows from the foregoing that more favourable tax treatment is reserved for non-profit-making bodies governed by public law both in member states which, pursuant to Annex E to the Sixth Directive, on 1 January 1989 applied VAT to sporting services and in member states which had not made use of that option.

28. In short, member states which, pursuant to Annex E to the Sixth Directive, on 1 January 1989 applied VAT to sporting services may make the grant of the exemption subject to compliance with the four conditions laid down in the first paragraph of art 133 where the supplier of the sporting services at issue is a non-profit-making body other than one governed by public law, whereas in the case of non-profit-making bodies governed by public law, the grant of that exemption can be made subject only to the condition relating to competition.

29. Member states which had not made use of the option offered by Annex E to the Sixth Directive can make only the exemption granted to non-profit-making bodies other than those governed by public law subject to conditions, as non-profit-making bodies governed by public law are definitively exempted on the basis of art 132(1)(m) of that directive. If the member states do not impose such conditions, the services in question are definitively exempted for all non-profit-making bodies.

30. It is apparent from the request for a preliminary ruling that the United Kingdom is one of the member states which on 1 January 1989 applied VAT to sporting services in application of Annex E to the Sixth Directive."

152. The Court determined as follows (at [33]):

> "… the second paragraph of art 133 of Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, where that legislation provides that compliance with the condition laid down in point (d) of the first paragraph of art 133 of that directive is a prerequisite for the grant of a VAT exemption to non-profit-making organisations governed by public law making supplies of services closely linked to sport or physical education, within the meaning of art 132(1)(m) of that directive, but fails also to apply that condition to non-profit-making organisations other than those governed by public law that make such supplies of services."

153. We agree with the summary and explanation of the effect of the *Ealing* decision provided by HMRC in their Revenue & Customs Brief 6/2017:

> "The Court of Justice of the European Union found, in the case of the London Borough of Ealing (Case C 633/15), that the UK had incorrectly excluded local authorities from the exemption for the provision of sporting facilities. Local authorities had been excluded from the exemption to ensure that there was no distortion of competition. However, the court decided that any restriction on those grounds had to be applied to both public bodies as well as private non-profit-making bodies providing sporting facilities. It followed that the local authorities were entitled to claim direct effect and therefore to treat those

> supplies as exempt from VAT provided that they did so on a consistent basis. HMRC has accepted the decision.
>
> This means that local authorities are entitled to recover any net over-declarations they have made as a result of having treated the supplies as taxable rather than exempt. The net over-declarations are calculated after deducting from the over-declared output tax any input tax wrongly claimed by prescribed accounting period (VAT return) on the assumption that the supplies in question were taxable and not exempt, unless that input tax is treated as insignificant …"

154. Ms Brown for the Council emphasises that Note 3 does not reference the competition condition in art 133(d), and the AG's comments (at Opinion [32]) that "that condition is nowhere laid down in the United Kingdom legislation or the explanatory notes issued by the United Kingdom administration" and "The court might thus take the view that the questions referred for a preliminary ruling are purely hypothetical". The AG points out that if the competition point was not invoked then, "It would then be necessary to conclude that the VAT applied to the sporting services supplied by non-profit-making bodies governed by public law had no legal basis, since the rule is exemption, possibly subject to conditions, which is not the case in regard to the United Kingdom rule, which, as the United Kingdom stated at the hearing, quite simply excludes the supply of those services from the exemption."

155. While Note 3 does not on its face refer to the competition condition (ie art 133(d)), it is not the case that this condition was not addressed by the parties to *Ealing*; on the contrary, all the parties had identical views on the matter, as is clear from the AG's Opinion:

> "33. All of the parties which took part in the hearing confirmed, moreover, that the United Kingdom legislation does not refer expressly to the condition relating to competition set out in point (d) of the first paragraph of art 133 of that directive.
>
> 34. Nonetheless, the referring tribunal, the parties to the main proceedings and the Commission proceed on the assumption that the exclusion of local authorities from the benefit of the exemption from VAT on the supply of sporting services is the consequence of the United Kingdom's use of the option granted to it by the second paragraph of art 133 to make the grant of the exemption to non-profit-making bodies governed by public law subject to fulfilment of the condition that it is not 'likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT'.
>
> 35. At the hearing, the London Borough of Ealing stated that the United Kingdom authorities claim that they are entitled to rely on the condition relating to competition, a concept which is to be understood as the manifestation of their decision to exclude local authorities from the exemption because their activities necessarily cause distortions of competition.
>
> 36. The United Kingdom government's representative agreed with the London Borough of Ealing's comments on that point, taking the view that that position was justified by the danger that local authorities would subsidise sports activities and that a distortion of competition was the result of their 'likely conduct'.
>
> 37. The Commission took the same view and recognised that the condition relating to competition was nowhere expressly stated in the United Kingdom

> legislation, but that that was not necessary owing to the latitude left to member states by that directive.
>
> 38. On the assumption that the court accepts the argument that the United Kingdom legislation implicitly imposed the condition relating to competition, I shall base my reasoning in the remainder of this opinion on the assumption that, so far as the United Kingdom legislature and tax authority are concerned, the grant of the exemption from VAT on sporting services supplied by non-profit-making bodies governed by public law is 'likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT' *in all cases.* Although the condition is implicitly present in the United Kingdom legislation, it is presumed, however, that it is never fulfilled."

156. We conclude that any suggestion that Note 3 was not motivated by the competition condition is speculation. The AG was correct to point out that unless the UK had used the option available to it under art 133 to make the grant of the exemption to non-profit-making bodies governed by public law subject to fulfilment of the competition condition, then the consequences would be as he set out in the extract above (from Opinion [32]). However, that observation and caution was then rendered academic because of the clear statements by all the parties quoted above (from Opinion [34-37]) that the option had indeed been so used.

157. Ms Brown places some weight on the fact that Note 3 has not been amended by Parliament, despite the *Ealing* decision. We do not consider that is persuasive. It is certainly desirable that the published UK tax code should reflect the current state of the law; ideally, Group 10 should by now have been amended to reflect the effect of the *Ealing* decision of the CJEU; one might wonder why, as HMRC had carefully explained the (correct) position post-*Ealing* in their R&C Brief 6/2017, they could not persuade a Treasury Minister to incorporate a short legislative amendment in one of the Finance Bills that have flowed through Parliament since the *Ealing* decision. However, the fact that Note 3 remains unamended on the statute book does not mean that there must be some deep and meaningful interpretation to be applied to the continued existence of the provision; it is simply that the statute has not yet been amended. There are, regrettably, other instances where tax provisions which have been discredited by the courts remain unaltered in the tax code – for example, s 84(3C) VATA (which purports to deny any right of onward appeal against a determination by this Tribunal of a "hardship" application) was ruled ultra vires and ineffective by the Court of Appeal (unanimously) in October 2012 (*R (oao ToTel Ltd) v First-tier Tribunal* [2013] STC 1557 at [37, 38 & 45]) but the offending provision still sits unamended over half-a-dozen years later, poised to trap an unwary litigant (or judge).

158. Our conclusion on the Note 3 Argument is that Note 3 is ineffective (per *Ealing*) so that local authorities (as non-profit making bodies) do constitute "eligible bodies" for the purposes of Group 10 sch 9, and thus their supplies of services within Item 3 are exempt supplies. That treatment is, as both parties acknowledge, available to the Council, as to all other UK local authorities.

Conclusions

159. As stated at [114-115] above, we do not accept the Article 2 Argument advanced by the Council; we conclude that the provision of the leisure, sporting and physical recreation facilities by the Council constitutes the supply of services for remuneration, and thus that supply constitutes economic activity within art 9 PVD.

160. As stated at [144] above, we accept the Article 13 Argument advanced by the Council insofar as the first paragraph of art 13: the supplies are made by the Council in its role as a public authority for the purposes of art 13 PVD, and it operates as such under a special legal regime. We make no finding as to the second paragraph of art 13, namely whether the Council's treatment as a non-taxable person would lead to significant distortions of competition.

Quantum

161. Finally, we understand that both parties would have further work to perform and discussions to continue in relation to the figures contained in the voluntary disclosures. Therefore nothing in this decision notice expresses any conclusions as to quantum.

DECISION

162. Subject to the second paragraph of art 13 PVD, the Council is not a taxable person in relation to its supplies of the relevant sports and leisure facilities in the period under appeal. The applicability of the second paragraph of art 13 PVD will be determined at a continuation hearing, if the parties so request – as to which, see [146] above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

163. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

Release date: 17 October 2020