



NCN: [2021] UKFTT 0382 (TC)

(TC) 08304

VAT – sporting exemption – true beneficiaries – provision of boathouse under licence to three Cambridge clubs – whether the clubs or the rowers were the true beneficiaries – on the facts, the clubs were the true beneficiaries – issue decided in favour of the Appellant

FIRST-TIER TRIBUNAL

Appeal number: TC/2019/01111

TAX CHAMBER

BETWEEN

CAMBRIDGE UNIVERSITY BOATHOUSE LIMITED Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY’S Respondents

REVENUE & CUSTOMS

**TRIBUNAL: JUDGE ANNE REDSTON
 MS GILL HUNTER**

The hearing took place on 16-18 August 2021 by video. A face to face hearing was not held because of the coronavirus pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

Ms Barbara Belgrano of Counsel , instructed by the Appellant, for the Appellant

Mr Max Simpson, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

Introduction and summary

1. Cambridge University Boathouse Limited (“CUBL”) owns a boathouse at Ely (“the Boathouse”). CUBL licenses the use of the Boathouse to the Cambridge University Women’s Boat Club (“CUWBC”), Cambridge University Boat Club (“CUBC”) and Cambridge Lightweight Rowing Club (“CULRC”), together, “the Clubs”, each of which is a company limited by guarantee. They field University crews to race against Oxford in the annual Boat Races (“the Boat Races”); these are organised and staged by a separate company, the Boat Race Company Ltd (“BRCL”).

2. The issue before the Tribunal was whether the supply of the Boathouse came within the sporting exemption in the Value Added Tax Act 1994 (“VATA”), Schedule 9, Group 10, Item 3, which reads:

“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.”

3. On 26 October 2018, HM Revenue & Customs (“HMRC”) decided that the supply came within the exemption. HMRC refused CUBL’s VAT repayment claims for periods 02/16 to 04/17 and 06/17 to 04/18 and raised VAT assessments for periods 05/17 and 07/18. Taken together, these form the “relevant period”, and the related VAT totalled £575,000. CUBL appealed on the basis that the supply was outwith the exemption and so standard rated.

4. It was common ground that CUBL was an “eligible body”, that the supply was of “services closely linked with and essential to sport”, and that the direct recipients of the supply were the Clubs, who were corporate bodies, not individuals. However, in *Canterbury Hockey Club v HMRC* (Case C-253/07) [2008] STC 3351 (“*Canterbury*”), the Court of Justice of the European Union (“the CJEU”) held that a supply to a corporate body nevertheless fell within the exemption if “the true beneficiaries” of the supply were individuals taking part in sport.

5. The Tribunal was asked by the parties to make a decision in principle on whether the “true beneficiaries” of the supply were the rowers, as HMRC contended, or the Clubs themselves, as CUBL contended.

6. In summary, the Tribunal decided that the Clubs were the true beneficiaries, because they have the right to use the Boathouse for their training programmes and the right to store their equipment, and they pay for those rights. In contrast, the rowers:

- (1) had no right to access or use the Boathouse other than at the invitation of the Clubs and at the direction of the Clubs’ employees;
- (2) did not pay, either in money or in kind, for the usage of the Boathouse; and
- (3) had no right to store their own equipment in the Boathouse.

7. This decision does not finally determine CUBL's appeal. HMRC's position is that CUBL's entitlement to recover VAT in respect of the relevant period may depend on the outcome of further issues, which the parties will now seek to agree and, in the absence of agreement, will ask the Tribunal to determine. The Tribunal has given related directions at the end of this decision.

The evidence

8. The Tribunal was provided with a bundle of documents which included:

- (1) the correspondence between the parties and between the parties and the Tribunal;
- (2) a draft licence agreement between CUBL and the Clubs dated 28 October 2017 "the Licence", which the parties agreed governed the supply;
- (3) certificates of incorporation for each of the Clubs;
- (4) Articles of Association for CUWBC and CUBC;
- (5) novation agreements between CUWBC and the Cambridge University Women's Boat Club, an unincorporated association, and between CUBC and the Cambridge University Boat Club, also an unincorporated association;
- (6) statutory accounts for each of the Clubs for the years ended 31 July 2016, 2017 and 2018;
- (7) the agreement between BRCL and the unincorporated association, Cambridge University Boat Club, dated 4 October 2011, appointing BRCL to organise and stage the annual Boat Races against Oxford, and the novation of that agreement to CUBC on 15 July 2016.

9. Dr Hood, who was a director of CUWBC from its inception until 2020, provided three witness statements, gave oral evidence led by Ms Belgrano, was cross-examined by Mr Simpson and answered questions from the Tribunal. We found her to be a wholly credible and honest witness.

10. On the basis of the evidence summarised above, the Tribunal makes the findings of fact set out in the next section of this decision. They all relate to the relevant period unless otherwise stated.

11. Dr Hood told the Tribunal that her witness statements had been read by those representing the other Clubs, who had confirmed that the evidence in those statements also applied to them. We have taken this as meaning that the evidence about the purposes, management and operations of each Club are broadly similar. Our findings about the CUWBC are thus to be read as applying to all of the Clubs unless specifically distinguished. We make further findings of fact at §93 and §103.

Findings of fact

12. The tradition of annual Boat Races between Oxford and Cambridge began in the nineteenth century. Originally, there was only a men's race, but at later points a woman's race and a men's lightweight race were added.

The unincorporated clubs

13. Until 2016 three unincorporated clubs were responsible for fielding teams for the Boat Races. These clubs had the same names as the Clubs, and in the rest of this decision we have called them "the women's club", "the men's club" and the "lightweight rowing club", together "the clubs" to distinguish them from the incorporated Clubs who are at the heart of this case.

14. The objects of the women's club were as follows:

"The objects of the Club shall be to encourage and develop rowing in the University of Cambridge; and, in particular, to establish and maintain the University as a world leader in women's rowing. In furtherance of these the Club:-

(a) Shall produce University crews to beat crews from Oxford University in The Women's and Women's Lightweight Boat Races and the Blondie vs Osiris Reserves race, and

(b) Shall help to develop College rowing in the University of Cambridge; and

(c) Shall provide facilities and coaching to enable the best University oarswomen to represent the University of Cambridge nationally and internationally in women's rowing."

15. We were not provided with the objects of the men's club or of the lightweight rowing club but have taken them to be similar.

16. The women's club benefitted from a small endowment; its other assets were held by individuals on trust for the club. The men's club held an endowment, owned a boathouse in Cambridge called the Goldie Boathouse, and had an interest in another boathouse, called the Crabtree boathouse.

The Clubs

17. CUBC was incorporated on 12 August 2015; CULRC was incorporated on 14 September 2015 and CUWBC on 8 October 2015. CUBC's objects, as set out in the Articles of Association, are:

"(a) the advancement of amateur sport for the public benefit by encouraging and developing representative rowing at the University;

(b) the organisation or provision of facilities for the learning, teaching, coaching, practising and competing in representative rowing by members of the University with the object of promoting health and wellbeing; and

(c) the advancement of sports education of members of the University by the provision of support, assistance and encouragement for representative rowing, in order to enable members of the University to develop their capabilities and fulfil their potential.”

18. The objects of the CUWBC and the CULRC, as set out in their Articles of Association, were identical.

19. The CUWBC and the CUBC each have a founding member. The CUWBC’s founding member is the CUWBC Foundation, incorporated on 8 October 2015; the CUBC’s founding member is the CUBC Foundation, incorporated on 11 October 2015, together “the Foundations”. CULRC does not have a founding member. The women’s and men’s clubs transferred their endowments and other assets to their respective Foundations.

20. The objects of the CUWBC Foundation are as follows:

“(a) the advancement of amateur sport in respect of representative rowing activities at the University for the public benefit by the provision of funding, training facilities, programmes and equipment to CUWBC to enable members of the University to develop their capabilities and fulfil their potential;

(b) the advancement of sports education at the University for the public benefit by the provision of support, assistance and encouragement in respect of representative rowing to enable members of the University to develop their capabilities and fulfil their potential;

(c) the organisation and/or provision of facilities for the learning, teaching, coaching, practising and competing in representative rowing by members of the University in order to promote health and wellbeing; and

(d) to assist (in such ways as the charity trustees of the Foundation think fit) any charity (in particular, CUWBC and CUBL and any successor entities) whose aims include the advancement of amateur sport by encouraging and developing representative rowing at the University.”

21. The objects of the CUBC Foundation were identical, with the word “CUBC” substituted for “CUWBC”.

The purpose of the Clubs

22. It is clear from the above that:

(1) the primary object of the women’s club was to “produce University crews to beat crews from Oxford University”, but that, according to the Articles of Association, the primary object of the CUWBC was “the advancement of amateur sport for the public benefit by encouraging and developing representative rowing”.

(2) the secondary object of the woman’s club was to “to develop College rowing”, and that of CUWBC was the “organisation or provision of facilities for...representative

rowing by members of the University with the object of promoting health and wellbeing”; and

(3) the tertiary object of the women’s club was to “provide facilities and coaching to enable the best University oarswomen to represent the University of Cambridge nationally and internationally”, while that of CUWBC was “the advancement of sports education of members of the University by the provision of support, assistance and encouragement for representative rowing, in order to enable members of the University to develop their capabilities and fulfil their potential”.

23. In other words, the objects of the CUWBC no longer mention the Boat Races: the focus is instead on public benefit and the participants’ health, well-being and development. However, Dr Hood said in her witness statement that CUWBC’s “primary objective is to race in, and win, the annual Boat Races against the University of Oxford”; that each Club is run in order “to win Boat Races” and “has the primary aim of fielding a rowing eight to race against Oxford in the annual Boat Races”. In oral evidence, Dr Hood confirmed that “the principles as to what the Clubs are about hasn’t changed at all” following incorporation: their primary purpose remained beating Oxford in the Boat Races.

24. When asked by the Tribunal why, if that was the case, the objects made no mention of the Boat Races, Dr Hood said that *pro-bono* assistance had been received from a lawyer who had referred to the website of the Charity Commission, and had advised that the objects as drafted were broad enough to encompass the continuing focus on winning the Boat Races. We find as a fact that the primary object of the Clubs is to win the Boat Races. This can also be seen in our findings about the decision to use the Boathouse (§29), the wording of the License (§36-37) and the selection of rowers (§55).

The directors of the Clubs

25. After CUWBC was incorporated on 8 October 2015, ten directors were appointed to its Board. Of those, six were not currently rowers in that Club’s squad, and all six non-rowers remained on the board throughout the relevant period. Another non-rower was appointed in 2017, and two in 2018. The remaining four of the original directors were rowers in the Club’s squad. Two of these served for an academic year when they were replaced by two others; the other two rowers served for two academic years.

26. CUBC was incorporated on 12 August 2015, and appointed 10 non-rower directors, five of whom were in office throughout the relevant period and the others served for between two and three years; two more directors were appointed in 2016 and one in 2018. None were current rowers in the Clubs.

27. CULRC had a smaller Board, with only 8 non-rowers, all but one of whom served through the relevant period; in addition, between one and two rowers sat on the Board at any time.

28. CUBC thus had no rower directors, and the other two Clubs had a core of long-serving non-rower directors, together with a small number of rower directors who sat on the relevant

Board for a year or two. Each Board met every two months or so, to determine strategy and manage the finances and operations of their respective Clubs.

29. The decision whether to use the Boathouse was taken by the Clubs' directors based on whether it would promote:

- (1) the annual aim of producing fast crews to win Boat Races: in other words "will it make the boat go faster"; and
- (2) the long-term survival of the Clubs and the Boat Races by ensuring that Cambridge crews remain competitive with Oxford in attracting the best coaching and student athlete talent and alumni and corporate support.

30. The directors meet periodically with their coaching team to determine how their Club is using the Boathouse facilities, and regularly review this usage at Board meetings.

The Boathouse and CUBL

31. Before the construction of the Boathouse:

- (1) CUBC had access to a different boathouse with limited facilities on which the lease was shortly to expire;
- (2) CUWBC's boathouse was a small shed with intermittent heating, often cold in winter, with inadequate space to rack the boats, an outside toilet, and no showers, kitchen or purpose-built changing rooms; and
- (3) CULRC had no boathouse or facilities whatsoever and left their boats on trestles outside at a boatyard in Ely.

32. The poor quality of the boathouses affected the standard of the rowing and so risked jeopardising Cambridge's chances of succeeding in the Boat Races, especially as Oxford had already built a new state-of-the-art boathouse. If Oxford regularly won every Boat Race, the event would become "predictable and processional" and lose the interest of the public and of sponsors.

33. People involved in the clubs, including Dr Hood, decided a new boathouse was required. Most of the pre-work and planning was completed before the incorporation of the Clubs, the Foundations and CUBL. Donations were solicited towards the Boathouse, which were transferred to the Foundations when they were established.

34. On 15 October 2015, CUBL was incorporated. It is a private non-profit making company limited by guarantee. Its guarantors are the Foundations and the CULRC. Its objects, as set out in the Articles of association, are as follows:

- "(a) the organisation and/or provision of a boathouse and other facilities for the public benefit for the learning, teaching, coaching, practising and competing in representative rowing by members of the University, with the object of promoting health and wellbeing; and

(b) to promote sports education in such ways as the charity trustees of CUBL think fit for the public benefit in respect of representative rowing at the University, including by running training and coaching camps.”

35. CUBL began to build the Boathouse on 9 Nov 2015; practical completion was achieved on 17 January 2017. In addition to a boathouse, the project included the construction of landing stages, wet docks, parking area and an entrance road. The building and other structures together with the remaining land, are all owned by CUBL. The cost of construction was around £5m; this was funded by the donations collected (see above) together with a loan from the University. The related VAT was £575,000. CUBL opted to tax the Boathouse.

The Licence

36. The Licence is expressed to last for 99 years beginning in January 2017. It begins by saying:

“the shared goal of the Cambridge University Rowing Clubs – CUBC, CULRC and CUWC – is to win all the boat races against Oxford, every year. Each club will have as their paramount goal the winning of their own race against Oxford.

The clubs commit to full co-operation and mutual support through the following principles to achieve this overriding aim.”

37. This text is followed by four principles, of which the first is “Beat Oxford”; the others are excellence, equality and respect, and collaboration. The Licence states that “this ethos” has been agreed between each of the Clubs and CUBL.

38. The rights given to the Clubs by the Licence include the following:

- (1) to use the Boathouse in connection with the Clubs’ rowing training programme and, to a lesser extent, for the Clubs’ social events and fundraising activities only (but not for any other purpose);
- (2) to use the boat bays on the ground floor of the Boathouse for storage of the Clubs’ rowing equipment;
- (3) to use the wet docks to store coaching launches, and the adjacent fuel store to store launch fuel and related additives; and
- (4) to park on the premises, and to use the roadway and gravel track

39. The rights given by the Licence are given on a non-exclusive basis, so each Club has to allow access to other users as directed by CUBL. These other users are the other Clubs, some other rowing clubs and occasional participants in specific rowing events. The Clubs were required to obtain third party and public liability insurance relating to their use of the Boathouse.

40. Fees payable by the Clubs under the Licence cover the following costs:

- (1) maintaining, cleaning, repairing, renewing, replacing and decorating the Boathouse;
- (2) lighting, heating, and water; and
- (3) any compliance with insurance or legal requirements.

41. The total fee payable by the Clubs is determined annually with the aim of covering those costs and leaving a small margin to form a sinking fund for future enhancement, repair and replacement costs. The amount charged to each Club relative to the other Clubs was determined by CUBL's directors when the Boathouse become operational, and was based broadly on the each Club's expected usage; the capital contributions they had made to its construction, and their relative abilities to pay. Each Club continues to be charged that agreed percentage annually: the fee does not vary, for example based on actual usage or number of rowers.

42. The Licence fees are CUBL's primary income, and total around £40,000 - £50,000 per annum, payable quarterly. In 2017-18, CUWBC paid fees of £6,345 per term, making a total of £19,035. In addition to the Licence fees, CUBL obtains income from hiring out the Boathouse for events; licensing the fishing rights and from occasional usage by other clubs as a training base.

The facilities

43. Under the terms of the Licence, the Boathouse provides the following:

- (1) *Specialised boat racks.* Boats for rowing eights of an international racing standard cost around £40,000 and are fragile: the outer casing can easily be pierced or scratched. Their length means that they must be stored on purpose-built racks which provide support at the right points. If a boat is not correctly supported, it can be damaged, lose its rigidity and be slower when raced. Each Club owns its own boats.
- (2) *Wet docks for coaching launches:* Each Club owns its own launches and they are stored on the Boathouse's wet docks.
- (3) *Storage for related equipment:* This includes oars, coxing equipment, tools for repairs, lifejackets, trestles, launch spares, coaching equipment, and fuel for launches. This equipment is all owned by the individual Clubs.
- (4) *Changing facilities:* These allow athletes to get out of wet kit, shower, use the toilet etc.
- (5) *Training equipment:* The Boathouse has limited land training equipment, such as cardio machines and weights; it is not designed to be a gym. The training equipment is owned by CUBL
- (6) *Club rooms:* The Boathouse provides rooms for training sessions, performance assessment and to "rehydrate between outings". The Clubs also use rooms for directors' meetings, hosting alumni events, hosting sponsors and/or hosting their own corporate events.

(7) *Landing stage*: This provides access to the river.

44. The rowers cannot store their own kit or equipment in the Boathouse. On occasion, a rower may ask if they can use it to store their single scull (a rowing boat for rowing as an individual), but this is rare. If it does occur, a separate licence agreement is drawn up between that individual and CUBL.

The Boat Races

45. The Boat Races are not organised directly by the Clubs, but by a separate company, BRCL. In 2011, the men's club signed an agreement under which it would supply the crew for the (men's) Boat Races, and BRCL would organise and stage those races. The agreement was expressed to cover any other races "as may subsequently be agreed between the parties". By the relevant period, there were five Boat Races, including the women's races and the lightweight race.

46. The BRCL carries out a number of practical tasks to make the Boat Races run efficiently, including liaising with the police and local councils. One of its key roles is to organise and provide sponsors for the Boat Races. Much of that sponsorship funding is paid to the Clubs. By way of example:

(1) in the year to July 2016, out of total income of £374,615, CUWBC received £235,219 or 63% of its income from BRCL; CUBC received the same sum, being 59% of its total income of £402,230; and

(2) in the year to July 2017, CUWBC received £160,423 of its total income of £309,423 (52%) from BRCL, and CUBC received £235,423 out of its total income of £467,569 (51%).

47. BRCL funnels approximately the same amounts of sponsorship money to Oxford. The Clubs are precluded by the agreement from arranging their own separate sponsorship deals for the Boat Races. This is so there is no "arm's race" between the two Universities, with each touting in the market to obtain more generous sponsorship. That could unbalance the teams, so that one of them regularly beats the other. The outcome of the Boat Races would then become predictable, and so less interesting.

48. The directors of the Clubs regularly meet with BRCL and with their counterparts at Oxford to ensure that the sponsorship is used to ensure the long-term health of the Boat Race. Dr Hood described this issue as "complicated" and the participation of non-rowing Board directors as "critical" to ensuring the continued success of the Boat Races and thus of the Clubs. This evidence was not challenged and we accepted it.

49. The Club's obligations under the agreement include ensuring that the crews of the boats participating in the Boat Races were available for interviews and press conferences; take part in reasonable promotional activities for sponsors, and use their "reasonable endeavours" to ensure the waiver of image, personality or related rights in relation to their participation in the Boat Races.

The Clubs' costs

50. The statutory accounts show that CUWBC's costs for 2015-6 and 2016-17 were around £400,000, and that CUBC's costs for 2015-16 were £378,321, increasing to £441,017 in 2016-17. Although we also had CULRC's statutory accounts, they did not contain a profit and loss account because CULRC is a "micro-entity" for accounting purposes.

51. From CUWBC's and CUBC's accounts we find that that their main item of expenditure was staff costs, namely the coaching and administration teams: these absorbed 40% of the costs. The second highest item was racing and training costs, followed by the costs of the boathouses and depreciation. We have assumed the pattern of expenditure for CULRC was similar.

The members of the Clubs

52. In addition to the Foundations, which were founder members of CUWBC and CUBC, the Clubs had two other types of members:

- (1) Ordinary members, all of whom were required to be full-time students at the University. The majority were individuals currently rowing and training with the Clubs, plus, on an exceptional basis, individuals who had made a "significant contribution" to the objects of one of the Clubs; and
- (2) Life members, being alumni of the Clubs who had raced a Boat Race.

53. Some students are already known to the Clubs when they go up to university, because of their successful participation in races. The Clubs approach these students and suggest they may like to join as an ordinary member. However, these are the exceptions. In most cases, the ordinary members are undergraduates or postgraduates who would like to participate in the Boat Races. They join a Club and by so doing "offer themselves up for selection" to row in a Boat Race. Around 150 people or more put themselves forward in this way each autumn, over three times the number of "race seats" available.

54. The Clubs do not wish to waste time and resources on athletes who will quite clearly not make a seat in a Boat Race crew. The coaches quickly determine which athletes should be cut from the squad, by carrying out one or more performance tests (such as time taken to row 5 km) on an indoor rowing machine. Those tests are usually carried out in the Goldie Boathouse in Cambridge, as it is more convenient and has more equipment than the Boathouse, which is based in Ely and has only limited equipment.

55. By late September, the Clubs have cut their numbers of ordinary members to fewer than 90, or around 1.8 per seat. Most of the students who are "cut" have never spent any time at the Boathouse. By late October, numbers are reduced further, to around 1.6 per seat, and by December there are only 1.25 per seat. These athletes remain part of the Clubs, forming the Boat Races crews together with a couple of "spares". The aim is to ensure that the Clubs' resources are utilised only on athletes that can help the Club win a Boat Race, and not spent on those who are not able to further that aim. In selecting rowers, the emphasis is on generating the fastest *crew*, so athletes who are fast on the rowing machine or appear to have

the most efficient stroke profile would only be included if they were able to work with others to form the fastest crew, because the focus is on winning the Boat Races, not on individual performance.

56. Once an athlete is cut from the squad, they are no longer part of the Club, they no longer train with the remaining athletes and are no longer able to use the Boathouse or any of the Clubs' other facilities. If they wish to continue rowing, they cannot do so at the Clubs. They may join their college team or a town club: unlike the Clubs, the colleges and the town clubs usually have an "open access" policy. Student who have been "cut" can reapply to the Clubs the following year, providing they continue to be full-time students of the University.

57. When rowers put themselves forward to the CUWBC or the CULRC, they are asked to pay £150, although payment is not enforced if a rower has difficulty in meeting that cost. A rower who is cut from the squad is not refunded the £150 already paid. Dr Hood described this as "the cost of putting yourself up for selection".

58. Athletes who are not cut from the team are required to pay a further £150 each term; the CUWBC's "Triallist's Handbook" describes this as giving them "access to world-class coaches, support staff and facilities, transport to and from training, and competition fees". CUWBC's total fee income from ordinary members is around £17,000 per annum, or around 5% of its total income. As Dr Hood pointed out, this would not cover the costs of employing a single coach.

59. Students who put themselves forward to the CUBC are not required to pay a fee, but are invited to make donations to the CUBC Foundation, because that Club is hoping to encourage a culture of regular giving which would continue after graduation.

Participation in the training programme and the Boat Races

60. The minority of athletes who are not "cut" by the Clubs are required to participate in a gruelling training programme, which includes 12 sessions per week with a day off only every two to three weeks. This requires participants to be committed, to remain motivated and to make sacrifices elsewhere in their lives.

61. Mr Simpson asked Dr Hood if the training improved participants' fitness; she responded by pointing out that they were elite athletes who were fit before they joined the Clubs, and the level of training demanded "pushes the boundaries" and the Clubs need to be careful that it does not damage participants' health. That evidence was not challenged and we accepted it.

62. Athletes do not have a voice in the training programme provided by the Clubs or in how the Club chooses to use its resources, although their feedback may be sought. The resources, programme and budget are instead set by the Lead Coach before the beginning of each season, in conjunction with the Clubs' Treasurers and having been approved by the Boards.

63. No athlete receives money for training or for participating in the Boat Races, and each signs a declaration in advance confirming his or her agreement to that and other conditions. These include the waiver of image and personality rights, and a commitment to participate in reasonable promotional activities. As noted above (see §49) these conditions relate to the agreement between the Clubs and BRC.

64. Competing in the Boat Races does, however, bring personal benefits: it makes an impressive addition to the rowers' *curricula vitae* and may help them obtain interviews and jobs when they leave Cambridge.

65. Athletes who form part of the Boat Race squads are also supported and encouraged by their Clubs to row for Team GB, and to participate in the Olympics, but only with the permission of the Clubs and not at the expense of the Boat Races. The Clubs also participate in high profile events such as the Henley Royal Regatta, which raise the Clubs' profile.

The legislation and the issue

66. Article 132(1)(m) of Directive 2006/112/EC ("the PVD") provides that:

"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 ..."

67. This replaced Article 13A(1)(m) of the Sixth VAT Directive, which was in materially identical terms.

68. VATA s 31 implements Article 132(1)(m) of the PVD by providing that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9. Item 3 of Group 10 of that Schedule provides exemption from VAT for:

"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."

69. It was common ground that CUBL was an "eligible body"; that the supply was of "services closely linked with and essential to sport", and that the direct recipients of the supply were the Clubs, who were corporate bodies, not individuals. The issue we had to decide was whether "the true beneficiaries" of the supply were individuals taking part in sport.

Case law

70. It was common ground that the leading authority was *Canterbury Hockey Club v HMRC* (Case C-253/07) [2008] STC 3351 ("*Canterbury*"). In addition, both parties referred to *Berkshire Golf Club v HMRC* [2015] UKFTT 627 (TC) ("*Berkshire*") and *Abbotsley Ltd v HMRC* [2018] STC 1539 ("*Abbotsley*"). We consider each in turn.

Canterbury

71. The background history to the case is set out in the headnote:

“The taxpayer hockey clubs were members-only sports clubs. Members paid an annual subscription in consideration for their membership rights. The hockey clubs were unincorporated associations without legal personality. They were themselves members of England Hockey, a non-profit-making organisation for the encouragement and development of the playing of hockey in England. England Hockey charged affiliation fees in consideration for the services it supplied to the hockey clubs. Revenue and Customs decided that the affiliation fees should be subject to value added tax (‘VAT’) at the standard rate. They considered that as the hockey clubs were not persons taking part in sport, the supplies of services by England Hockey to the clubs in consideration of the affiliation fees did not fall within the exemption.”

72. The High Court referred two questions to the CJEU, of which the first is relevant to this appeal:

“For the purposes of the exemption contained in Article 13A(1)(m) of the Sixth Directive, does the term “persons” in the context of “persons taking part in sport” include corporate persons and unincorporated associations, or is it limited to individuals, in the sense of natural persons or human beings?”

73. The CJEU began its consideration of that question by setting out at [17] the well-known principles for interpreting VAT exemptions:

“The terms used to specify the exemptions under art 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all supplies of services for consideration. However, that requirement of strict interpretation does not mean that the terms used to specify those exemptions should be construed in such a way as to deprive them of their intended effect...They must be interpreted in the light of the context in which they are used and the scheme of the Sixth Directive, having particular regard to the underlying purpose of the exemption in question...”

74. The CJEU said at [19] that the exemption was “intended to encourage” sport and physical education, but “is not a general exemption of all supplies of services linked to them”. Instead, to satisfy the exemption, the supply must be made by a non-profit making body, be closely linked and essential to the sport or physical education, and be “supplied to persons taking part in sport or physical education”, see [20]-[22] of the judgment.

75. Having considered the parties’ submissions, the CJEU said:

“27. the exemption...covers sport in general, which also includes sports necessarily practised by individuals in groups of persons or practised within organisational and administrative structures put in place by unincorporated associations or corporate persons, such as sports clubs, provided that the

requirements set forth in paras 21 and 22 of the present judgment are fulfilled.

28. Sport within such a structure generally entails that, for practical, organisational or administrative reasons, the individual does not himself organise the services which are essential to participation in the sport, but that the sports club to which he belongs organises and puts those services in place, as, for example, the provision of a pitch or referee necessary for participation in every team sport. In such situations, it is, first, between the sports club and the service supplier and, second, between the sports club and its members that the services are supplied and the legal relationships formed.”

76. At [29] the CJEU clarified that there was no requirement for the services to be “directly supplied to natural persons taking part in sport within an organisational structure put in place by a sports club”, because:

“Such an interpretation would mean that a large number of supplies of services essential to sport would be automatically and inevitably excluded from the benefit of that exemption, irrespective of the question whether those services were directly linked to persons taking part in sport and who was the true beneficiary of those services.”

77. The exemption is therefore satisfied if the true beneficiaries of the services are individuals taking part in sport. Whether or not that is the position is a matter for the national court to decide “having regard to all the circumstances in which the transaction takes place”, see [31]-[35] of the judgment.

Berkshire

78. This lead case decided a number of issues, of which only one is relevant for the purposes of this appeal, namely the VAT status of corporate golf days. The FTT (Judge Brooks and Mrs O’Neil) set out the appellant’s definition of a corporate golf day at [206]:

“a package supplied by a club, which issues a formal tax invoice, to a corporate who wishes to hold an event which includes green fees and one or more of catering, the right to place advertising material in the clubhouse/course, exclusive use of the club by way of block tee times.”

79. Mrs Amanda Brown, the appellants’ representative, submitted that the true beneficiaries of the supply were the individuals who had been invited by the corporate body to play golf at the clubs. She said (see [256] and [258]) that this was because:

“...the same services are supplied (ie green fee golf to a visitor) irrespective of whether the fee is paid by a corporate body or by an individual...the recipient is not a corporate body that pays a green fee but a golfer who receives exactly the same facilities as if he had paid the green fees as an individual.”

80. Mr Hill, for HMRC, submitted at [258]-[259] that the “true beneficiary” was the corporate body because “the legal transaction is between the golf club and the corporate body” and:

“...it is the corporate body, not the invited golfers who participate in the day, that decides where and when to hold the event, which course to hire, its timing, the format of golf to be played and every other aspect of the day.”

81. The FTT agreed with Mr Hill, saying at [265]:

“...there is no onward supply by the corporate body to the golfer and no legal relationship between the corporate body and the golfer, who is only able to play as the invited guest of the corporate body, for provision of access to the golf course or any of the other services provided.”

82. Although FTT judgments are not binding on us, that conclusion was considered and approved by the UT in *Abbotsley*, to which we now turn.

Abbotsley

83. This case concerned the VAT status of annual affiliation fees paid by golf clubs to various regional and national governing bodies, including county unions and associations and the Council of National Golf Unions (“CONGU”). The Upper Tribunal (Arnold J and Judge Hellier) set out the FTT’s main findings at the beginning of their judgment:

“[14] The FTT found that the principal service provided by the county unions/associations and England Golf in return for the payment of affiliation fees (although there are others) is the management of the CONGU handicapping system. CONGU has developed a standardised handicapping system which is only available to members of affiliated clubs. The system enables members to have a CONGU handicap and therefore to play in serious competitions. The system is administered in England by England Golf and the county unions/associations. It is a common, but not invariable, practice for those organising competitions to stipulate that an entrant must possess a CONGU handicap. Nevertheless, many club members choose not to obtain a CONGU handicap.

[15] Although only about one-third of the golfers in England belong to clubs, the FTT found that members are attracted to clubs where better players play, and those players typically want to have a CONGU handicap and to participate in competitions. If a club failed to pay affiliation fees, the club's members would lose their CONGU handicaps. If that happened, some members would leave the club. Accordingly, it was the Appellants' own evidence that it would be 'commercial suicide' for a club not to affiliate with the county unions/associations and England Golf. Indeed, it had taken 13 years for *Abbotsley* to recover from being temporarily expelled because of a dispute over fees.

[16] The FTT found that the true beneficiaries of the supply relating to CONGU handicaps by county unions/associations and England Golf to clubs such as the Appellants were the golfers who were the members of the clubs.”

84. As noted above, at [34] the UT approved the relevant part of the FTT’s judgment in *Berkshire*, saying that it concerned:

“a corporate golf package supplied to corporate persons like KPMG so that KPMG could entertain their clients was a standard-rated supply. We agree with counsel for HMRC that that case is readily distinguishable from the present case. Corporate golf packages are standard-rated because the true beneficiary of the service is the corporate person, since the purpose of the exercise is to promote the corporate person's business.”

85. At [41]ff the UT considered what is meant by the requirement that the supply be “essential to sport”, see *Canterbury* at §74 above. They first considered the case law on the meaning of “essential” in the context of VAT exemptions, and then said at [48]:

“It is clear from this case law that a supply of a service is 'essential to' the exempted transaction if the supply is of such a nature and quality that, without it, there could [be] no assurance that the exempted transaction would have an equivalent value.”

86. They continued at [49]:

“Two points may be noted about this test. First, it is plain that the test is an objective one. Secondly, it is clear that it does not depend on an investigation of the extent to which the recipients of the service in fact rely upon the nature and quality of the service without which there could no assurance that the exempted transaction would have an equivalent value...it is a matter for the evaluation of the national court taking into account all the relevant circumstances.”

87. Applying that principle to the facts of the case, the UT first noted at [52] that the FTT had found that:

“...without the system of CONGU handicapping it would be impossible to participate in golf of the same value, or...without the facilitation of CONGU handicaps the quality of the sport of golf would be of a materially poorer quality.”

88. The UT then said at [54] that:

“It follows that, in considering whether it would be impossible to participate in golf of the same value without CONGU handicaps, the FTT applied the correct test.”

The parties’ positions and the Tribunal’s consideration

89. Ms Belgrano said that the Clubs, and not the rowers, were the “ultimate beneficiaries” of the supply made by CUBL. HMRC’s case was that the rowers were the ultimate beneficiaries. We have set out their main contentions in the next part of our decision, together with our conclusions.

Payment by the rowers for right to use the Boathouse?

90. Mr Simpson submitted in his skeleton argument that the rowers pay membership fees to be permitted to use the Boathouse. Ms Belgrano's initial position was that the £150 payments made by the rowers fell far short of the fees paid by the Clubs for the use of the Boathouse.

91. However, in his oral submissions Mr Simpson pointed out that CUWBC received around £17,000pa in payments from ordinary members, which was not so very different from the fees payable under the Licence of £19,035. In Reply Ms Belgrano accepted that there was some broad equivalence in the numbers, but submitted that there is nevertheless no link between the £150 paid by ordinary members of the CUWBC or CULRC and the fee paid by the Clubs under the Licence for the use of the Boathouse, because:

- (1) No ordinary member has any "right" to use the Boathouse: usage is controlled by the coaches who are employed by the Clubs.
- (2) There is no requirement that any rower pay anything to the CUBC.
- (3) The initial £150 paid by those who want to be considered by the CUWBC and the CULRC to row in the Boat Races was "the cost of putting yourself up for selection".
- (4) Over a third of those who put themselves up for selection are "cut" in the first month following performance tests carried out in the Goldie boathouse, and are unlikely ever to visit the Boathouse or carry out any activities there. Almost a further third are cut within the following month, so any time spent at the Boathouse is very limited.
- (5) Those who remain and pay further amounts of £150 per term participate in a programme which gives them "access to world-class coaches, support staff and facilities, transport to and from training, and competition fees". Although part of this programme is delivered at the Boathouse, the costs of delivering the programme are not funded by the £150 fees, which make up only 5% of the CUWBC's income, and it is understood that the position is the same for the CULRC.

92. Mr Simpson's secondary argument was that even if the £150 payments did not give the rowers entitlement to use the Boathouse, that did not change the position, because they were indirectly paying for the supply of the Boathouse by providing their labour to the Clubs for free, and by giving up their image and other rights, which have a value.

93. We agree with Ms Belgrano that the £150 is not paid for the right to use the Boathouse, for the reasons she gave, and we so find. We reject Mr Simpson's argument that by rowing, and by giving up their image and other rights, the rowers were indirectly paying to use the Boathouse. It is clear that the rowers are rowing because they want to participate in the world-famous Boat Races: they provide their labour and give up their image rights as a condition of that participation, not in exchange for the right to use the Boathouse.

Only two beneficiaries?

94. Mr Simpson submitted that if the rowers were not paying for the supply of the Boathouse, then “the sponsors must be paying”, and “by that logic, the sponsors would be the ‘true beneficiaries’ of the supply; that such a conclusion was clearly wrong, because “the sponsors don’t want the Boathouse, they want to benefit themselves by advertising”. Since the sponsors could not be the true beneficiaries, the rowers must be the true beneficiaries.

95. Ms Belgrano said that this analysis overlooked the Clubs, who were limited companies with their own independent and very clear purpose, namely to win the Boat Races. The Boathouse was supplied to the Clubs so as to increase their chances of success in the Boat Races. The Boathouse helped them attract and train the best rowers for the boat race crews, and thereby fulfilled the Clubs’ obligations under their sponsorship agreements. She added that:

(1) the Clubs also had the purpose of ensuring the long-term future of the Boat Races, by making sure that the events remained competitive. If either Oxford or Cambridge won every Boat Race, the event would become “predictable and processional” and lose the interest of the public and sponsors. Oxford already had a state-of-the-art boathouse, and the lack of an equivalent facility risked weakening Cambridge and undermining the long-term viability of the Boat Races.

(2) In contrast, the rowers use the Boathouse only in order to comply with the training regime designed by, and imposed by, the relevant Club for so long as they are not ‘cut’ from the squad.

96. We agree that the sponsors were not the ultimate beneficiaries of the Boat House. However, we do not accept Mr Simpson’s argument that the only possible other beneficiaries are the rowers. Instead, as Ms Belgrano said, the Clubs have their own separate identities and purposes, namely to win the Boat Races and maintain a healthy competitive environment with Oxford, so as to ensure the long-term health of the Boat Races.

97. We go on to consider further factors to help us decide whether the Clubs or the rowers were the true beneficiaries of the Boathouse.

Training at the Boathouse

98. Ms Belgrano submitted that only the Clubs had the right to use the Boathouse at their discretion for their training programmes: rowers cannot use the Boathouse for their personal training, but only at the invitation of, and directed by, the Clubs. It is thus the Clubs’ decisions which determine whether rowers (and which rowers) can use the facilities; for what specific purposes and at what specific times. Thus, the rowers can only use the Boathouse

(1) in accordance with the Clubs’ own rowing programme (which is not set by the rowers);

(2) in accordance with the decisions of the Clubs’ Directors and coaches; and

(3) if they have agreed to the conditions imposed by the relevant Club, including being available for interviews and press conferences, participating in promotional activities for sponsors and waiving their image, personality and related rights.

99. She said that the position was similar to that of golfers participating in the corporate golf days described in *Berkshire*. The FTT in that case had found the golfers were playing only as the invited guests of the corporate body which had purchased a day package of access to a golf course. The true beneficiary of the supply was the corporate body, who was able to choose what use to make of that package, for example by selecting which golfers to invite. In her submission, rowers are only able to use the Boathouse “as the invited athletes” of the Clubs and not because they were entitled to benefit from CUBL’s supply of the Boathouse.

100. Mr Simpson rejected Ms Belgrano’s reliance on *Berkshire*, saying that the rowers were not in the same position as the golfers. He said that rowing is the “entire reason” the athletes join the Clubs, whereas playing golf was ancillary to the relationship between the corporate body and its guests. He added that the Clubs provide training and support above and beyond preparing rowers to row in the Boat Race: rowers use the boathouse to train for other races with the club and even for races outside the club, such as preparing to race in the Olympics or other international competitions.

101. We agree with Mr Simpson that the position of the rowers is not identical to that of the invited golfers in *Berkshire*. The corporate body invited clients primarily for its own ends, and golf was just one means of developing its commercial relationships. As the UT said in *Abbotsley* “the purpose of the exercise is to promote the corporate person's business”, not to play sport. Here, both the Clubs and the rowers are focused on the sport of rowing.

102. However, we also agree with Ms Belgrano that in important respects, there is a similarity between the position in this case and that in *Berkshire*. In the latter, it was the corporate body, not the invited golfers, who decided “where and when to hold the event, which course to hire, its timing, the format of golf to be played and every other aspect of the day”. Here, the Clubs control whether a rower can access the Boathouse, the timing of those visits, the training carried out and every other aspect of the usage made by the rowers of the Boathouse. It is the coaches who decide who will row on behalf of the Clubs in the Boat Races, and in the Henley Regatta. Although some rowers may use the Boathouse to train for other elite events, such as the Olympic Games, this occurs only with the permission of the Clubs and on an exceptional basis: it is not a matter of right.

103. We find that the use of the Boathouse for training belongs only to the Clubs; that this right is derived from the Licence agreed with CUBL, and that the rowers only have the right to use the Boathouse at the invitation and under the direction of the Clubs.

Storage

104. Ms Belgrano submitted that the Licence gave the Clubs the right to use the boat bays for storage of their own equipment; to use the wet docks to store coaching launches and to use the adjacent fuel store to store launch fuel and other additives. In contrast, being a member of

a Club did not give the rowers rights to store their own boats or equipment in the Boathouse. If, exceptionally, an individual was granted the right to store his own single scull there, a separate agreement was drawn up between that rower and CUBL, so the right was not derived from the Licence. Apart from those rare exceptions, all the boats stored in the Boathouse belong to the Clubs.

105. Mr Simpson's response was that almost all the Clubs' boats were multi-seater boats, and it would therefore be unusual (and unnecessary) for any one rower to own their own boat. Moreover, the boats are expensive. The provision of the Boathouse to store the boats was thus a specialised service which added quality to the rowing experience.

106. We again agree with Ms Belgrano. The boats belong to the Clubs. It is the Clubs which have to store the boats, prevent them being damaged, repair them and maintain them. The Clubs own all the equipment in the Boathouse which does not belong to CUBL: the launches, the oars, coxing equipment, tools for repairs, lifejackets, trestles, launch spares, coaching equipment, and fuel. Nothing in the Boathouse belongs to the rowers, and they have no responsibility for purchasing, repairing or maintaining any of the boats or other equipment kept within it. The Clubs are the clear and obvious beneficiary of the Boathouse as a place to store their own equipment.

The contrast with Abbotsley

107. Mr Simpson submitted that the position was similar to that in *Abbotsley*, where the UT had relied on the fact that "without the system of CONGU handicapping it would be impossible to participate in golf of the same value, or...without the facilitation of CONGU handicaps the quality of the sport of golf would be of a materially poorer quality". He said that the position was the same here: the rowers could not participate in the same quality of rowing without the Boathouse, and it was clear from the facts that before the Boathouse was built, the facilities were inadequate for participation in elite rowing.

108. Ms Belgrano disagreed. She said that in *Abbotsley* the predominant service supplied in exchange for the affiliation fee was the right of the individual to have a CONGU handicap and therefore to play in serious competitions. Here, there is no flow through of rights to the rowers. They have no right to use the Boathouse for training, other than as invited or directed by the Clubs and they have no right to use it to store equipment.

109. In the Tribunal's view, it is important to focus on the supply, which here is of the right to use Boathouse. As Ms Belgrano says, that right does not flow through to the rowers. In contrast, the payment of affiliation fees in *Abbotsley* gave individual golfers the right to obtain a CONGU handicap. It is true that, having been allowed to use the Boathouse by the Clubs, the rowers are then able to participate in rowing of a materially better quality, but it does not follow that they are therefore the "true beneficiaries" of the supply of the Boathouse.

The "floodgates" argument

110. An important part of Mr Simpson's case was that the position of CUBL, the Clubs and the rowers could not be distinguished from that of other membership clubs. He submitted

that if Ms Belgrano's submissions were correct, many clubs would lose their VAT exemption, and this would run counter to its purpose of encouraging sport and physical education. He said that many clubs, like the Clubs in this appeal:

- (1) have an identity which continues beyond the current active participants;
- (2) select teams and reject others who would like to play; and
- (3) own the major items of equipment and the rights to carry out the sport in a particular location. For instance, rowing clubs typically own the boats, and football clubs license the pitch and provide the goal posts, corner posts, nets and balls.

111. Ms Belgrano said this misrepresented the position. The issue in this case was that none of the rights to use the Boathouse were passed to the rowers, whereas in most clubs the members had rights of access and usage.

112. It is not for this Tribunal to decide the position of hypothetical supplies made to hypothetical clubs: the position will depend on the facts of each particular case. However, we can see significant differences between the position of CUBL and the Clubs on the one hand, and that of most membership clubs on the other. Even though (a) a club may have a reputation or identity which continues over time; (b) may own the equipment used by the members, and (c) the club's coaches may select teams, it would nevertheless be rare for the members to be prevented from using the facilities other than under the explicit direction and control of the club's employees.

Conclusion

113. For the reasons set out above, we find that the ultimate beneficiaries of the supply of the Boathouse are the Clubs, not the rowers. We thank both Ms Belgrano and Mr Simpson for their helpful submissions.

114. As noted at the beginning of this decision, this does not determine CUBL's appeal. HMRC's position is that CUBL's entitlement to recover VAT in respect of the relevant period may depend on the outcome of further issues, which the parties will now seek to agree.

Appeal rights

115. 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.

116. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party ("the PTA date"). 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.

Directions

117. Within 35 days from the later of the PTA date and the determination of any onward appeal against this decision, the parties are jointly to inform the Tribunal whether they have come to an agreement on the remaining issues, or whether a further hearing is required.

**ANNE REDSTON
TRIBUNAL JUDGE**

Release date: 28 OCTOBER 2021