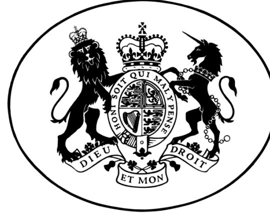
[2013] UKFTT 072 (TC)



TC02490

Appeal number: TC/2010/2389

VAT - Exemption - Article 13A(1)(n) Sixth VAT Directive – Cultural services – Admission to cinema – Whether provisions of Directive unconditional and sufficiently precise so as to make them directly effective

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRITISH FILM INSTITUTE **Appellant**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
MRS LYNNETH SALISBURY

Sitting in public at Bedford Square, London on 7 December 2011

Mr David Milne QC and Ms Zizhen Yang of counsel, instructed by Deloitte LLP, for the Appellant

Mr Sarabjit Singh of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The Appellant ("BFI") claims repayment of overpaid output VAT (approximately £1.2 million plus interest) accounted for in the period 1 January 1990 to 31 May 1996 ("the Claim Period") on the grounds that its supplies in the Claim Period were exempt as "cultural services" within the meaning of the relevant provisions. The Respondents ("HMRC") dispute that claim.

Facts

2. The following facts are not in dispute.

3. BFI is a non-profit-making body. It was formed in 1933 as a private company limited by guarantee. It was granted a Royal Charter in 1983, which formed and continues to form the constitutional basis for BFI and which required and requires BFI to act in the public interest. BFI has also been a registered charity since September 1983. From April 2011 BFI took on the activities of the UK Film Council. In 1951, it was agreed that BFI could run the National Film Theatre (now the BFI Southbank), and this was opened to the public in 1952. During the Claim Period, BFI received its funding from the UK Film Council, the Department for Culture Media and Sport, various donated services, ticket sales, and donations.

4. On 30 March 2009 BFI submitted a written claim to HMRC for output tax overpaid on supplies during the Claim Period, in the amount of £1,195,646 plus interest. Those supplies comprised sales of admission tickets to films shown at the National Film Theatre and at various film festivals. HMRC rejected this claim by a letter dated 23 November 2009. On 22 December 2009 BFI requested a formal internal review of the decision. By a letter dated 3 February 2010 HMRC upheld their earlier decision. On 4 March 2010 BFI submitted its notice of appeal to the Tribunal.

Statutory provisions

5. The VAT provisions are stated as in force at the date of the relevant events.

6. Article 13A(1) of the Sixth VAT Directive (Dir 77/388/EEC) ("the Sixth Directive") provided, so far as relevant:

> "Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:
>
> …
>
> (*m*) certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education;

(*n*) certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned;

…"

5 7. Article 13A(2) of the Sixth Directive provided, so far as relevant:

"Member States may make the granting to bodies other than those governed by public law of each exemption provided for in 1 … (*m*) and (*n*) of this Article subject in each individual case to one or more of the following conditions:

10 —they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied,

—they shall be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either 15 themselves or through intermediaries, in the results of the activities concerned,

—they shall charge prices 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 20 services by commercial enterprises subject to value added tax,

—exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises liable to value added tax."

8. Annex H to the Sixth Directive gives a "List of supplies of goods and services 25 which may be subject to reduced rates of VAT" and includes (as category 7):

"Admissions to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities."

9. Until 1 January 1990 art 28(3)(a) of the Sixth Directive permitted member states 30 to continue to subject to VAT certain otherwise exempt services, including cultural services. On the cessation of that transitional provision the UK failed to amend its domestic legislation until 1996, when it inserted Group 13 into sch 9 VAT Act 1994 (by the VAT (Cultural Services) Order 1996 (SI 1996/1256)) so as to grant exemption for (so far as relevant):

35 "2 The supply by an eligible body of a right of admission to—

(*a*) a museum, gallery, art exhibition or zoo; or

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

NOTES …

40 (2) For the purposes of item 2 "eligible body" means any body (other than a public body) which—

(*a*) is precluded from distributing, and does not distribute, any profit it makes;

(*b*) applies any profits made from supplies of a description falling within item 2 to the continuance or improvement of the facilities made available by means of the supplies; and

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

10. Thus there were three distinct periods:

(1) Prior to the Claim Period – the UK was entitled not to exempt cultural services because of the transitional provisions in art 28(3)(a) of the Sixth Directive.

(2) During the Claim Period – Article 28(3)(a) had expired and art 13A(1) was in force but with no UK domestic legislation granting exemption for cultural services. This is the period under appeal in these proceedings.

(3) After the Claim Period – Group 13 exempts some cultural services. We understand there is a dispute between the parties as to the status of the supplies by BFI in this third period, but that lies outside the current proceedings before this Tribunal.

Case law references

11. The following abbreviations of relevant case law are used in this decision notice

12. CJEU decisions:

Becker - *Ursula Becker v. Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53

Commission v. Spain - *EC Commission v. Spain* (C-124/96) [1998] STC 1237

Hoffman – *Criminal Proceedings against Hoffmann* (Case C-144/00) [2004] STC 740

Claverhouse – *JP Morgan Fleming Claverhouse Investment Trust plc & anor v RCC* (C-363/05) [2008] STC 1180

Canterbury Hockey – *Canterbury Hockey Club & anor v RCC* (C-253/07) [2008] STC 3351

Erotic Center - *Erotic Center BVBA v Belgium* (C-3/09) [2010] STC 1018

13. VAT Tribunal decisions:

Glastonbury Abbey - *Glastonbury Abbey* [1996] V&DR 307

Trebah Garden Trust - *Trebah Garden Trust* [2000] VTD 16598

Chichester Cinema - *Chichester Cinema at New Park Limited* [2005] VTD 19344.

Appellant's submissions

14. For BFI Mr Milne submitted as follows.

15. Although there was no UK domestic legislation granting exemption during the Claim Period, art 13A(1)(n) had direct effect. As explained by the CJEU in *Becker* (at ¶¶ 22 *et seq*):

> "[22] Consequently it would be incompatible with the binding effect given by Article 189 to directives to refuse in principle to allow persons concerned to invoke the obligation imposed by the directive.
>
> [23] Especially in cases where the Community authorities, by means of a directive, oblige member-States to adopt a specific course of action, the practical effectiveness of such a measure is weakened if individuals cannot invoke it before a court and national courts cannot take account of it as part of Community law.
>
> [24] Therefore a member-State which has not adopted, within the specified time limit, the implementation measures prescribed in the directive cannot raise the objection, as against individuals, that it has not fulfilled the obligations arising from the directive.
>
> [25] Consequently, in the absence of duly adopted implementing measures, individuals may invoke the provisions of a directive which, from the viewpoint of content, are unconditional and sufficiently precise, against all national legislation which does not conform with it. Individuals may also invoke those provisions if they lay down rights which can be enforced against the State."

16. The test of the provisions of art 13A(1)(n) being "unconditional and sufficiently precise" was met.

17. The opening words of art 13A(1)(n) ("under conditions which [the member states] shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse") did not detract from the direct effect of that article – see *Becker* at ¶¶ 31 to 34, and *Commission v. Spain* at ¶¶ 10 to 13.

18. BFI was a body "governed by public law".

19. The services supplied by BFI were clearly "cultural". Annex H to the Sixth Directive listed supplies eligible for reduced rates of VAT and Category 7 was "Admissions to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities". That provision was considered by the CJEU in *Erotic Center* where the court stated, at ¶¶ 16 & 17:

> "16. It follows in particular that the concept of admissions to a cinema must be interpreted in accordance with the usual meaning of those words …

> 17. Furthermore, … the various events and facilities listed in the first paragraph of Category 7 in Annex H to the Sixth Directive have in particular the common feature that they are available to the public on prior payment of an admission fee giving all those who pay it the right collectively to enjoy the cultural and entertainment services characteristic of those events and facilities."

20. The words "recognised by the Member State concerned" in art 13A(1)(n) did not give member states express power somehow to recognise which cultural services should be exempt and which cultural services should not. Not only is it clear as a matter of English language that the words "recognised by the Member State concerned" govern "other cultural bodies" rather than "certain cultural services", it is manifest as a matter of French language that they do so. The French version of Article 13A(l)(n) reads:

> "certaines prestations de services culturels, ainsi que les livraisons de biens qui leur sont etroitement liees, effectuees par des organismes de droit public ou par d'autres organismes culturels reconnus par I 'Etat membre concerne,"

"Prestation", the word used in the French version for "services", is a female noun; "organisme", the word used in the French version for "body", is a male noun. "Reconnus" must therefore refer to "bodies" rather than to "services": otherwise it would be "reconnues".

21. The word "certain" in art 13A(1)(n) did not - as argued by HMRC – introduce any imprecision into the meaning of the cultural services eligible for exemption. In this context "certain" meant "those". The member state had power (subject to overriding EU principles, particularly the principle of fiscal neutrality) to decide which "cultural bodies", in addition to bodies governed by public law, to recognise; but it did not have power to define "cultural services" or to decide which categories of "cultural services" to exempt. The VAT Tribunal authorities cited by HMRC (*Glastonbury Abbey*, *Trebah Garden Trust* and *Chichester Cinema*) had been overtaken by decisions of the CJEU (*Commission v Spain, Hoffman, Claverhouse* and *Canterbury Hockey)*.

22. The similar wording of art 13A(1)(m) in relation to "certain services closely linked to sport" was considered in *Commission v. Spain* where the Spanish government argued, *inter alia*, that it had a discretion as to what sport services were eligible for exemption. Advocate-General A La Pergola dismissed that argument (at ¶ 5 of his opinion):

> "The exemption at issue in this case concerns 'services closely linked to sport or physical education supplied by *non-profit-making* organisations to persons taking part in sport or physical education (emphasis added) [by A-G]' (see art 13(A)(1)(m)). (I need scarcely point out that the Spanish government's argument to the effect that member states are free to determine the services which may benefit from an exemption, since art 13(A)(1)(m) provides only that '*certain* services (emphasis added [by A-G])' are exempted, cannot be accepted. I do not believe that the Community legislature intended to confer such

> a wide discretion on member states. The term in question ('*certain*') doubtless constitutes an unfortunate formulation of the provision, but it does not have the scope attributed to it in the Spanish government's defence; it simply means that not all services are to be exempted but merely those which, as the provision states, are 'supplied by non-profit-making organisations'. Moreover, since the latter constitutes the aim which justifies the grant of the exemption, the rule in question must in any event—in so far as it lays down the services to be exempted—be capable of pursuing that aim. As I shall explain below, that is not the case here.) The services in question must therefore benefit in any event from the exemption provided for. It is precisely in that respect that the Spanish legislation does not comply with the rule in question."

The CJEU followed the opinion of the Advocate-General (at ¶¶ 14-15 of its judgment):

> "14. The Spanish government then argues, concerning the exemption of supplies of services referred to in art 13A(1)(m), that, unlike other exemptions envisaged by that provision, letter (m) provides for the exemption of 'certain' supplies of services. In its submission, that permits member states to limit the scope of art 13A(1)(m), not only by expressly excluding certain services provided by sports establishments from the exemption, but also by applying 'other criteria', such as the amount of the consideration for the services in question.
>
> 15. On that point, it is clear from art 13A(1)(m) of the Sixth Directive that the exemption in question concerns supplies of services closely linked to sport or physical education provided by non-profit-making bodies.
>
> …
>
> 18. Moreover, there is nothing in that provision to the effect that a member state, when granting an exemption for a certain supply of services closely linked to sport or physical education provided by non-profit-making bodies, may make that exemption subject to any conditions other than those laid down in art 13A(2)."

Thus it was clear from *Commission v. Spain* that member states had no discretion to alter the scope of sporting services covered by art 13A(1)(m) – for example, they could not exempt football but not basketball.

23. *Hoffman* concerned primarily whether individual artistes (the Three Tenors) could constitute "bodies" for the purposes of art 13A(1)(n). However, there was nothing in that case running counter to the conclusions reached in *Commission v. Spain* – indeed the Advocate-General in *Hoffman* summarised (at footnote (g)) the decision in *Commission v. Spain* as:

> "… the court defined the following limit: the criteria which the member states use must not affect the substantive scope of the exemption by resulting in *certain cultural services* being excluded from the VAT exemption."

24. In *Claverhouse* the CJEU considered the exemption in art 13B(d)(6) for the "management of special investment funds as defined by Member States" and concluded:

(a) (at ¶ 41) the phrase "as defined by Member States" "does not in any way permit the member states to select certain funds located on their territory and grant them exemption and exclude other funds from that exemption."; and

(b) (at ¶ 61) the provision had direct effect notwithstanding that it "allows member states a discretion, indicating that they are responsible for defining special investment funds".

If art 13B(d)(6) did not entitle the UK to restrict the range of supplies eligible for exemption despite being given an explicit discretion to make a definition of "special investment funds", then no such power to restrict cultural services could be read into art 13A(1)(n), and it must also have direct effect.

25. *Canterbury Hockey* (like *Commission v Spain*) concerned the exemption in art 13A(1)(m) for "certain services closely linked to sport". The Court held (at ¶¶ 36 to 40):

> "36. By its second question, the national court is asking whether the member states may limit the scheme of the exemption under art 13A(1)(m) of the Sixth Directive to services supplied only to individuals taking part in sport.
>
> 37. The United Kingdom government submits that the member states are free to limit the scope of the exemption to supplies of services which are provided to individuals, since art 13A(1)(m) of the Sixth Directive requires the exemption only of '*certain* services closely linked to sport' (emphasis added [by Court]).
>
> 38. In that regard, the different categories of activities which are to be exempted from VAT, those which may be exempted by the member states and those which may not, as well as the conditions to which the activities eligible for exemption may be made subject by the member states, are specifically defined by the content of art 13A of the Sixth Directive (see *[Hoffmann]* para 38).
>
> 39. The possible restrictions on the benefit of the exemptions provided for by art 13A of the Sixth Directive may be imposed only in the context of the application of para 2 of that provision (see *Hoffmann*, para 39). Thus, when a member state accords an exemption for certain services closely linked to sport or physical education supplied by non-profit-making organisations, it may not make that exemption subject to conditions other than those laid down in art 13A(2) of the Sixth Directive (see [*Commission v Spain]* para 18). Since that provision does not lay down restrictions as regards recipients of the services in question, the member states have no power to exclude a certain group of recipients of those services from the benefit of the exemption in question.

> 40. Therefore, the reply to the second question referred must be that the expression 'certain services closely linked to sport', in art 13A(1)(m) of the Sixth Directive, does not allow the member states to limit the exemption under that provision by reference to the recipients of the services in question."

Again, the CJEU was clear that the use of the words "certain services" did not confer on member states any power to restrict the supplies qualifying for exemption.

26. HMRC's position on this point may be influenced by the ramifications in relation to the position after April 1996. If, as BFI contend, art 13A(1)(n) had direct effect then Group 13, which contains limitations (including the omission of cinemas), is in breach of the Sixth Directive. That was not currently a matter before the Tribunal but may explain HMRC's intransigence on the interpretation of art 13A(1)(n).

27. Given that the UK failed to make any domestic law provision after the expiry of the transitional provisions in art 28(3)(a), the result of HMRC's contention that art 13A(1)(n) did not have direct effect would be that *no* supply of cultural services was exempt in the UK in the Claim Period – a period of over five years. HMRC did after 1996 make arrangements for reclaims by some persons for the Claim Period, if the relevant supplies would have been exempt had Group 13 been in force during that period; this is stated in HMRC's skeleton in the current proceedings and was also stated by HMRC's counsel in *Glastonbury Abbey* (see ¶ 31 of the VAT Tribunal's decision). That appears to be some form of retrospective extra-statutory concession, probably *ultra vires*, and is entirely inappropriate as a means of attempting to remedy a failure to implement a directly enforceable right conferred by the Sixth Directive. The true position was that all supplies of cultural services were exempt from 1 January 1990 by virtue of the direct effect of art 13A(1)(n) and the UK had no power retrospectively to limit the exemption between 1990 and 1996 – to have attempted to do so would be contrary to EU law principles of effectiveness and legitimate expectation.

28. BFI was not, at least at this stage of the proceedings, seeking a reference to the CJEU.

Respondents' submissions

29. For HMRC Mr Singh submitted as follows.

30. Article 13A(1)(n) does not have direct effect because it is not "unconditional and sufficiently precise" as required by *Becker*.

31. If art 13A(1)(n) did have direct effect as contended by BFI then the effect would be far-reaching. That would require every member state to exempt every conceivable cultural service provided by any public law or other recognised body. Any member state that purported to be selective about which cultural services were exempt would have acted illegally.

32. The word "certain" in art 13A(1)(n) must have some meaning and must be there for a reason. That word occurred only in paragraphs (k), (m) and (n) of the article. Para (n) did not say "all cultural services", or "any cultural services" but "certain cultural services". The deliberate inclusion of the word "certain" in art 13A(1)(n) begged the question, "Which cultural services?" The inclusion of the word allowed member states to choose which cultural services to exempt.

33. In *Glastonbury Abbey* the VAT Tribunal (Dr Brice) considered the very issue raised in the current proceedings: whether art 13A(1)(n) had direct effect. The appeal was decided on other grounds (relating to the detailed provisions of Group 13 of schedule 9) but Dr Brice gave her view on the direct effect point *obiter dicta*. She summarised HMRC's contention (at ¶¶ 30 & 31):

> "[Counsel for HMRC accepted that HMRC] had had an obligation after 1 January 1990 to exempt some supplies of cultural services but submitted that the Appellant could not rely upon the provisions of art 13A 1(n) as being directly effective because that Article was neither sufficiently precise nor unconditional within the meaning of para 25 of the judgment of the European Court of Justice in [*Becker*]. Article 13A 1(n) was not precise because it referred to "certain cultural services" supplied by "bodies recognised by the Member State concerned"; these matters were left to Member States to decide and, until they so decided, the Article was not sufficiently precise to be enforced by national courts. Article 13A 1(n) was not unconditional because art 13A 2(a) allowed Member States to impose conditions.
>
> [Counsel for HMRC] submitted that, for the same reason, the Appellant was not entitled to rely upon art 13A 1(n) alone as being directly effective between the dates of 1 January 1990 and 31 May 1996. In any event, the right of taxable persons to claim tax paid from 1 January 1990 to 31 May 1996 was an extra-statutory concession which had been introduced to recognise that Group 13 should have been introduced in 1990."

Dr Brice concluded (at ¶¶ 54 to 57):

> ".. art 13A 1(n) does refer to "certain cultural services" which are not defined and to "bodies recognised by the Member State concerned" and thus it is, in my view, not sufficiently precise to be enforced by a national court. Also, as art 13A 2(a) is not mandatory but discretionary it may not be relied upon by the Appellant. Accordingly, whatever other remedies are available to a taxable person against a Member State which fails to implement a Directive, art 13A 1(n) and art 13A 2(a) are not, in my view, directly effective and cannot be relied upon by the Appellant.
>
> …
>
> The final issue in the appeal was whether the Appellant could rely upon art 13A 1(n) alone as being directly effective so as to give the Appellant exemption between the dates of 1 January 1990 and 31 May 1996. It will be clear from what I have said about the second issue that

> I do not consider that art 13A 1(n) is directly effective as it is not sufficiently precise."

34. In *Trebah Garden Trust* - where the VAT Tribunal had to decide whether a botanical garden constituted a "museum" for the purposes of Group 13 of Schedule 9 - the VAT Tribunal came to the same conclusion as Dr Brice in *Glastonbury Abbey* when it accepted (at ¶ 17) HMRC's argument that:

> "…whilst Member States must grant exemption to cultural activities (as the United Kingdom has in Group 13 of Schedule 9), it is left to the Member States to determine which cultural activities within its territory shall be exempt. We accordingly have to decide whether Trebah Garden falls within any of the descriptions in item 2 of Group 13 (which do not include a botanical garden) construed as a matter of United Kingdom domestic legislation, with little assistance to be obtained from the Directive."

35. In *Chichester Cinema* the VAT Tribunal had to decide whether sales of cinema tickets constituted "a supply of a right of admission to … a theatrical, musical or choreographic performance ..." for the purposes of Group 13. The VAT Tribunal (at ¶ 14) concluded:

> "Insofar as we are influenced by anything in this case other than what we think is the plain ordinary meaning of the statutory phrase, we are very influenced by several factors connected with the interplay between [the Sixth Directive], and in particular [Annex H], and the choice of words adopted in the domestic legislation.
>
> The European Directive required the Member States to enact that "certain" cultural services were to be made exempt services for VAT purposes, but it left the States with a discretion as to which services to select. Manifestly the supply of cinema films was one of the services included in the Annex, along with the services rendered at circuses, fairs and in amusement arcades, that the Member States could include in their domestic provisions, treating them as exempt cultural services. And equally clearly the Member States had a choice here and could choose which of the services to include.
>
> Much the strongest inference to be drawn from this background is that the UK chose deliberately to include various of the services, but it chose to ignore and leave out the services at circuses, fairs, amusement arcades and cinemas. When cinemas were specifically mentioned in the Annex, but were not specifically included in the domestic legislation, but three expressions which were not naturally apt to apply to cinemas (or for that matter amusement arcades) were adopted in the domestic legislation, we think that much the most obvious construction is to assume that these other services were deliberately omitted.
>
> The phrase "theatre and cinema" is after all a natural phrase. It might often be included in the list of a person's interests. So when the phrase draws a distinction between theatre and cinema, and when the draftsman of the UK legislation has omitted "cinema" and three other types of service that were specifically referred to in the relevant Annex, we repeat that the natural inference is that cinema was

> deliberately excluded. To say moreover that it was implicitly included and clear words such as "other than cinema" would have been needed to exclude it seems again to be untenable.
>
> Accordingly we conclude that cinema was deliberately left off the list of cultural services that were to be given exempt status, and we find this very supportive of our purely linguistic interpretation set out above."

36. Even if - which was not accepted - art 13A(1)(n) could be read so as to ignore the word "certain", then it was still not "unconditional and sufficiently precise" so as to have direct effect. That would still leave "cultural services" undefined and there was no Community law or agreement between member states as to the meaning of that expression. Annex H to the Sixth Directive did not define cultural services but instead merely gave examples of things that could be cultural. This lack of a definition of cultural services was highlighted in *Trebah Garden Trust*, where the VAT Tribunal (at ¶ 17) stated:

> "[Counsel for the taxpayer] sought support from the legislative history as showing what the Directive is getting at in referring to certain cultural activities. The Proposal for a Sixth Directive provided for an exemption of
>
> "the supply of services by theatres, cinema-clubs, concert halls, museums, libraries, public parks, botanical or zoological gardens, educational exhibitions, and operations within the framework of activities in the public interest of a social, cultural or educational nature, by
>
> - bodies governed by public law; or
> - non-profit making organisations; or
> - private charitable organisations."
>
> But, as Terra and Kajus remark in their Commentary on the Sixth Directive, the text that was finally adopted bears hardly any resemblance to the Proposal because it would appear that the Member States could not agree on a precise [list] of cultural activities."

37. None of the CJEU authorities cited by BFI undermined the VAT Tribunal caselaw in *Glastonbury Abbey*, *Trebah Garden Trust* and *Chichester Cinema*.

38. In *Commission v Spain* there was no dispute as to the meaning of "certain services closely linked to sport"; rather, the Spanish government claimed that it could limit that exemption to services of organisations that levied low subscription fees, and that argument was dismissed (at ¶¶ 14-19 of the Court's decision):

> "14. The Spanish government then argues, concerning the exemption of supplies of services referred to in art 13A(1)(m), that, unlike other exemptions envisaged by that provision, letter (m) provides for the exemption of 'certain' supplies of services. In its submission, that permits member states to limit the scope of art 13A(1)(m), not only by expressly excluding certain services provided by sports establishments from the exemption, but also by applying 'other criteria', such as the amount of the consideration for the services in question.

> 15. On that point, it is clear from art 13A(1)(m) of the Sixth Directive that the exemption in question concerns supplies of services closely linked to sport or physical education provided by non-profit-making bodies.
>
> 16. It is undisputed that, under the Spanish legislation, the exemption envisaged under art 13A(1)(m) of the Sixth Directive is granted only to private sports bodies or establishments of a social nature which charge membership fees not exceeding certain amounts.
>
> 17. To apply the criterion of the amount of membership fees may lead to results contrary to art 13A(1)(m). As the Advocate General has pointed out at para 5 of his opinion, to apply such a criterion may result, first, in a non-profit-making body being excluded from the benefit of the exemption provided for by the provision and, secondly, in a profit-making body being able to benefit from it.
>
> 18. Moreover, there is nothing in that provision to the effect that a member state, when granting an exemption for a certain supply of services closely linked to sport or physical education provided by non-profit-making bodies, may make that exemption subject to any conditions other than those laid down in art 13A(2).
>
> 19. It follows that the limitation of the exemption for supplies of services closely linked to sport or physical education to private sports bodies or establishments of a social nature whose membership fees do not exceed a certain amount is contrary to art 13A(1)(m) of the Sixth Directive."

There was nothing in those words to support BFI's contention that the case assisted their argument that the word "certain" in art 13A(1)(n) could be ignored.

39. *Hoffmann* – which directly concerns art 13A(1)(n) – also gave no assistance to BFI. The dispute there was whether soloists could constitute "bodies" for the purposes of that article. Neither the Advocate-General not the CJEU at any point stated that "certain cultural services" means "all cultural services", despite having the perfect opportunity to make that point if they so wished. Indeed, the Advocate-General stated (at ¶ 47 of his opinion) that, "Certain, but not all, cultural services are covered by the exemption provided for in art 13A".

40. *Claverhouse* had no real relevance. The CJEU had held that art 13B (d)(6) had direct effect because it was unconditional and sufficiently precise. The national measures adopted by the UK had been ruled to be incompatible with the Sixth Directive. The UK government had, regrettably, exceeded the limit of the discretion granted by the Directive; that was not in issue in the current proceedings. The term "special investment funds" may be sufficiently clear and precise and the provision in which it appears may be directly effective; however, the same cannot be said of the term "certain cultural services".

41. *Canterbury Hockey* did not move matters forward from the position in *Commission v Spain*. Again, the CJEU did not elaborate on the meaning of "certain" in "certain services closely linked to sport" despite having an opportunity so to do.

42. The end point was that in art 13A(1)(n) member states did indeed have a discretion to choose which cultural services qualified for exemption and the word "certain" could not be "airbrushed" out of the legislation just because that suited BFI.

43. Even if the terms of a provision are sufficiently clear and precise, that provision cannot have direct effect if it allows member states any substantial latitude or discretion in applying in; see, for example, *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijzen* (Case 51/76) [1977] ECR at ¶¶ 27-28.

44. If the appeal should be successful then HMRC reserved the right (a) to look into the effects on BFI's partial exemption position and calculations; and (b) to consider whether the rules concerning unjust enrichment were in point.

45. Mr Singh on instructions gave the following responses to questions from the Tribunal:

(1) *What was the legal position between 1990 and 1996?* HMRC considered that the relevant article of the Sixth Directive did not have direct effect and there was no national implementing legislation during that period. However, because of the UK's delay in implementing national legislation, a concession was made to enable payment to certain people who met the terms of the subsequent domestic legislation.

(2) *When the transitional provisions in art 28(3)(a) expired in 1990, did BFI have a legitimate expectation that ticket sales would be exempt?* A claim of legitimate expectation required a clear representation of benefit to a taxpayer, and that was not the case with BFI.

(3) *This was an appeal against a refusal to repay VAT; should not HMRC argue now any partial exemption or unjust enrichment points as part of their defence of the appeal?* The Tribunal was invited to treat the arguments put forward by both sides as the determination of a preliminary issue in the dispute. HMRC reserved the right to come back on the other points if they lost on this issue; that was fair and appropriate because the position had been flagged in their formal statement of case.

Consideration and conclusions

Comments on the matter to be determined

46. These proceedings were listed for an oral hearing to determine BFI's appeal. Paragraph 28 of HMRC's statement of case dated 20 July 2010 stated,

> "The Respondents refused the Claim on the basis that the Appellant was not entitled to the exemption claimed and the Appellant has brought this Appeal against the Respondents' decision in respect of the entitlement to exemption. For the avoidance of doubt, the Respondents record that should the Tribunal determine the Appeal in the Appellant's favour, the Respondents reserve the right to make further inquiries into the Claim in order to consider the impact on the Claim of, inter alia, the Appellant's partial exemption position and the

> possibility that payment of the Claim would lead to the unjust enrichment of the Appellant."

That was stated in Mr Singh's skeleton argument (paragraph 27) as:

> "At the present stage, the Respondents do no more than submit that there is a prima facie case that the Appellant would be unjustly enriched if credited with any VAT found to be overpaid (see paragraphs 40-42, 44-45 & 51 of the recent decision of Sir Stephen Oliver in *British Association of Leisure Parks, Piers & Attractions v RCC* [2011] UKFTT 662 (TC)"

Only during the course of Mr Singh's submissions did HMRC suggest that the hearing should be treated as being confined to a "preliminary issue" on the direct effect of art 13A(1)(n). Mr Milne for BFI confirmed to the Tribunal that his client was content to address the partial exemption and unjust enrichment issues as separate matters at a later date if necessary. As it apparently suits both parties to proceed on that basis the Tribunal consents to do so, but we record that it would be far preferable for all of the Tribunal and both parties to know and agree in advance of the commencement of the hearing exactly what is the ambit of the matter for determination by the Tribunal.

47. Accordingly, this decision is confined to the preliminary issue of: whether art 13A(1)(n) of the Sixth Directive has direct effect.

48. HMRC argue that art 13A(1)(n) does not have direct effect because it is not "unconditional and sufficiently precise" as required by *Becker*. They say that even if sales of cinema tickets can constitute cultural services, art 13A(1)(n) only exempts "*certain* cultural services" without specifying which ones, and (at least in the Claim Period) the UK government had not specified sales of cinema tickets as being such cultural services.

Do sales of cinema tickets constitute supplies of cultural services within art 13A?

49. We start with a point that Mr Milne for BFI suggested was clear and uncontroversial but on which Mr Singh for HMRC was less enthusiastic: do sales of cinema tickets constitute supplies of cultural services within art 13A?

50. Mr Milne for BFI referred us to Annex H, pointing out that Category 7 includes "Admission to … cinemas … and similar cultural events and facilities", and that in the current case the requirement stated by the CJEU in *Erotic Center* was clearly met:

> "… the various events and facilities listed in the first paragraph of Category 7 in Annex H to the Sixth Directive have in particular the common feature that they are available to the public on prior payment of an admission fee giving all those who pay it the right collectively to enjoy the cultural and entertainment services characteristic of those events and facilities."

51. However, we exercise some caution here. Annex H relates to reduced rates of VAT under art 12(3) rather than exemptions under art 13. That is a distinction that (with respect) was not made by the VAT Tribunal in *Chichester Cinema* (see ¶ 4 of that decision). The most that can be drawn from Category 7 is that cinema admissions are considered to be cultural events for the purposes of reduced rates under art 12(3). However, having drawn that distinction we see no reason why sales of tickets for admission to view films selected by the BFI (for example, at the National Film Theatre) do not constitute "cultural services". Without blurring the distinction between art 12(3) and art 13, we note that in *Erotic Center* the challenge was to the concept of "admissions to a cinema" (and it was held this did not cover "the payment made by a customer so as to be able to watch on his own one or more films, or extracts from films, in private cubicles") rather than that viewing pornographic films in private cubicles did not amount to "cultural events". We conclude that viewings of films of the type selected by BFI are *a fortiori* "cultural events" not just for the purposes of Annex H but also for the purposes of art 13A(1)(n).

52. Accordingly, we agree with BFI that tickets for admission to showings of films organised by BFI do constitute "cultural services" for the purposes of art 13A(1)(n).

53. We now move to the fact that art 13A(1)(n) refers to "*certain* cultural services".

Consideration of the VAT Tribunal caselaw

54. At first sight it appears that the inclusion of the word "certain" in art 13A(1)(n) must have been intended to qualify "cultural services" – to mean, in effect, "some but not all cultural services". Looking at the other heads of exempt supplies listed in art 13A(1) there are several descriptions where the word "certain" does *not* appear - for example, "services supplied by dental technicians …" (rather than "certain services supplied by dental technicians …") in art 13A(1)(e), and "services supplied by independent groups of persons …" (rather than "certain services supplied by independent groups of persons …") in art 13A(1)(f). That implies the intention was for those descriptions that omitted the qualifier "certain" to be interpreted as *all* such services (eg all services of dental technicians), while those descriptions that included the qualifier "certain" (eg "certain cultural services") should be interpreted as *some but not all* such services. That approach to the interpretation of art 13A(1)(n) was the one adopted by the VAT Tribunal in *Glastonbury Abbey*, *Trebah Garden Trust* and *Chichester Cinema.*

55. In *Glastonbury Abbey* the VAT Tribunal gave its view *obiter dicta* (but without qualification) that art 13A(1)(n) did not have direct effect– see ¶¶ 30 & 31 and 54 to 57 quoted at ¶ 33 above.

56. In *Trebah Garden Trust* the VAT Tribunal concluded (at ¶ 17 quoted at ¶ 34 above) that "…whilst Member States must grant exemption to cultural activities (as the United Kingdom has in Group 13 of Schedule 9), it is left to the Member States to determine which cultural activities within its territory shall be exempt." The consequence was that art 13A(1)(n) had no direct effect, and the taxpayer failed to

convince the VAT Tribunal that it was within the terms of the relevant domestic legislation.

57. In *Chichester Cinema* the VAT Tribunal also concluded that art 13A(1)(n) gave a discretion to member states to choose which cultural services to exempt under domestic law (see passages quoted at ¶ 35 above), with the same result as in *Trebah Garden Trust*.

58. Thus in all of *Glastonbury Abbey, Trebah Garden Trust* and *Chichester Cinema* the VAT Tribunal concluded that only some types of cultural services fell within art 13A(1)(n), and it was undefined (by that article) what types of cultural services would qualify for exemption. None of those decisions is binding on this Tribunal, and the views in *Glastonbury Abbey* were *obiter*, but we do consider that if called upon to decide the point in the absence of any guidance from the CJEU we would reach the same conclusion as Dr Brice in *Glastonbury Abbey:* the use of the word "certain" qualifies and restricts the type of cultural services eligible for exemption and thus art 13A(1)(n) is not sufficiently precise to have direct effect and so could not be relied upon by BFI.

Consideration of the European caselaw

59. We now turn to how the CJEU has construed the word "certain" in the context of art 13A(1).

60. We start with the recent case of *Canterbury Hockey* and the Court's decision concerning "certain services closely linked to sport" in art 13A(1)(m) (see ¶ 25 above) that:

> "…the different categories of activities which are to be exempted from VAT, those which may be exempted by the member states and those which may not, as well as the conditions to which the activities eligible for exemption may be made subject by the member states, are specifically defined by the content of art 13A of the Sixth Directive (see *[Hoffmann]* para 38).
>
> The possible restrictions on the benefit of the exemptions provided for by art 13A of the Sixth Directive may be imposed only in the context of the application of para 2 of that provision (see *Hoffmann*, para 39). …"

It was not open to the UK government to restrict the exemption applicable to "certain services closely linked to sport", save as allowed by art 13A(2). That same conclusion had been reached by the Court in *Commission v Spain* (see ¶ 22 above):

> "Moreover, there is nothing in [art 13A(1)(m)] to the effect that a member state, when granting an exemption for a certain supply of services closely linked to sport or physical education provided by non-profit-making bodies, may make that exemption subject to any conditions other than those laid down in art 13A(2)."

61. The different categories of cultural activities exempted from VAT "are specifically defined by the content of art 13A". We have not heard any argument that any of the restrictions in art 13A(2) are relevant to BFI's appeal. Article 13A(1)(n) contains no restrictions on the meaning of "certain cultural services". We consider, therefore, that the only justification for any restriction is if the word "*certain*" can itself constitute such a restriction.

62. This point was specifically addressed and answered by Advocate-General A La Pergola in *Commission v Spain* (see ¶ 22 above) – indeed, he was dismissive of the argument:

> "I need scarcely point out that the Spanish government's argument to the effect that member states are free to determine the services which may benefit from an exemption, since art 13(A)(1)(m) provides only that '*certain* services (emphasis added [by A-G])' are exempted, cannot be accepted. I do not believe that the Community legislature intended to confer such a wide discretion on member states. The term in question ('*certain*') doubtless constitutes an unfortunate formulation of the provision, but it does not have the scope attributed to it in the Spanish government's defence; it simply means that not all services are to be exempted but merely those which, as the provision states, are 'supplied by non-profit-making organisations'. Moreover, since the latter constitutes the aim which justifies the grant of the exemption, the rule in question must in any event—in so far as it lays down the services to be exempted—be capable of pursuing that aim."

63. The Court followed the Advocate-General's opinion without in any way contradicting or even qualifying the above statement – see the passages quoted at ¶ 22 above.

64. *Hoffmann* directly concerned art 13A(1)(n) and (at ¶¶ 38-40) reached the same conclusion as the subsequent case of *Canterbury Hockey* (and as can be seen above was cited in *Canterbury Hockey*):

> "37. In that regard, it must be observed that the heading of art 13A of the Sixth Directive, the wording of which is 'Exemptions for certain activities in the public interest', does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision.
>
> 38. First, the activities which are to be exempted from VAT, those which may be exempted by the member states and those which may not, as well as the conditions to which the activities eligible for exemption may be made subject by the member states, are specifically defined by the content of art 13A of the Sixth Directive. Second, as is confirmed by para 2(a) of that article, which authorises, but does not oblige, the member states to restrict exemption to bodies other than public law bodies which do not have a systematic profit-making aim, the commercial nature of an activity does not preclude it from being, in the context of art 13A of the Sixth Directive, an activity in the public interest.

> 39. The possible restrictions on the benefit of the exemptions provided for by art 13A of the Sixth Directive may be imposed, as is pointed out at paras 28 and 29 of this judgment, only in the context of the application of para 2 of that provision.
>
> 40. The reply to the second question must therefore be that the heading of art 13A of the Sixth Directive does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision."

65. In *Hoffmann* the Advocate-General noted the decision in *Commission v Spain* with no elaboration or qualification. (On *Hoffmann* we should mention that although Mr Singh invited us to take ¶ 19 of the Court's decision as being the view of the Court, we agree with Mr Milne that ¶ 19 is instead a recitation by the Court of the contentions put to it by the German, Netherlands and UK governments.)

66. We agree with Advocate-General A La Pergola's observation (in *Commission v Spain)* that the use of the word "certain" "doubtless constitutes an unfortunate formulation of the provision". However, we conclude that the CJEU's decisions in all of *Commission v Spain, Hoffmann* and *Canterbury Hockey* are clear that (save for the restrictions in art 13A(2)) no discretion is given to member states to discriminate between services closely linked to sport (in the case of art 13A(1)(m)) nor to discriminate between cultural services (in the case of art 13A(1)(n)).

67. We do not accept HMRC's objection that "cultural services" is too general, vague or unspecific a description to allow sufficient precision to invoke direct effect. The same objection could be made to the phrase "certain services closely linked to sport or physical education" in art 13A(1)(m) (for example, what about chess? – and see the discussion by the VAT Tribunal in *Royal Pigeon Racing Association* (1996) V14006) but that sub-article *does* have direct effect (*per Commission v Spain*) – and in the UK domestic legislation (group 10 schedule 9 VATA 1994) the words "sports or physical recreation" are used without any statutory definition thereof.

68. Accordingly, we conclude that all cultural services qualify for exemption by virtue of art 13A(1)(n) (provided they are "supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned"), and that such exemption took place with direct effect (without the need for any national implementing legislation) once the transitional provisions in art 28(3)(a) expired on 1 January 1990.

Comments on distinguishing the VAT Tribunal cases

69. We are very aware that our decision in this appeal reaches a different conclusion from the VAT Tribunal decisions in *Glastonbury Abbey, Trebah Garden Trust* and *Chichester Cinema* and, although those decisions have no binding authority on this Tribunal, we wish to comment on that difference, given the desirability of consistency of approach to issues litigated before the tax tribunals.

70. *Glastonbury Abbey* was decided in 1996 – before the CJEU decision in *Commission v Spain* – and so the VAT Tribunal did not have the benefit of the clear views expressed by the Advocate-General and the Court in that case on the meaning

of "certain services"; further, the relevant comments in *Glastonbury Abbey* were *obiter dicta.*

71. Both *Trebah Garden Trust* and *Chichester Cinema* were decided after the CJEU decision in *Commission v Spain* but neither Tribunal decision refers to that CJEU decision - or indeed, any other CJEU caselaw - and we conclude (without any criticism of the advocates involved in those cases) that in both cases the VAT Tribunal was unaware of the CJEU decision in *Commission v Spain.*

72. Another VAT Tribunal case (not cited in these proceedings) on the point was *The Corn Exchange Newbury* [2007] (V20268), where the VAT Tribunal reached the same conclusion as in *Chichester Cinema* (and again without the benefit of being referred to *Commission v Spain*) and observed (at ¶ 9):

> "Article [13A] is somewhat paradoxical in that having directed that Member States "shall exempt" the following supplies subparagraph (n) and some of the other subparagraphs, by referring to "certain services", appears to leave it to the Member States to decide precisely which such services are to be exempted."

That paradox disappears when one has the benefit of the explanation given by Advocate-General A La Pergola in *Commission v Spain* (see ¶ 62 above).

73. Accordingly, we conclude that the above VAT Tribunal cases were decided in the absence of any consideration of the CJEU decision in *Commission v Spain,* and even if they were authoritative precedents for this Tribunal (which they are not) we would decline to follow them as being decided *per incuriam*.

Decision

74. The preliminary issue described in ¶ 47 above is determined in favour of the Appellant. Supplies of services of admission to cinemas by BFI in the Claim Period were exempt supplies for VAT purposes by reason of art 13A(1)(n) of the Sixth Directive which had direct effect in that period.

75. 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: 5 December 2012