[2015] UKFTT 0241 (TC)

TC04433

Appeal number: TC/2014/01997

TYPE OF TAX – VAT – extra-statutory concession – apportionment of subscription income between standard and exempt VAT. Double taxation. No.

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE REFORM CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MS GILL HUNTER.

Sitting in public at The Royal Courts of Justice, London on 08 May 2015.

Mr. Brown - counsel for the Appellant

Mrs Carroll, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Reform Club was formed in 1842 as a social club for reformers and in the 19th century became, effectively, the headquarters of the Liberal Party (as it then was). It is a private members club with its premises in Pall Mall, London, owned by its voting members. It is not in dispute that it operates as a non-profit-making organisation with any surplus of income over expenditure being used for the benefit of the club and its members at large.

2. The club charges each of its members an annual subscription. Payment of the annual subscription confers upon each member a basket of benefit and privileges some of which, if supplied individually, would be zero rated for VAT purposes or VAT exempt; others of which would be standard rated.

3. Normally where it can be shown that the principal benefit arising from the payment of a subscription is subject to VAT at the standard rate, any ancillary benefits will also be subject to VAT at the standard rate. However, in the case of non-profit-making organisations HMRC has publicly set out an extra statutory concession: 3.35 VAT which provides :

"However bodies that are non-profit making and supply a mixture of zero rated, exempt and/or standard rated benefits to their members in return for their subscriptions, may apportion such subscriptions to reflect the value and VAT liability of those individual benefits, without regard to whether there is one principal benefit. This concession may not be used for the purpose of tax avoidance."

4. The appellant has been eligible to benefit from that extra statutory concession and has done so. The difficulty with the extra statutory concession is not in understanding it or its purpose, but in arriving at a satisfactory basis for apportionment which is fair and reasonable. It has been accepted in this appeal that it is not something that can be determined by the application of a precise arithmetic formula but, of necessity, involves an element of judgement and balanced fairness.

5. From sometime in 1998 the appellant has used what has been described as a floor space based apportionment method, which it had agreed with HMRC. The fact that it was agreed does not mean that it was or is set in stone for evermore and cannot be changed if a proper case is put forward for identifying a more appropriate and accurate method.

6. We should record that at the outset of this appeal the respondent raised as a preliminary point the issue of whether, given that the appellant is relying upon an extra statutory concession, an appeal lies to this Tribunal or only by way of judicial review to the High Court. There could be no doubt that each party had prepared to deal with the appeal substantively and that costs had been incurred on each side. If such a preliminary point was seriously to be advanced it should have been taken at a much earlier stage upon a strike out application. It was apparent to us that the

7. outcome of this appeal might involve findings of fact being made albeit probably not on the basis of significantly disputed factual evidence. That is not normally the province of the High Court in judicial review proceedings.

8. A Court or Tribunal has the jurisdiction which is granted to it by statute or is part and parcel of its inherent jurisdiction. However, additionally, the parties to litigation can agree to extend the jurisdiction of a Court or to confer jurisdiction where none might otherwise exist. For example, it was commonplace in the days when the County Court had a financial limit upon its jurisdiction for parties to agree to extend that financial limit so as to keep a case within the County Court. The rationale is that the parties are free to contract to extend or confer jurisdiction just as they would be free to contract to refer a particular dispute to arbitration.

9. In those circumstances we invited the parties to consider whether they wanted to agree that the Tribunal should have jurisdiction to deal with the issue raised by this appeal, without prejudice to the respondent contending in any other case, that the Tribunal does not have jurisdiction where the appeal relates to an extra statutory concession. After some short time for consideration the respondent agreed that the Tribunal should have jurisdiction, such agreement being without prejudice to its position, in any other appeal that may arise concerning the extra statutory concession, that the Tribunal may not have jurisdiction to hear such an appeal. In those circumstances we do not consider it necessary to rule upon whether the Tribunal did or did not have jurisdiction regardless of the agreement or concession made by the respondent, as we did not proceed to hear full argument on the point.

10. The issue raised by the Grounds of Appeal in this case is that the appellant contends that the floor space based method of apportionment does not, or has ceased to, provide a fair and reasonable apportionment of the proportion of the annual subscription that is subject to VAT at the standard rate and the part that should be zero rated or exempt.

11. The issue arose in this way. The Club took the view that the previously agreed method of apportionment did not, or no longer, amounted to a fair and reasonable apportionment. It proposed to the respondent that it should change the methodology so as to exclude from the overall floor area, the floor areas occupied by the restaurant and the bedrooms (on the basis that they generated fee income on which VAT was charged separately). By excluding those floor areas the percentage of the subscription that would not be subject to the standard rate of VAT would increase significantly.

12. The Club therefore put in a VAT error correction claim for the period ended 30 September 2013. This was after it had been in correspondence with the respondent for some time which, in reality, was getting nowhere. In other words, the Club had to do something to force the issue and to bring about a situation where the respondent issued a decision adverse to the Club which triggered a right of appeal to this Tribunal.

13. To deal with this issue it is necessary to understand something of the physical layout of the Club and something of the facilities that it offers to its members. We heard evidence from Mr Crispin Morton, the Club Secretary and Chief Executive, which we accept, that the physical size of the Club has almost doubled since 1998. It is not the size of the club matters but the nature and type of the accommodation and

facilities that it offers. In that regard we were provided with plans showing each of the three floors at the Club with two intervening mezzanine floors.

14. At basement level there are various rooms which are used as stores, plant rooms changing rooms and toilets. The basement mezzanine is similar but also includes the Secretary's office and other administrative offices. On the ground floor are to be found a morning room, saloon, coffee room (in effect the main restaurant) a cabinet room and a *"strangers' room"*. The ground floor mezzanine has a small meeting room and two rooms given over to computer equipment. On the first floor a substantial amount of space is given over to library facilities, a smoking room, cardroom, billiard room and other smaller rooms available for the use of members. The Club is particularly proud of its library which, the evidence discloses, runs to something in excess of 65,000 books. The area described as the first/second mezzanine floor has areas taken up by ceiling voids and an area referred to as "Grippers Emporium".

15. The second and third floors comprise bedrooms (most of which do not have an *en suite* bathroom) and bathrooms. The Club refers to its bedrooms as "chambers". They are of differing sizes and the price per night varies according to the comparative commodiousness of the accommodation purchased.

16. The 1998 agreement was to the effect that 54.72% of the subscription income would be treated for VAT purposes as standard rated.

17. The appellant contends that this is no longer a fair and just reflection of the true position and should be adjusted in its favour. It has submitted, through Mr Brown, that the existing methodology is flawed and unfair because it involves double taxation. He puts the submission on the basis that those areas of the Club which are used only (or mainly) by members who make further payments whilst using those facilities, for example, the restaurant and bedrooms, results in the use of those parts of the premises giving rise to double taxation unless they are excluded from the floor - based apportionment.

18. We do not agree with the submission made. The essential question is to ask what is it that the hypothetical average member obtains in exchange for his subscription. Put otherwise, what basket of benefits and privileges are enjoyed in exchange for the subscription. It is that basket of rights and privileges that is "purchased" by payment of the subscription fee. The evidence makes it clear that there are numerous benefits which range from entering the Club to use what we will call its "free" facilities and the right to use other facilities upon payment of a sum of money. The facilities that are free at the point of supply are things such as the use of the library, smoking room, cardroom, billiards room various changing rooms, squash courts and toilet facilities along with other "public" rooms which afford somewhere where members can simply sit, read, discuss matters or simply take an afternoon snooze. The facilities for which additional payment is required are, understandably, the use of bedrooms for which a nightly fee must be paid and, in effect, the use of the dining room or coffee room where members must pay for the food and drink that they order and consume.

19. In our judgement the fact that payment is made for the use of bedrooms and/or for food and drink does not give rise to actual or notional double taxation. The subscription fee is a payment made by each member in exchange for that member

being given the right to access and use the various facilities offered by the Club. The ability to use the various and differing facilities (whether free at the point of supply or involving further payment) arises from the rights and privileges of membership. The subscription purchases those rights and privileges. The fact that accessing a particular facility, for example the taking of meals in the restaurant, involves the payment of a sum in respect of the food and beverages consumed, is to confuse the issue. The subscription is paid in exchange for the right to access the other facilities which, if a member chooses to access and use them or any of them, requires the payment of an additional sum of money. In our judgement this is no different to the situation where a person pays a fee (on which VAT is paid) to enter a country park or a country house and then whilst at the park or in the country house chooses to purchase a meal or some souvenirs, which, being separate supplies of goods or services which attract VAT at the standard rate, will involve that person paying more tax. That is not double taxation; it is separate taxation for separate identifiable supplies.

20. It follows that in our judgement this appeal fails on the express basis upon which it was put.

21. During the course of the argument it was identified that different rights and privileges that arise by reason of membership of the Club, for which the subscription fee is paid, may justifiably warrant variable or differing proportions of the subscription fee being attributed to them. For example, it may be thought that a lower proportion of the subscription fee would be attributable to a member's ability to access other goods or services in respect whereof further payment must be made, when compared with those services or facilities which can be used as of right without payment of any further fee. Such an approach may well mean that the square footage apportionment basis of assessment fails to take account of those aspects of the rights and privileges of membership which are more modest in value (and so to which a lower proportion of the subscription fee should be attributed) compared to those of greater value (to which a greater proportion of the subscription fee should be attributed).

22. Plainly we are in no position to come to any view about how different aspects of the rights and privileges of membership should be valued or apportioned within the subscription. Any such assessment would necessarily have to be evidence-based and no evidence has been adduced before us designed to address any other approach to apportionment other than the floor space apportionment basis. Nonetheless, that is not to say that some other properly calibrated and assessed basis of assessment may not prove to be fairer than the existing square area basis, but that will very much depend upon the Club being able to come up with a fair and reasonable apportionment (albeit not on a precise scientific basis) of that part of the subscription fee that is attributable the differing rights or privileges of membership which make up the basket of rights and privileges for which a single subscription fee is paid. Indeed, such an approach would follow the wording of the extra statutory concession which speaks in terms of apportioning the subscription "*to reflect the value and VAT liability of those individual benefits ……*".

23. On the basis upon which this appeal was put, and argued, it must be dismissed.

24. 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.

GERAINT JONES Q. C.

TRIBUNAL JUDGE
RELEASE DATE: 21 May 2015