



TC04836

Appeal number:TC/2014/06121

VALUE ADDED TAX – exemption – granting of credit – membership subscriptions to a sports club – charge for credit in first year exempt – terms on which membership continued after first year – no charge for credit – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SPORTS AND LEISURE GROUP LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MS ANN CHRISTIAN**

Sitting in public Manchester on 15 October 2015

Mr Nigel Gibbon of Nigel Gibbon & Co for the Appellant

Mr Julian Winkley of HM Revenue & Customs Solicitor's Office for the Respondents

DECISION

Background

1. The Appellant operates health and fitness clubs in various towns and cities in
5 England, each trading under the name Roko Health Club. On 19 December 2012 it
made a claim for repayment of VAT totalling £434,880 said to have been overpaid in
relation to output tax on certain membership income. Output tax had been accounted
for on all membership subscriptions at the standard rate whereas it was claimed that
10 part of the payments in relation to certain membership subscriptions ought to have
been treated as exempt from VAT as consideration for a supply of credit.

2. The Appellant's claim for repayment related to VAT periods 11/08 to 09/12. By
letter dated 16 July 2013 the Respondents accepted that part of the claim was
justified. This appeal concerns the balance of the claim. The principal issue is whether
15 there is any supply of credit after the first year of certain memberships. That in turn
depends on the contractual terms between the Appellant and the relevant members.

3. There was no real dispute of fact and we heard no witness evidence. The parties
produced a Statement of Agreed Facts together with documentary evidence which
was not contentious. In some respects there were gaps in the evidence which were, by
agreement, dealt with by Mr Gibbon on instructions during the course of the hearing.
20 Based on all the material before us we make the following findings of fact.

Findings of Fact

4. The Appellant is based in Nottingham. During the period to which the claim
relates it operated health and fitness clubs in London (Chiswick), Gillingham,
25 Nottingham, Portsmouth and York. The terms on which membership of the clubs was
granted was the same at each club, although there was a difference in pricing. The
club in Nottingham was representative of all the clubs and we shall make findings in
relation to that club. Save where otherwise appears our findings relate to the periods
comprised in the claim.

5. All members were entitled to full use of a fitness area, group exercise schedules,
30 spinning classes, swimming pool and a members' club lounge. Additional facilities
were charged separately by reference to usage, such as personal training, health and
beauty treatments and sunbeds.

6. Whilst all members were entitled to the same facilities, the Appellant had four
categories of membership, distinguished primarily by the membership fees and the
35 minimum term of membership. The categories of membership are described in a
document before us which we shall refer to as the "Membership Description". It
contained amongst other matters the following information, with rates being those
applicable at October 2012:

40

Category of Membership	Minimum Term	Joining Fee £	Monthly Membership Fee £	Annual Fee £
Results	12 months	50	53.95	593.45
Impact	6 months	65	57.95	n/a
Lifestyle	3 months	70	61.95	n/a
Open	1 month	100	65.00	n/a

7. We were told and we find as a fact that there were no changes to membership fees in the period of the claim.

8. We refer to the specific contractual terms in more detail below, but broadly the longer the commitment the lower the joining fee and the lower the monthly membership fee. This appeal is concerned directly with the “Results” membership for which there was an annual fee of £593.45. In the first year a member with Results membership could choose to pay the annual fee by way of a lump sum in advance, or by way of a monthly direct debit of £53.95 per month. If a member chose the latter then the total payment for membership in the first year, ignoring the joining fee, would be £647.40 which is an additional £53.95 over and above the annual fee.

9. The description in the table above of a “monthly membership fee” for Results membership is not strictly correct, at least in relation to the first year of membership. In fact it is an annual membership fee, paid by monthly instalments. The Respondents accept that where a Results member paid the annual fee by way of monthly direct debit in the first year of membership there was a charge for credit of £53.95. The Respondents also accept that in the first year of a Results membership the charge for credit, amounting to £4.50 per month, was exempt from VAT. Hence the Appellant’s claim for repayment has been agreed in so far as it relates to monthly payments in the first year of a Results membership.

10. There is no option in the other categories of membership to make a smaller lump sum payment, whether annually or otherwise. The fees for those categories of membership may properly be described as monthly membership fees. The minimum term for these other categories of membership is set out in the table above. Impact and Lifestyle membership could each be cancelled by giving 3 calendar months notice in writing ending not earlier than the minimum term of membership. Open membership, could be cancelled at any time by giving notice in writing of 1 calendar month.

11. The terms in relation to cancellation are explained on the front of the Membership Agreement form which is signed by members and the Appellant. The front of the form identifies the membership start date, minimum membership period and category of membership. In relation to Results membership the front of the form states:

“By signing this agreement form below, I understand and agree that the terms of this entire membership will run for 12 months from my start date shown

above. During and after the expiry of this minimum period I may cancel this agreement by giving to you three calendar months notice in writing so as to expire, at the earliest, on the annual anniversary of my membership start date.”

5 12. The front page also has a box for the membership fee and a box for the amount of the monthly direct debit.

10 13. The reverse of the Membership Agreement contains detailed terms and conditions. Clause 1.3 identifies the specific categories of membership described above. We are not concerned with the different types of membership within each category, such as off peak, students and juniors where a reduced subscription is paid. Curiously, clause 1.3A requires Results membership to be paid by way of a monthly direct debit. The terms and conditions do not make any provision for payment of the fee by way of a lump sum in advance. Both parties however accepted that a Results member had the option of paying the first year fee by way of a lump sum or by way of monthly instalments.

15 14. Clause 6 deals with terminating a membership. It provides as follows in relation to Results membership:

20 *“6.1 In respect of a minimum 12 calendar month membership paid monthly, as per clause 1.3A, notice to cancel must be given 3 calendar months prior to the anniversary of the start date stated overleaf, if the membership is not required past this date. If notice to cancel is not received, then the membership shall continue monthly and can be terminated at any time after the anniversary of the start date by giving 3 calendar months notice in writing to cancel.*

...

25 *6.5 In all cases payment for the notice period is due and will continue to be made on the same basis as agreed hereunder.”*

15. The principal issue in this appeal concerns what happens at the end of the minimum 12 month period of Results membership.

30 16. HMRC were told during the course of a visit that no documents would be sent to members about continued membership at the end of the minimum 12 month period and that there would be no discussions between the member and the Appellant as to whether the member wished to pay a further annual fee by way of a lump sum. Where applicable a member’s monthly direct debit would continue to be collected until 3 calendar months notice of termination was given.

35 17. At the hearing Mr Gibbon told us on instructions that if a Results member had paid the annual fee in a lump sum then at the end of the minimum term they would be asked if they wished to pay for the next year by lump sum or by monthly direct debit. No further joining fee would be payable.

18. We are unable to make any findings of fact as to what discussions might take place at the end of the 12 month minimum subscription period. In any event the

dealings between the Appellant and its members could not in the present circumstances affect the true nature of the contractual relationship, which must be determined by construing the written contract. The Appellant's case was presented on the basis that members paying by monthly direct debit would simply continue to pay by monthly direct debit. There was no evidence that any Results members, whatever payment method they had chosen for the first year, entered into a further obligation at the end of the first year to pay another annual fee.

The Law

19. We can deal with the legal framework relatively briefly. In the first instance, Article 135(1) of the Principal VAT Directive (2006/112/EEC) provides that:

“Member States shall exempt the following transactions:

...

(b) the granting and negotiation of credit and the management of credit by the person granting it;”

20. By Article 131, Member States may also lay down conditions for the purpose of ensuring the correct and straightforward application of the exemption.

21. The UK domestic provision which incorporates this exemption is Item 2 Group 5 Schedule 9 Value Added Tax Act 1994 which exempts *“the making of any advance or the granting of any credit”*. Note 3 then provides that *“Item 2 includes the supply of credit by a person, in connection with a supply of goods or services by him, for which a separate charge is made and disclosed to the recipient of the supply of goods or services”*.

22. Mr Winkley relied on a decision of the Court of Justice of the European Union in *Muys’ en De Winter’s Bouw-en-Aannemingsbedrijf BV v Staatssecretaris van Financiën [1997] STC 665*. In that case Muys was a building contractor which supplied a plot of land on which it was to construct a dwelling. The purchaser could defer payment until the land with the completed dwelling was transferred. Interest was payable on the amount deferred. The Dutch tax authorities treated interest attributable to deferred payment for the construction of the house as a supply of credit and therefore exempt. The issue related to interest for deferred payment for the land. The Dutch authorities considered that such interest was part of the actual consideration for the supply of the land.

23. It is clear from Muys that the exemption is not restricted to loans and credit granted by banking and financial institutions. It applies where credit is granted by a supplier of goods. However Advocate General Jacobs noted at [12] of his opinion:

“... the contractual arrangements and terms must be such that the credit transaction is clearly dissociable from the main supply of goods. Although it seems unnecessary to consider this point in detail in the present case, I think that requirement would generally be satisfied where, for example, a contract for

the supply of goods contained one or more specific clauses offering the customer a credit facility and setting out in full the terms on which the credit was granted, including a specified rate of interest ...”

24. Mr Winkley submitted that the domestic provisions emphasise that the person
5 receiving credit must be made aware in clear terms that a separate charge for credit is being made. Mr Gibbon did not make any submission to the contrary, but it does not seem to us that the domestic provisions require anything more or less than a separate charge for credit which is disclosed to the recipient.

25. Mr Winkley also referred us to a decision of the VAT Tribunal in *PD & G
10 Taylor t/a Riverside Sports and Leisure Club v Commissioners for HM Revenue & Customs (Decision 19354)*. That case involved a very similar issue to the present appeal, namely whether membership fees paid to a sports club were annual fees paid by monthly instalments including a supply of credit or monthly fees.

26. At [31] the VAT Tribunal stated that the issue involved identifying the terms of
15 the contract between the club and individual members. We respectfully agree with that approach. The Tribunal recorded that there was no evidence of dealings between members and the club, and that the documentary evidence was ambiguous. It went on to dismiss the appeal, apparently on the basis that the Appellant had not satisfied it that the membership fees were annual fees payable by instalments with a charge for
20 credit. The case is really of very little assistance in resolving the issue we must decide on the particular facts of the present appeal.

27. Finally we should record Mr Winkley’s submission that exemptions from VAT
must be strictly construed, which is not controversial. He went on to submit with that principle in mind that if the facts were equivocal then we should dismiss the appeal.
25 We do not accept the logic of that submission. The principle is aimed at the construction of exemptions as a matter of law. It is not engaged at the fact finding stage, where we must find facts and draw inferences on the balance of probabilities and bearing in mind the burden of proof.

Discussion

30 28. The Appellant’s case is that clause 6.1 of the terms and conditions has the effect of continuing a Results membership. No new membership or category of membership comes into existence at the end of the 12 month minimum period. The Results membership continues on the same terms and conditions, save as to termination. Where a member has paid by monthly payments, those payments continue to include
35 a charge for credit of £4.50 per month which is an exempt supply.

29. During the course of his submissions, Mr Gibbon suggested that clause 6.1 had
the effect that a notice of termination could be given by a Results member to terminate the membership on the anniversary of the start date. If such a notice was not
40 given, then notice could only be given after the anniversary of the start date, in which case the term would be either exactly 12 months or at least 15 months. It does not seem to us that this is directly relevant to the issue we must determine, but in any

event that is not how we construe clause 6.1. Clause 6.1 provides that the membership may be “terminated” at any time after the anniversary of the start date. Termination takes effect following 3 months written notice which can be given at any time following the start date. If a member wished to terminate the membership after 13
5 months, he could do so by giving at least 3 calendar months notice at any time. That construction is consistent with the description on the front of the Membership Agreement described above.

30. It is notable that the terms and conditions say nothing about the termination of a Results membership paid by way of a lump sum in advance.

10 31. Mr Gibbon drew our attention to clause 6.5, which provides that payment for the notice period will continue to be due and must be made on the same basis as previously agreed. Clause 6.5 relates only to payment for the notice period referred to in clause 6.1 which in turn applies only to Results members who pay by way of
15 monthly direct debit. It does not support Mr Gibbon’s argument that a Results membership which has been paid in a lump sum continues on the same terms after the anniversary of the start date. In particular there is no term dealing with the amount of the membership fee beyond the anniversary date or how and when it might be due for payment. It is not possible to imply such terms into the agreement without re-writing the agreement.

20 32. In our view where a member has paid the first year by way of lump sum in advance, a term may be implied into the contract that membership will cease automatically on the anniversary of the start date. That term is necessary to give the contract business efficacy because there must be some provision for such
25 memberships to come to an end. It would of course be subject to any specific agreement a particular member and the Appellant might come to as regards continuing membership.

33. Whatever method of payment was adopted by a Results member for the first year, the terms and conditions do not make provision for Results members to have an option to pay the second year by way of a lump sum and they certainly do not require
30 such a payment. If a Results member had paid a lump sum for the first year then the parties would have to enter into a new agreement as to the terms on which membership was to continue. We do not consider that use of the term “annual fee” in the Membership Description gives rise to any implied obligation on the part of a Results member to pay a yearly amount for the second and subsequent years in
35 circumstances where there are no express provisions for termination.

34. If a Results member had paid by monthly direct debit, then clause 6.1 provides that payment shall continue to be made monthly. We accept that in such a case there is no provision for a reduction in the monthly direct debit to remove the £4.50 charge for credit made in the first year. For the reasons which follow we do not accept that
40 this is properly to be regarded as a charge for credit in the second year.

35. Clause 2.9 provides that membership subscriptions may be changed at any time by the Appellant subject to 10 working days notice. The power of the Appellant to

change fees is also subject to clause 2.7 which provides that membership subscriptions “will remain at your contracted rate for the ‘minimum membership period’ shown overleaf.” In the second year of a Results membership therefore, the subscription would remain at the same rate unless the Appellant gave notice of a change.

36. We have already made the point that Results membership, at least in its first year, had an annual fee of £593.45 rather than a monthly membership fee of £53.95. We accept Mr Gibbon’s submission that a Results membership continues at the same price where the member is paying monthly. It is however necessary to know, as a matter of contract, what obligation a member has in the period after the first anniversary of the start date. Clause 6.1 provides that the membership “shall continue monthly”. The reference to the membership continuing monthly must be a reference to clause 1.3A which both parties accept provides for the first year’s annual fee to be payable “monthly by Direct Debit”. However clause 6.1 does not provide for an annual fee for the second or subsequent years.

37. In the case of a Results member who was paying by monthly direct debit, it seems to us that properly construed the terms and conditions provide for those monthly payments to continue after the first year until the agreement is terminated or until the Appellant changes the fees in accordance with clause 2.9. It cannot be said that there is any obligation to pay an annual fee for the second year. The sums paid must therefore be considered to be monthly fees for continuing membership.

38. We acknowledge that the monthly payment for Results membership in the first year includes a charge for credit. Mr Gibbon invited us to conclude that a continuing monthly payment for Results membership must also therefore include a charge for credit, otherwise a member would expect his monthly payment to be reduced by £4.50. He submitted that in practical terms this demonstrated a fallacy in the Respondents’ arguments

39. We do not accept that conclusion or that it exposes any fallacy in the Respondents’ arguments. At the end of the first year, a Results member paying monthly is subject to obligations which differ from those during the minimum period of membership. He can give three calendar months notice of termination at any time. He continues to pay £53.95 per month, but that is less than the £61.95 paid by a Lifestyle member who must also give three calendar months notice of termination. The fact that there is no reduction of £4.50 from the monthly payments in the second year does not mean that there is still a charge for credit. It remains necessary to analyse what members pay and what is supplied in return for that consideration.

40. We accept Mr Winkley’s submission that in order for there to be a charge for credit there must be a charge for deferment of a sum which would otherwise fall due immediately. In other words, there must be a sum for which credit is given, a period over which it is given, and a charge for that credit.

41. It is notable that whilst Mr Gibbon identified £4.50 per month as the charge for credit, he did not seek to identify the sum for which credit was given or the period over which it was given.

42. The contract does not provide for any Results member to be liable for an annual fee for the second and subsequent years, whatever method of payment that member chose for the first year. The Appellant is not therefore giving credit for any sum in relation to the second year. Nor is there any period over which credit is given or any disclosure of a charge for credit. We agree with Mr Winkley that without these factors there can be no exempt supply of credit. It cannot be said, based on the terms of the contract that credit was given for a second annual fee over the course of the second year because no annual fee was chargeable for the second year. The obligation of a Results member who had paid by direct debit was to continue making monthly payments until termination in accordance with clause 6.1. A Results member who had paid by lump sum had no continuing obligation to pay an annual fee for the second and subsequent years.

43. Mr Gibbon maintained that a Results member would have the option of paying an annual fee for the second year of £593.45. We do not consider that was a term of the agreement. It may be that the Appellant would accept £593.45 as payment by way of a lump sum, however that would be a separately agreed extension to the original agreement on whatever terms might be agreed as to joining fees and periodic payments. The actual terms and conditions do not include the option and it is not necessary to imply such a term.

44. In the circumstances we are not satisfied that there is any charge for credit in the second and subsequent years of a Results membership.

Conclusion

45. For the reasons given above we dismiss the appeal.

46. 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 18 JANUARY 2016