[2016] UKFTT 0414 (TC)

TC05168

Appeal number: TC/2009/12825

VAT – whether appellant an association the primary purpose of which was to make representations to the Government – on facts no – whether HMRC can assess repaid VAT under s 80(4A) VATA on basis repayment unjustly enriched appellant - yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

UKINBOUND LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, London on 2, 3 and 5 February 2016

Mr T Brown, Counsel, instructed by Charcroft Baker LLP, for the Appellant

Mr R O'Brien, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

PRELIMINARY DECISION

The history of the litigation

1. The appellant charged its members VAT on its subscription charges. On 31 January 2008, it submitted a claim to HMRC for repayment of overpaid output tax on its subscription charges as it then took the view that properly its subscription charges should have been exempt. The claim covered the period of three years (1 January 2005 to 31 December 2007) and was for £100,141.

2. HMRC accepted the voluntary disclosure and paid £100,141 to the appellant. On 4 February 2009 the appellant submitted a further voluntary disclosure, this time for the period from its registration for VAT in 1977 to 31 December 2004 (in other words the entire period of its VAT registration up to the date of the claim for which it had already been paid). This claim was for repayment of some £501,798 in VAT and HMRC by letter dated 20 February 2009 notified the appellant that it would not repay it on the basis that its subscription charges were not (in HMRC's view) exempt.

3. The letter also notified the appellant that HMRC would assess it to recover the previously repaid £100,141 which (in HMRC's view) had been repaid in error. This was followed by two assessments. Both were made on 12 March 2009. One was for £10,834 and related to VAT periods 03/05, 03/06, 03/07 and 06/07 and was made under s 73(2) Value Added Tax Act 1994 ('VATA') and the other was made under s 80(4A) VATA and was for £89,311 and related to the remaining periods in the years 2005-2007 inclusive. In total, the assessments were for £100,145 (the slight discrepancy with the original claim was not explained to me).

4. I was not informed why HMRC assessed four periods under s 73(2) VATA. It was HMRC's position that this was incorrect and all periods ought to have been assessed under s 80(4A) VATA. HMRC notified the appellant by letter dated 12 May 2009 that the entire assessment ought to have been under s 80(4A) and was therefore to be treated as if made under s 80(4A).

5. The appellant appealed HMRC's review decision dated 11 May 2009 which upheld the assessments and HMRC's refusal to repay the voluntary disclosure for all periods to end 2004. These are the appeals which have now come on for hearing.

6. The appellant also, during the course of this dispute with HMRC, periodically continued to submit claims for overpaid tax relating to its later VAT periods, in other words, those periods after 2007. Those claims, for 2008-2015, were all refused by HMRC and appealed to this this Tribunal by the appellant and have been stayed pending the outcome of the above appeals covering the period to 2007. Mr Brown invited me to consider them in this preliminary decision.

7. Mr O'Brien objected to this as those periods were not the subject of this hearing and he was not prepared to deal with them. Mr Brown then agreed that the hearing should only deal with periods before 2007.

8. So far as the years 1997-2004 were concerned, Mr Brown concurred with Mr O'Brien's position that this Tribunal was also not concerned with them. I presume this was agreed between the parties because a claim made (as this one was) in 2009 was only 'in time' to the extent it related to periods before 5 December 1996. See *Leeds City Council* [2015] EWCA Civ 1293. I have therefore not considered the periods 1997-2004.

Application to amend statement of case

9. HMRC commenced the hearing with an application to amend their statement of case. They wished to introduce an entirely new ground for resisting the appeal and that was that, irrespective of the rights and wrongs of the appellant's claim to exemption, the appellant had been unjustly enriched by the repayment to it of £100,141 and would be unjustly enriched by the claimed repayment of £501, 799 and therefore the assessment should be upheld and the claim denied irrespective of whether the appellant's subscription fee was properly exempt.

Miscarriage of justice if ground excluded?

10. HMRC's position was that they had a good case, following obiter remarks by Morgan J sitting in the Upper Tribunal in the case of *BALPPA* (see §25 below), that the appellant was unjustly enriched by the payment and claimed repayment. Their position was that it was clear that the £100,141 was not returned to the appellant's members (as there were minutes when the appellant's board referred to it as working capital for expansion), that the appellant could not return the money (neither the monies which it been repaid and which it was claiming ought to be repaid) to its members as it was prohibited from doing so by its memorandum of association, and that even if it did return the monies to its current members, they were not the same as the members who actually paid the subscriptions in 1977-2007.

11. The appellant's position was that the application was made at such short notice they were not in a position to assess its legal strength let alone assess whether it was a matter on which they could usefully call evidence. It was also Mr Brown's position that the strength of HMRC's case was irrelevant (relying on *Data Select* and *Romasave* (below)).

Delay

12. HMRC's position was that the law on unjust enrichment and members' associations was seen as complex but this was clarified by the *BALPPA* judgment which was handed down in March 2013. Moreover, HMRC did not have disclosure of the relevant internal documentation of the appellant's until the stay in the appeal was lifted in April 2014.

13. At that point, HMRC accept that they had enough information to apply to amend the statement of case but they did not in practice do so until shortly before the hearing. I was told this was because in April 2014 they looked at the disclosure with

an eye to whether it was proper disclosure but only looked at the detail of it properly when they received the trial bundles.

14. As Mr Brown pointed out, the trial bundle was received in April 2015 so it seems to be the case that the bundles were not considered at least with the unjust enrichment point in mind until immediately before the hearing. Moreover, back in the original letter claiming £501,798 the appellant had stated its position that unjust enrichment did not apply (apparently on the basis that its memorandum required the appellant to use its assets for the benefit of its members). It was for HMRC to take the point if they did not agree with the appellant.

15. Mr Brown referred me to *Romasave* [2015] UKUT 254 (TCC). That case concerned an application to bring a late appeal and considered the earlier decisions in *Data Select, Leeds City Council* and *BPP* in the Upper Tribunal. It was Mr Brown's position that even on the law as it was understood in *Romasave,* the length of the delay in time (7 years since the commencement of the litigation) must act to prevent a late amendment to the statement of case; and that was all the more so with the Court of Appeal's decision in *BPP* [2016] EWCA Civ 121 with its stricter approach to the need for adherence with time limits than the Upper Tribunal had shown in *Leeds City Council* and *BPP*, neither of which decisions now represent good law.

Prejudice?

16. HMRC did not accept that the delay in raising this point has actually prejudiced the appellant. They considered that it was unlikely, in view of what was already before the Tribunal, that the appellant could have called any evidence to show that it has or will refund its members. The point is a purely legal one which, with a little notice, the appellant's counsel could deal with. Mr O'Brien suggested, however, if the appellant wanted time to consider calling evidence I could go ahead with the hearing and hear the evidence in respect of which I had witness statements, and then adjourn to complete the evidence on unjust enrichment (if any) at a later date.

17. The appellant pointed out that, if HMRC were permitted to raise the unjust enrichment point and win on it, it will consider it is prejudiced in that had HMRC raised the point at the outset the appellant may not have proceeded with the case. Instead, it has incurred considerable legal fees fighting the case on the basis only its right to exemption was in issue.

18. HMRC considered that the question of any wasted costs ought to be dealt with at the conclusion of the hearing.

Decision

19. I gave my reasoned decision on this orally at the hearing and agreed the reasons for it would be recorded in my written decision.

20. I agreed that I must consider all relevant matters. It was relevant that the application was made so late that, if granted, there must be a later hearing to deal with

the new ground as the appellant was unable to deal properly with it in the listed hearing; it was relevant that raising matters late inevitably results in extra costs over and above the costs that would have been incurred had HMRC raised the issue on a timely basis; and it was relevant that there was a possibility the appellant would not have pursued the appeal at all had this point of law been raised at the right time, in the original statement of case.

21. But I considered that the prejudice to the appellant could be managed by (a) by changing this hearing to being a preliminary hearing, allowing a later hearing to determine whether there is actual unjust enrichment if the result of this hearing is a decision in favour of the appellant on exemption and (b) costs. So far as costs were concerned I recognised I had no general jurisdiction to award costs, but considered that the delay by HMRC in raising this issue (many months after receiving the trial bundle containing the relevant information and two years since the obviously relevant decision in *BALPPA)* did amount to unreasonable conduct and would justify a costs order in favour of the appellant, although the determination of the costs actually attributable to that unreasonable conduct would have to wait until the conclusion of the appeal.

22. I considered the strength of HMRC's case on unjust enrichment and considered it a relevant factor that, following *BALPPA*, it appeared a strong defence. Moreover, I considered that there was a difference between cases where the court is considering whether to admit an appeal at all to a case when the court is considering whether to permit an amendment to the grounds of appeal/defence of a case before it. Once proceedings are afoot, I consider there is strong public interest in the court reaching a correct decision on the applicable law and that weighed in favour of allowing the amendment. On balance, I permitted the statement of case to be amended to include HMRC's case on unjust enrichment, but directed that this hearing would be a preliminary hearing to consider in full the appeal on exemption and, as the appellant wanted the issue resolved earlier rather than later, the purely legal point on whether unjust enrichment was relevant when HMRC assessed for repayment of repaid tax. The hearing then proceeded on the exemption issue and that one legal point on unjust enrichment.

The law

The exemption

23. The exemption of which the appellant claimed the benefit was contained in group 9 of schedule 9 to VATA. It provided as follows:

> **Item no 1**
>
> The supply to its members of such services and, in connection with those services, of such goods as are both referable only to its aims and available without payment other than a membership subscription by any of the following non-profit-making organisations-
>
> ….

> (d) An association, the primary purpose of which is to make representations to the Government on legislation and other public matters which affect the business or professional interests of its members.

24. Both parties were agreed that UK law in item 1 of group 9 schedule 9 in so far as it was relevant to this case properly implemented EU law and in particular article 132 of the Principle VAT Directive ('PVD').

25. The parties also appeared agreed on the meaning and effect of item 1(d) and that it was as set out by Morgan J in the Upper Tribunal decision in *British Association of Leisure Parks, Piers and Attractions Ltd* [2013] UKUT 130 (TCC) (*'BALPPA')*. At [14] he said as follows:

> **[14]** the parties did not disagree as to the meaning or the effect of item 1(d). They agreed that the relevant legal principles were to be found in the decisions in *British Association for Shooting and Conservation Ltd* [2009] EWHC 399 … and *European Tour Operators' Association* [2012] UKUT 377 (TCC). I can summarise the principles which I derive from those authorities and other principles which were not in dispute, so far as they are relevant to the present appeal, as follows:
>
> (1) in construing item 1(d), which is an exception to a general principle of community law as to VAT, the court should adopt a strict but not a strained approach; a strict approach is not to be equated with a restricted approach; a court should not reject a claim reliant on the exemption where the claim comes within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question;
>
> (2) the reference to "primary purpose" in item 1(d) does not require the association to show that the purpose referred to in item 1(d) was the sole purpose of the association but the purpose referred to in item 1(d) must be its main or principal purpose;
>
> (3) it is possible for a body to have multiple objects so that no single object could be said to be the predominant primary;
>
> (4) the primary purpose test involves an objective enquiry, not a subjective one; the matter is to be determined primarily by an examination of the stated objects and the actual activities of the body in question; the subjective views of the officers and members of the body may throw some light on the relevant objective enquiry but those views are not to be elevated into a diagnostic test;
>
> (5) the enquiry as to the primary purpose of the body normally involves the tribunal looking at the constitutional documents of that body and other materials from which the purposes of the body can be derived against the reality of what the body does.

26. The parties were also agreed that it was possible for the association's primary purpose to have changed over time and possible therefore that it may have been

exempt for some but not all of the period for which it made a claim (although Mr O'Brien's case was it was not exempt over any period.)

27. The burden of proof is on the appellant. This is apparent from *European Tour Operators Association* [2012] UKUT 377 TCC at [26] where the FTT on this point was cited without criticism. It was also assumed in *BALPPA*. Moreover, the burden of proof is ordinarily on the appellant in tax appeals and none of the exceptions to that rule apply here.

What is within the scope of Item 1(d)?

28. What activities come within item 1(d)? Both parties were agreed references in article 1(d) to the government included the UK government and the EU government. It probably includes local governments as well but that point was not in issue on the facts of this case.

29. What was an issue was whether lobbying to a tourist board counted as political lobbying. The appellant's position was that the tourist board, in its various guises over the years, was merely an extension of DCMS (Department of Culture Media and Sport) and its predecessors and therefore the appellant's relationship with it, and it particular the representations to it, was within the scope of item 1(d).

30. It was certainly the case that to some extent the appellant saw its role as making representations to certain bodies some of which were at best only quasi-governmental and others were no more than trade associations, but to a great extent I find they did this because they perceived that that body was more effective at influencing the Government than the appellant alone.

31. Did such activity come within item 1(d)? Were representations to intermediary bodies representations to the Government? My view is, that if the appellant's primary objective was to make representations to the Government, the fact it also chose to achieve this objective indirectly by making political representations to intermediaries would not affect its entitlement to exemption. So I would decide this point in favour of the appellant but on the facts of this case it does not affect the outcome.

32. I accept that in some places in the documents there are references to 'representations' and in some cases it is clear that this was not limited to political representations made to the governmental or otherwise, but simply meant business-promoting representations made to suppliers and potential customers. I have not been misled by that. Representations to suppliers and potential customers are clearly not within item 1(d).

The facts

Appellant's corporate history

33. The appellant as such came into existence in 2007. Prior to that date, it was an unincorporated association. Originally it was known as the British Incoming Tour

Operators Association ('BITOA') but in 2004 changed its name to UK Inbound ('UKI'). On its incorporation in 2007, the appellant successfully applied to take over BITOA's VAT registration number and is therefore treated by HMRC as registered for VAT since BITOA was registered, back in 1977.

34. I will not make a distinction between BITOA, UK Inbound and UK Inbound Ltd. It does not matter for the purposes of this appeal. A reference to the appellant should be taken as a reference to the body at the relevant time with the appellant's VAT registration number.

The appellant's aims and objectives

35. A comparison of the various documents from different dates which I was shown demonstrated that BITOA's and then UKI's portrayal of its aims and objectives did change over time, although, as one would expect, it often re-used the same expressions to describe its purpose (sometimes with slight modifications).

Its contemporary written descriptions of its main aim(s)

36. The appellant had nothing from its very earliest years. But it did have its handbooks/yearbooks from 1985 and many of the intervening years to 2013. In the yearbooks 1985-1990 its main aim was expressed as:

> 'to represent the interests of" its members

37. A main aim was not mentioned in the later handbooks, but later constitutional documents dating to around 2004 show that the main aim had morphed by then to

> 'to represent the commercial and political interests' of its members

although by the November of that year, as part of the re-branding to UKI, this was expressed as:

> 'to represent the commercial interests of…' its members

38. In the same document, it also said:

> 'the primary aim of the association is (sic) help our members manage successful, profitable businesses that are part of a vibrant and sustainable inbound tourism industry.'

39. This phrase was then to be repeated again in nearly identical form over the years: for instance it appeared as the introductory phrase on its 2009 website.

40. Over the years, the appellant would also in its official documents and websites give a list of principal aims, by which I find it meant how it would achieve its primary objective as set out above. The earliest list was from its 1985-1990 yearbooks which read as follows:

- Continue to improve the quality of the services provided by members, for the benefit of visitors to Britain and to encourage

the maintenance of a high standard of facilities by all providers of tourism services;

- develop and uphold a generally accepted code of conduct in the supply of services by members;
- establish and maintain the members a recognised status, by informing the travel industry worldwide, the British government and associated agencies and the public of the activities and objectives of incoming tour operators;
- provide a forum for the exchange of ideas and information relative to the activities members;
- provide incoming tour operators with an opportunity to form and express and promulgate an independent corporate voice on matters of common interest.

41. This list did not obviously include lobbying but it was hinted at: item 3 mentioned self-publication to (amongst others) the government and such self-publication would be pointless if it did not develop into lobbying; item 5 talked of a 'corporate voice' which also indicated lobbying. By 2003 the list did expressly include lobbying: its website in 2003 said as follows:

OBJECTIVES

- to promote tourism to Britain, and to ensure that overseas operators work with a BITOA member
- ensure that BITOA members adopt ethical 'best practice' procedures with clients and suppliers
- encourage BITOA members to adopt eco-friendly practice in their business
- encourage BITOA members to support educational and training programs
- represent the political interests of BITOA members in Whitehall, Westminster and Brussels.

42. And by 2004 these read as follows (I note a very similar list had already been published in January 2002):

The aims and objectives of the association are to

- Continue to improve the quality of services provided by Members for the benefit of visitors to Britain, and to actively encourage the maintenance of a high standard of facilities from all British providers of tourism services in Britain.
- Develop and uphold a generally accepted Code of Conduct in the supply of services by Members
- Establish and maintain for members a recognised status – by informing the travel industry world-wide, the British activities and objectives of Britain's incoming tour operators.

- Provide a forum for the exchange of ideas and non commercially sensitive information in relation to the activities of the Members.
- Provide incoming tour operators and its associate members with an opportunity to form, express and promulgate an independent corporate voice on matters of common interest.
- Maintain regular liaison with central government, the British Tourist Authority, national and regional tourist boards, and other trade bodies, to develop policies to assist Members commercial activities
- Develop the creation of recognised training programmes and to develop recognised qualification standards for the benefit of both BITOA and BITOA members.
- Consult with central government and the European Commission on matters of common and commercial interest.

43. The rebranding of BITOA as UK Inbound was not just a name change but also resulted in a re-think of its aims and objectives. New aims and objectives, published in November 2004, were now shortened to three:

> **Advocacy -** to champion the interests of our members with government to ensure we have a legislative and fiscal framework that allows their businesses to grow and prosper
>
> **Professionalism** - to promote best practice and encourage lifelong learning. To facilitate the provision of vocational and management training that will improve quality, encourage staff development and provide the prospect of fulfilling and rewarding career path.
>
> **Networking**-to provide the opportunities for our members to develop relationships with suppliers, buyers and partners both abroad and in the UK through a programme of business and social events.

44. These three 'focuses' appeared under the primary aim set out above in §38 in its 2009 website and on its membership application form from around this time. A combination of the main aims (to represent the commercial interests and help members manage successful profitable businesses, as per the text in quoted in §38) and these three focuses constituted the company's objects in its 2007 memorandum of association.

Its self-description

45. BITOA's 1990 yearbook commenced with the heading, 'What is BITOA?' And is description was:

> "BITOA is the British incoming tour operators Association. Founded in 1977, the association is now recognised as the professional collective voice of the inbound tourism industry. With its large and

> comprehensive associate membership including suppliers to the industry, it is an effective focal point for the commercial sector."

46. This phrase, slightly modified, was to be repeated in later documents in later years. Another paragraph was used in its 1994/5 handbook and then slightly reformulated and re-used over the years:

> 'Individual companies or organisations, however large or important, are seldom recognised in Whitehall, Westminster or Brussels to be sufficiently objective and cross-representational to exert any influence, and therefore the resources and experience to draw from a multi—disciplined membership enables the association to present a balanced global view which is greatly valued in political circles.'

> … It is acknowledged in government circles as both authoritative and influential. This is because the BITOA Executive Council has always been committed to promoting and protecting the interests of the industry and all its component parts.

47. These three paragraphs, slightly modified and in a different order, then formed the introduction to the 2000 handbook, and up to 2006. (I did not have the 2007 handbook). The 2008 handbook for its introductory words repeated its new primary aim with 3 focuses (see §44), and this was done in some of the later handbooks (I had none later than 2013).

48. The handbooks also mentioned fairly prominently the appellant's Secretariat, which it said offered impartial advice and support to its members on industry related matters. Its membership application form dating to 2004-2008 continued on to set out other benefits of membership such as

- legal Hotline
- preferential rates for services such as insurance
- educational conferences
- members directory
- annual convention
- discounts on participating in travel trade exhibitions
- advice from Secretariat

The contemporary views of the appellant's chairpersons and other officers

49. Most the handbooks/yearbooks contained reports from the appellant's senior officers and often from its committees. These are a source of evidence about what the appellant's officers at the times in question thought the purpose of the association was.

50. In 1986, the report by the appellant's then chairman, Pat Hansen, does not really mention lobbying at all although it does mention members of the executive

committee being consulted by MPs, journalists and educationalists: mainly it talked of professionalism, education and training in the inbound tourism industry and the value of BITOA being forum for discussion, education and conferences.

51. By 1993, the chairman was Mr Stuart Crouch. His report on the front page of BITOA's newsletter for November of that year stated:

> "The primary objectives of the Association are to promote business between members of the Association and buyers of tourism services, and to lobby central government on behalf of the industry."

He went on to mention raising standards, training and collective buying power which related to the first of the two primary objectives. On the lobbying front, he said the executive Council maintained regular dialogue with ministers, civil servants, and the other main political parties as well as the British tourist authority and national tourist boards.

52. His report in the newsletter a year later was much the same: he saw the association as having two primary objectives of which one was lobbying

53. His report in the 1994/1995 Yearbook largely dealt with BITOA's lobbying activities and the prospects of government support for its members. And his contributions to the yearbook for the next two years were much the same.

54. Other officers made contributions to the handbook. Mr Richard Tobias was chief executive 1993-2003. His contribution to the 1994/5 yearbook mentioned the range of services offered to the association's members but not lobbying. His contribution to the 1996/7 Yearbook was much the same but did have a short section on the political front.

55. His report in the year 2000 handbook looked back on the previous decade and said:

> "In the 1990s new member services, and a greater emphasis on political representation and commercial benefits were key objectives of the Association. Some changes were quickly implemented-some took longer to establish. All, however, were introduced to ensure that BITOA remain proactive, relevant and meaningful in a constantly changing world to our customers, BITOA members.

56. Mr Stephen Dowd was chief executive 2003-2008 (covering the entire period of second claim). His introduction to the handbook in 2004 said:

> "BITOA is committed to helping our members enhance their professional skills and knowledge while continuing our political lobbying to ensure we have a legislative and fiscal framework that allows companies to invest in our industry, remain competitive and produce a trained and committed workforce for the future."

57. The text of a speech by the chairman in 2004 included this statement of BITOA's objectives:

> ‘the role of BITOA is to promote the interests of our members to whereever (sic) possible and to represent the views of our members to government local national and European. We also provide educational programs and networking opportunities at major event is the annual convention…’

58. Ms Rance became Chief Executive in 2008 and said she saw it as her focus to increase UKI’s lobbying. However, in cross examination she accepted that at same time her objectives as recorded in contemporary documents included growing membership, increasing revenue and extending the programme of business development activities in response to members’ needs.

59. The chairman, Rita Beckwith, by the time of the 2013 yearbook, gave a short forward in which she mentioned UKI’s various services to its members such as the annual convention and a new series of training courses. Lobbying was not explicitly mentioned, although at the end she said it was important the association continued to grow and develop its profile in the industry.

The evidence from contemporary minutes of meetings

60. The appellant provided minutes of meetings going back to 2001. The chairman’s statement given at a meeting held in the Tower of London in June 2001 comprised nearly 4 pages and a large part the second page was devoted to BITOA events in the coming months and the first to be mentioned was BITOA’s annual Parliamentary reception at the House of Commons. He said:

> ‘this is our chance to impress upon [the MPs] the importance in general of tourism as well as the particular issues that relate to the various sectors in our industry’

He went on to mention the name of the ministers in charge of tourism and said the BITOA had already established a rapport with them. But the rest of the statement dealt with non-political matters; there was mention of conferences and training, trade stands at trade shows, and a gala dinner. The major part of the speech was given over to the then current outbreak of foot-and-mouth and the reportedly disastrous effect on members’ businesses. Politics was again mentioned in relation to this. The chairman promised that BITOA was very active in offering members support, in keeping them informed, in distributing information and, fourthly, was putting its members’ case forcefully

> “with the media and with politicians”.

He went on to say

> “if there is any benefit at all to be had from the recent outbreak, it is that tourism is now very firmly on the political radar screen… You can be assured that we will not let the government forget how important tourism is to the health and wealth of Britain and we will continue to push for more funds to promote Britain overseas.”

61. The minutes of a meeting from a few months later were available. Then the chairman had not only to deal with the devastating effects of foot-and-mouth but also with the events of 9/11 on the British tourism industry. He said

> "Our objectives are clear-on the one hand, to offer our members every help and support we can during these very difficult times and, on the other, equally important, to ensure that government recognises that Britain's inbound tourism industry needs considerable additional funding"

62. But these were not the only things mentioned. The chairman referred to the House of Commons reception being a resounding success, to new special offers to BITOA members, trade exhibitions, a farm trip, a training programme, BOTOA's modern apprenticeship programme, a workshop and a proposed change to the current constitution.

63. The Chairman's speech from spring 2002 mentioned various things such as the convention, trade fairs, and the membership questionnaire. Mr Richard Tobias, who was still chief executive in 2002, spoke of the large number of telephone and email queries from members the secretariat dealt with each year and its administration of the 25 commercial member benefits; he went on to say:

> "an important part of my remit… is to represent the Association on public and private sector bodies with interesting tourism matters or issues"

and he went on to talk about various lobbying initiatives.

64. I was shown the Executive Council meeting minutes of early 2003. The secretariat report dealt with various non-political matters such as membership update convention and workshop and so on. Out of 9 items, only the sixth mentioned political activities. In my view, all the minutes showed much the same story: lobbying was always on the agenda but it was never the only thing discussed.

Other post 2007 documents

65. The post 2007 documents were after the period in issue and therefore only peripherally relevant: see §127. The Tribunal had sight of UKI's 'communication strategy document' dated October 2007 to March 2010. This listed four key messages that UKI wished to give. The first was that it was the only trade association representing the UK's inbound tourism industry. My reading of this, from the context, is that it was using 'representation' in the general sense rather than a specific sense of lobbying government. The context included the other three key messages. Those were (1) that the Association was the "authoritative and collective voice of" its members and represented their interests "to government, decision-makers, investors, legislators, press and potential overseas partners and clients", which was a message which was only in part concerned with lobbying government; (2) that tourism must move up the political agenda, which could fairly be said to entirely refer to lobbying, and (3) to ensure its members had an advantage over their competitors by raising their profile, promoting networking best practice, and by providing concessions on a

vast range of products and services. In other words, a document concerned with UKI's communications strategy was concerned with more than just lobbying.

66. UKI's 2009 business plan contained a section on business analysis and insights, the fifth bullet point of which said "lobbying is perceived as important but with limited resource and tourism framework which envisages a tourism advisory Council drawing together senior practitioners from the industry and public sector to engage with government, it is questionable that UK inbound can grow this role other than to play its part to communicate key messages about inbound tourism, initiating industry campaigns and engaging with stakeholders". None of the other 11 bullet points mentioned lobbying.

67. UKI's public affairs strategy 2007 to 2010 stated the intention of the appellant to position itself as spokes body for the inbound tourism industry in the UK with close ties to industry partners such as Tourism Alliance; however, as this was its public affairs strategy it was not representative of its entire strategy: lobbying was to be expected to be the main part of its public affairs strategy but that does not prove it was UKI's main purpose.

The officers and employees

68. The officers of UKI appeared to be unpaid persons who were also members of UKI (such as Mrs Beckwith (see below at §§87-90) and Mr Green (see below at §§79-86)). The Chief Executive was a paid employee of UKI (including Ms Rance). Virtually nothing was said about the role of the other employees. I find that while Ms Rance was CEO, UKI had four other full-time employees, all of whom worked in the secretariat with Ms Rance in charge, but I had no evidence about what they did.

69. There was some oral evidence from the witnesses that the CEO was focussed on lobbying but, while I accept that the CEO certainly undertook lobbying, and at least part of the reason for employing Ms Rance was her lobbying experience, nevertheless the documents show that the chief executive was not solely focussed on lobbying: for instance Ms Rance's job specification comprised 15 items only the last three of which were concerned with lobbying.

The sub-committees

70. BITOA had various sub-committees, including one devoted to political lobbying and liaison, and another one liaising with regional tourist boards. The 1985 handbook shows it had by then some 9 committees. While one was devoted to lobbying, and at least one other (the regional liaison committee) may have included a lobbying remit, the others did not. They included committees on hotels, membership, 'standards, ethics and grievances', transport, public relations, training and education, guides, and trade. Later handbooks showed a similar picture.

Views of members

71. The 1985 handbook including various statements, including one by an associate member of BITOA, Lord Montagu of Beaulieu. He saw BITOA as enhancing the standards of its members, providing a forum for the exchange of ideas among its members, the travel industry and government and most importantly increasing business opportunities.

72. This was a view from single member and was not necessarily representative; the appellant pointed out that Lord Montagu at the time was a member of the House of Lords and therefore may have considered it unwise to mention the lobbying side of BITOA.

73. Ms Beckwith's evidence (discussed below) was that her business joined BITOA in the 1990s because its lobbying activities were perceived to be beneficial to it.

74. Ms Rance's evidence (discussed below) was that, while lobbying had had greater emphasis in the 1990s, she implied BITOA had thereafter had to diversify its offering in order to maintain membership.

75. Minutes of a later Board of Directors' meeting in 2009 recorded Ms Rance as saying that members thought 'business information' was important and some viewed UKI as a drinking club. The company secretary in a board meeting in the same year said that in the past UKI had had a greater emphasis on lobbying but had had to re-trench due to pressure from the membership.

76. In another board meeting in 2009, Mr Green was recorded as suggesting that UKI should stop it lobbying activities and concentrate on building up its membership. In cross examination, he said it was an ironic comment as he was playing devil's advocate. While I accept that that may well be the case, the minutes record that it got a serious reply from the company secretary stating that lobbying was important to some of the members and in particular the senior people in member organisations. It was an odd exchange to have taken place if, as Mr Green said (§§80-81), everyone knew UKI's primary purpose was lobbying. The exchange only really makes sense if everyone knew that lobbying was only a part of what UKI did.

77. The 2011 business plan (which dated to after any period at issue in this appeal) noted amongst many other things that the members' feedback was that UKI's key services were political lobbying, seminars and briefings, and networking. The feedback was also that industry representation was viewed as highly important.

78. My impression from this rather scanty evidence of the members' views, is that many members did regard lobbying as significant and, in the case of some members, such as Ms Beckwith's company, as paramount, but that there was no compelling evidence that lobbying was seen at any time as BITOA's primary aim by most of its members.

The current views of certain officers

Mr Philip Green

79. Mr Green was a managing director of a travel company which had been a member of BITOA/UKI since the late 1980s/early 1990s. He was on BITOA's executive council 1992-6 and worked with Richard Tobias who was Chief Executive of BITOA at that time. Mr Green was General Secretary of BITOA 2002-2006 and its chairman 2006-2010. (He was succeeded by Rita Beckwith).

80. It was his evidence that political advocacy on behalf of its members was paramount to BITOA/UKI.

81. He was asked about the appellant's 8 published objectives set out in §42 for 2004. His explanation was that by then everyone knew that BITOA's main objective was lobbying and it did not need to be spelt out, but on the other hand it did need to publicise its 'extras' in order to get in members to make BITOA more representative of the industry and therefore more effective at lobbying. He also said the 'extras' such as best practice and training in the industry were part of BITOA's objectives at the request of the government.

82. Mr O'Brien did suggest to him that BITOA's original objectives (see §40) did not include lobbying; lobbying was added later (see §41), thus suggesting the 'extras' were not add-ons merely to support lobbying. Mr Green did not accept this analysis and said he understood BITOA was originally formed to lobby on behalf of the industry.

83. Mr Green was on the committee which re-drafted the appellant's objective(s) when it became UKI and then later incorporated (§43). He accepted in cross examination that UKI's published objectives did not make it clear that political lobbying was its main purpose but he maintained that nevertheless everyone knew this was the position.

84. I was unable to accept his evidence that, while UKI's written documents did not make plain that lobbying was UKI's principle purpose, nevertheless everyone knew this was the case. He offered no explanation why, if lobbying really was UKI's primary purpose, the documents failed to make this clear.

85. Moreover, he was also involved in Ms Rance's recruitment in 2008. The actual job specification had 15 requirements only the last 3 of which were related to lobbying. Yet Mr Green's witness statement only included 5 of the requirements: the last three and two media related ones. He said he did this because they were the most important requirements: I consider that it showed his evidence was not balanced and was wary of accepting it where it appeared inconsistent with the contemporary documents.

86. In conclusion, I did not accept as reliable Mr Green's evidence that lobbying was always paramount to UKI because I did not find it to be consistent with the contemporary published aims of the association (see §36-44) or with the

contemporary views of officers as expressed in published documents (§49-58) and in the minutes (§60-64). Those published contemporary documents indicate that lobbying was important but not that it was UKI's principle purpose.

Rita Beckwith

87. Mrs Beckwith was the chief executive of a company which had been a member of BITOA/UKI since the mid-1990s. She herself was General Secretary of UKI 2008-2010 and its Chairman from 2010-2015. Her period as chairman therefore overlapped with Mary Rance's period as chief executive of UKI and they had worked together.

88. Her evidence was that UKI's main purpose was and had always been making of representations to the Government on behalf of its members. She considered lobbying was the focus of the chief executive. As I have recorded, her company had joined UKI in 1996 because she though lobbying vital to her business.

89. She was shown in cross examination documents which appeared to indicate that lobbying was only one of number of objectives but she did not agree that that was ever the case; she had no recollection of the meeting in which Ms Rance had said some members were unhappy with the amount of lobbying and said she would not have agreed with it. Her own 2013 report (§59) was put to her but she did not accept lobbying had ever been anything but UKI's main purpose.

90. I was unable to accept what she said as entirely representative of what UKI's purpose or purposes had been: her evidence did not appear to be entirely consistent with the documents (eg §45), not even with a contemporary report of hers (§59); nor did she really recognise or seek to explain the inconsistency.

Mary Rance

91. Ms Mary Rance was Chief Executive Officer 2008-2013. Her background was not in the tourism industry and she could not speak to what happened before 2008 in relation to UKI from personal experience. It was anecdotal.

92. Her evidence was that UKI had as its overriding objective the representation of the interests of the inbound tourism industry to government. It was her evidence that UKI's chief executive was predominantly focused on external and political affairs and her witness statement gave evidence about the various lobbying activities undertaken, such as meetings with politicians. She mentioned UKI regularly made comments to the press and stated this was one of the ways in which they could influence government policy.

93. It was put to her that in a meeting of the board of directors shortly after her appointment, she had said it was not clear if UKI was

> 'a social club running events or a lobbying body'.

94. She had also said it was not clear what UKI 'was about' and that lobbying had been uncoordinated. However, I recognise not too much should be read into this as it was a speech of someone newly appointed who no doubt hoped to be recognised as improving on what had gone before. She was also reported saying later the same year that lobbying was patchy due to time constraints. In cross examination, she pointed out that there was a recession in 2009 and the appellant was losing members, and therefore revenues.

95. In cross examination, she accepted she had been wrong to say in her witness statement that UKI was an exclusively lobbying organisation but she maintained that lobbying was its main activity. It was put to her that her witness statement was not entirely reliable in that the documents of the time did not reflect her position that lobbying was the appellant's main purpose. As with the other witnesses, I was wary of accepting her evidence where it appeared at variance not only with the association's published documents (see §43-44) but what the officers themselves had said at the time, and in particular what she had done at the time (§58).

HMRC visit reports

96. HMRC was able to produce the visit reports dating back to when BITOA was first back registered in 1977 and its early years. While the officer during the 1980 visit correctly reported that BITOA was a trade association, he had clearly misunderstood exactly who BITOA represented. It does show that BITOA had about 70 members at the time. The 1993 visit report records that BITOA arranged conferences and seminars for its members and provided a yearbook and quarterly newsletters.

Was political representation UKI's primary purpose?

97. The appellant relies on its witnesses' evidence to say that political representation was the appellant's primary aim; I understand its case to have been that to the extent this was not reflected in its published documents, its published documents did not reflect the true position.

98. However, I must consider the question period by period as there is no presumption that the objectives did not change over time.

1977-1985

99. There was virtually no evidence for this period. There were no handbooks or other contemporary documents and none of the witnesses had been members 30 years ago. Mr Green believed that he had joined the appellant in either the late 80's or early 90's but could say nothing from his own experience of the period 1977-1985.

100. The only contemporary evidence was HMRC's visit report (§96) but I gain nothing useful from this. And while Mr Green stated that lobbying had always been BITOA's main purpose, I was unable to accept this for later periods for the reasons given below, and was wary of putting much weight on what he said for the reasons explained above at §§79-86. Taking into account it was at best hearsay evidence in

respect of the period 1977-1985, I reject it. There is evidence in the form of a retrospective statement made in a handbook in 1994/5 (§46) that lobbying was always something BITOA did but that is not evidence it was ever the primary purpose of BITOA.

101. In conclusion, I find that the appellant has certainly not proved that its primary purpose was political lobbying in 1977-1985.

1985-1993

102. Mr O'Brien considered the next period I should consider in a block was 1985-1993 as what documentary evidence there was for this period was fairly consistent and I agree. There was in fact little evidence for this period but more than for the earlier period.

103. Mr Green was a member for at least a part of this period but had little to say about it other than his general view that lobbying had always been the main focus of BITOA. However, as I have said, I am wary of his evidence for reasons given at §79-86 and prefer to rely on the contemporary documents.

104. These show that BITOA's main aim was to represent its members (§36). Mr Green's evidence was that this meant to represent its member's interests to the Government, in other words, it was Mr Green's view that BITOA was here stating that its main aim was political representation. I do not agree that that is a fair reading: firstly, there are many kinds of representation (see §32) and 'represent' by itself would not by itself normally be taken to mean *political* representation. Looking at 'represent' in the context in which it was used (§40) suggests it was not used to refer to political representation: on the contrary, the methods it described at the time which it would use to meet its objective do not explicitly refer to lobbying although of the 5 methods used, two of them should probably be read as referring to or including lobbying (§40-41). My conclusion is that the word 'represent' was here used was used in the more general sense of looking after the members' interests.

105. I find that looking after the members' interests did for the reasons given in (§41) include lobbying but lobbying was only one of a number of ways BITOA represented its members: the others were setting standards (bullet 1 at §40), a code of conduct (bullet 2) and providing opportunities for networking (bullet 4).

106. The Chairman's report in 1986 (§50) gave much the same impression: BITOA was at this time focussed on lobbying, education and standards. The handbooks back this up: at the time BITOA had 9 committees, only one of which was for lobbying (§70).

107. So far as member's views are concerned, I tend to discount the view expressed by Lord Montagu as it may not have been representative; nevertheless it clearly does not support the appellant's case that political lobbying was BITOA's main aim at this time.

108. The HMRC visit reports (§96) do date to this period; I don't really put any weight on them as it's not clear that the HMRC officer really understood what BITOA was about; nevertheless they clearly do not support the appellant's case that political lobbying was BITOA's main aim at this time.

109. I also take account of (§45) its self-description in 1990 as the 'professional collective voice' and 'effective focal point' but consider these very general statements which by themselves they do not show that lobbying was the appellant's main aim. Taking the rest of the details in the handbooks into account, I am not satisfied that lobbying was the appellant's main purpose in this period.

110. All the other documents, such as the minutes, do not cover this early period.

111. My conclusion on 1985-1993 is that the appellant has not satisfied me that lobbying was BITOA's primary purpose at this time. It was clearly an important aim to BITOA, as one would expect of a trade body, but it was clear that BITOA also represented the interests of its members in other ways, such as trying to establish an industry code of conduct, and best practice, education of its members and to provide its members with networking opportunities.

112. I was not satisfied that these other aims of BITOA should be seen as subsidiary to a main aim of lobbying: they are not subsidiary to lobbying as they do not support lobbying. On the contrary, they are parallel with lobbying as they are all distinct methods of representing the interests of the members. It was suggested that it was easier to be effective at lobbying if the industry could demonstrate to the Government that it had a code of practice and so on and this may be true; but there are more obvious ways in which establishing a code of conduct, training and so on support the industry. They do this by attracting customers. I was certainly not satisfied that these other objectives were there simply to support lobbying activities: the strong impression I had is that they were objectives in their own right, supporting the commercial interests of the association's members.

1993-1996

113. Mr O'Brien saw the period 1993-1996 as the first three years of a distinct decade with Mr Tobias as Chief Executive in which Mr O'Brien accepted that lobbying had become one of two main objectives of BITOA. The appellant's position, on the other hand, was that lobbying was and always had been BITOA's only primary purpose.

114. Mr Green had little specific to say about this period and, as I have said at §§79-86, I do not accept as reliable his evidence that lobbying was always the main aim of the appellant. Ms Beckwith's evidence was that she had joined BITOA at about this time due to its lobbying activities: I accept that, but one member's view does not necessarily indicate that was the views of all members. Had it been the consistent view of all members, it would be strange that the documents indicate BITOA saw itself as having other objectives (see §116 below).

115. Ms Rance's evidence was that during Mr Tobias' period as Chief Executive, 1993-2003, lobbying had become more important to the extent that Mr Tobias was criticised for dedicating UKI to lobbying to the exclusion of other activities and when in 2003 Mr Dowd (§56) was appointed as chief executive, he was charged with bringing more 'balance' to BITOA's activities. Mr Green was in a position to comment on this as he was on BITOA's executive council at the time (§79): Mr Green's view was that lobbying had always been paramount and there was no change before or after Mr Tobias. I have already said why I don't accept that view.

116. Looking at the contemporary documentary evidence, there is no actual evidence of the aims and objectives set out in official documents for 1993-1996. However, the periods immediately before had the aims and objectives set out at §40, and by 2002/4 they had morphed to those set out in §§41-42. It can be seen that those at §41-42 were a development out of the earlier aims and objectives and it is considerably more likely than not that a version somewhere in between that of §40 and that of §41/2 was in force at this time.

117. I have found that the aims and objectives at §40 did not establish lobbying as a principle aim and objective; two of the extra 3 bullets added at §41/2 clearly related to lobbying. Even so, bearing in mind the other 5 objectives, it cannot be said that this proved that lobbying was UKI's primary purpose in 2002/4. It was important but not the only principle objective.

118. Its self-description in 1994/5 (§§46-47) did give prominence to lobbying. This has to be considered with what the 1993 and 1994/5 handbooks show. The then Chairman, Mr Crouch (§§51-52) two years running stated his view that BITOA had two main aims: promoting the business of its members (by raising standards, training and collective buying power) and through lobbying. While this might show that lobbying was by the mid-1990's one of two principle objectives, it does not show that it was UKI's primary purpose.

119. Mr Tobias' reports at the start of the period do not mention lobbying; his 1996/6 report does include a short section on lobbying activities. His retrospective on the previous decade contained in the 2000 Handbook (§55) said BITOA had put greater emphasis on political representation and commercial benefits. That is really, I find, consistent with what Mr Crouch said in respect of 1993-1996.

120. In conclusion, for this period, I do not accept that in 1993-1996 Mr Tobias' main concern was lobbying, even if it became so later. If lobbying had at the earlier point been his main concern, his contemporary reports would have read rather differently. But the question is BITOA's main objective: the contemporary reports from Mr Crouch (supported by Mr Tobias' retrospective) is that lobbying was not the single main objective of BITOA; at best it was one of two main objectives, the other being commercial benefits. Even if it is correct to see all its other objectives (standards, training, collective buying power, business promotion), as set out at §41, as subsidiary aspects to an overall objective, that objective was the commercial interests of its members. And the aim of supporting the members' commercial interests was at least as much of a main aim as lobbying: it was not subsidiary to it.

121. I do not find that the appellant has made out its case that lobbying was its primary purpose in the period 1993-1996.

2005-2007

122. Most of the documentary evidence related to post 2000. As Mr O'Brien said, I could not assume that UKI's main aim(s) did not change during this period and I needed to consider what its main aim in the relevant period of 2005-7 was. Nevertheless, the earlier and later periods evidenced in the documents were of some relevance where there appeared to be continuity.

123. UKI's main aim as set out in 2004 was to represent its members commercial and political aims, or as put later the same year, its members' commercial interests (§37). By the end of 2004 (§38) it had coined a phrase that it was to repeat until 2009: its main aim was increasing its members' success and profitability in a vibrant industry.

124. This was at the time it was re-branding itself as UKI and it reconsidered its methods of achieving its aims; it ditched the list of 8 (§42) and saw itself as having 3 main methods: lobbying, professionalism (which included best practice and training) and networking (§43) . It saw itself in its contemporary documents as achieving its aim of promoting its members' commercial interests by these three main methods. Lobbying was not stated to be paramount, although it was clearly important.

125. It did give importance to its lobbying (see §47) but looking at what its officers said at the time, the message from its new Chief Executive, Mr Dowd, in 2004 (§56) was one of mixed aims, of which lobbying was only one. Ms Rance was appointed after the end this period; I have accepted her appointment was at least in part because of her lobbying skills; but even if she did increase the lobbying undertaken by UKI, that does not help its case as it only indicates that there was less lobbying before she was appointed, which is the relevant period.

126. The minutes of meetings start in 2001 (§60-64); the impression I have from them is that lobbying is important to UKI but not its sole focus. From the minutes, it is clear there are other important member benefits.

127. The post 2007 documents are of limited relevance as later than the period in question; yet I note that they give me the same impression as the minutes during and before the relevant period: lobbying is important to UKI but not its sole focus.

128. The views of the members, to the extent I have them, also give the same impression: lobbying is important but not the sole focus. I note that for this period, I had the membership application form, which listed member benefits, none of which included lobbying (§48).

129. I have rejected Mr Green's and Ms Beckwith's evidence that lobbying was always paramount to UKI; I reject Ms Rance's similar view for the same reasons.

130. My conclusion for this period is that the appellant has not made out its case that lobbying was the primary purpose of UKI during 2005-2007. The evidence shows that it was an important aim of the appellant, but the appellant had other important aims at the same time, in particular professionalism and networking.

Summary of conclusions

131. The reality, as I see it, is that throughout its existence, the appellant's main aim was always to promote its members' businesses. Although how it expressed this changed over the years, that is what its aim was. This is no surprise: it was a trade association. This explains why it not only undertook lobbying but had a secretariat dealing with member benefits, why it attended trade shows, why it offered training, instituted a code of conduct, set up best practice, had an annual conference, offered networking opportunities and so on. It explains why its main aim was always to 'represent' its members' interests, using 'represent' in the sense of look after its members' interests. Political lobbying was one of the important methods by which it realised this objective. But I find lobbying was never its primary purpose.

132. Referring to the principles set out in *BALPPA*, and in particular at [14](2) (§25), the appellant must show that lobbying was UKI's main or principal purpose and it has failed to do so in this appeal: representing its member's commercial interests was UKI's primary purpose.

133. It seems to me that to be a main aim, the objective must be a purpose to which all other purposes are subsidiary or, at least, of much less significance. It was suggested that some of its other aims, such as promoting standards in the industry, were there merely to support lobbying because lobbying was more effective if government could see the industry had a high standard offering. However, I do not accept that the evidence shows that UKI supported improvement in standards simply to support its lobbying: the documentary evidence shows that these aims were aims in themselves. They clearly went to support the main aim, not of lobbying, but of representing the members' commercial interests. Mr Green suggested that while the conference gave members opportunities for business support, networking and obtaining information, so far as UKI was concerned the purpose of the conference was to get its members' views in order to inform its lobbying activities. Again, for the same reason, I do not accept Mr Green's evidence on this as it is not consistent with the documentary evidence which shows that UKI was about a lot more than just lobbying.

134. It was also suggested that the non-lobbying objectives were subsidiary to lobbying because they were not an aim in themselves but were there to attract and retain members, making UKI more representative of the industry as a whole and therefore more effective at lobbying. I do not accept that this was the reason for its non-lobbying activities. It is inconsistent with the contemporary documents as discussed above and inconsistent with the impression given by the members themselves and what the officers said at the time. The oral evidence in the hearing was different but I have explained why I do not accept it painted an accurate picture of what UKI was all about. The non-lobbying activities were objectives in

themselves, all supporting the primary purpose of representing the members' commercial interests.

135. Referring to the principles set out in *BALPPA* at [14](3) (§25), I find UKI had a number of methods (including lobbying) of supporting its main aim of representing its members commercial interests and lobbying could not be said even to be the predominant method used to represent its members commercial interests, and this was the case even in the 1990s, when it might be accurate to describe lobbying as one of two principle methods of carrying out its objective (§118).

136. So I find UKI's non-lobbying aims were not subsidiary to its lobbying. Nor do I think it can be said that at any time the non-lobbying aims were simply of so much less significance then lobbying such that lobbying was properly the primary purpose by itself. UKI's published documents taken as a whole never suggested that lobbying was a primary aim, with other benefits merely tacked on. Even in the mid-1990s when it seems that lobbying was one of two principle methods by which it achieved its ultimate aim of representing its members' business interests, it could not be described as a main aim to which the association's other aims were subordinate. The appellant was a trade association: lobbying was very significant to it but never its principle aim. Its main aim was the representation of its members' commercial interests by identified methods which included, but was far from limited to, lobbying.

137. I have rejected the three witnesses' evidence, largely consistent with each other, that lobbying was paramount. I have explained why I have done so: which was that it was not consistent with the contemporary documents and contemporary views of officers as recorded in the documents. I consider that their roles as UKI officers must have involved a significant amount of high-profile lobbying and this may have coloured their recollection of what UKI was about. I think, however, that if UKI was principally a lobbying body, as they said in their evidence, this would have been reflected in its contemporary published documents and other materials such as minutes of meetings, and it was not.

138. The contemporary published documents provide UKI's stated objects and the handbooks and minutes and so on are contemporary evidence UKI's actual activities in the periods in issue: the test at [14](4) and (5) of *BALPPA* states that the stated objects and actual activities are how the primary purpose of the body is largely to be determined. The subjective views of the officers are not a diagnostic test; I have in any event found their evidence not reliable on the very point at issue in this appeal and so reject it.

139. As I reject the appellant's case that political representation was its primary purpose at any of the times at issue in this appeal, it follows that its membership subscriptions 1977-1996 and 2005-7 did not fall within the exemption contained in Item 1(d) of Group 9 Schedule 9 VATA and this appeal must be dismissed. Even though I decided at the outset that this would be a decision in principle, in reality my decision disposes of the entire appeal.

The applicability of s 80(3) VATA 1994 to recovery assessments under s 80(4A)

140. Having decided the 'exemption' issue against the appellant, I do not need to decide whether repayment would unjustly enrich the appellant, as there will be no repayment. There is therefore no need for a further hearing to decide whether repayment would in fact unjustly enrich the appellant.

141. I also do not need to resolve whether HMRC are entitled to recover a repayment of tax made to the appellant which HMRC could have refused to repay on the grounds it would unjustly enrich the appellant: it is clear that HMRC can recover the repayment of the £100,141 because the appellant's subscriptions were not exempt. HMRC do not need to rely on the unjust enrichment defence.

142. Nevertheless, as the submissions were made, and it seems to me the answer is clear, it may be useful for me to record my views. What I say below is on the assumptions that (1) my decision on the exemption issue was the opposite of what it is, and (2) repayment would unjustly enrich the appellant, which was a point which was not conceded and not resolved, and now will not be resolved.

The legislation

143. It was accepted and clear that the £100,141 had been credited to the appellant under s 80(1) on a claim being made by the appellant (§1). The appellant does not accept repayment would unjustly enrich it but says that in any event the unjust enrichment defence contained in s 80(3) would not apply once a repayment has been made and even if proved would not justify an assessment under s 80(4A).

144. Section 80(3) provides:

> (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.

145. Section 80(4A) provides:

> (4A) Where –
>
> (a) an amount has been credited under subsection (1) or (1A) above to any person at any time on or after 26 May 2005,
>
> (b) the amount so credited exceeded the amount which the Commissioners were liable at that time to credit to that person,
>
> the Commissioners may, to the best of their judgment, assess the excess credited to that person and notify it to him.

Tense used

146. Mr Brown referred me to the tense used in s 80(3). It refers to 'the crediting of an amount would…'. It was therefore not apt, said Mr Brown, to refer to a situation where the crediting of an amount had resulted in unjust enrichment.

147. I agree with Mr Brown with the point he makes on the tense: As I read it, s 80(3) applies at the point liability to make the repayment is established and this is clear in the tense used: 'the crediting of an amount would' result in unjust enrichment. The question is not whether the repayment did result in unjust enrichment.

148. But I do not agree with Mr Brown on the effect of that interpretation. It is true that s 80(3) is not apt to permit a recovery assessment on the basis that a repayment did unjustly enrich the claimant, but that is not relevant for s 80(4A). S 80(4A) allows a recovery assessment where at the time of the credit, HMRC were not liable to make the credit. So s 80(4A)(a) is looking at the position, not after the credit has been made, but at the point of the credit. And at that point, the present tense of 'the crediting of an amount would unjustly enrich the claimant' is apposite.

149. In other words, looking at the tense used, HMRC can raise an assessment under s 80(4A) if, at the time HMRC made the repayment, the crediting of that amount would have resulted in unjust enrichment of the appellant.

Position in section

150. Mr Brown's next point was that S 80(4A) was inserted into s 80 to occupy a position after s 80(3). Mr Brown was not making a timing point (s 80(4A) did post date s 80(3)) but simply the point that, he said, it was clear from its position in s 80 that HMRC could only consider unjust enrichment before making the repayment, and not when assessing to recover a repayment.

151. I do not agree. I think the point I made above applies to this as much as to the tense. The point is that when making a s 80(4A) assessment, HMRC's liability must be looked at at the time of the credit. So unjust enrichment is to be considered at the point of credit, and that is apparent from its position in s 80 as well as the words actually used; but that does not prevent a later recovery assessment under s 80(4A) because that later recovery assessment looks at the position at the time the money was credited.

Actual versus perceived liability?

152. Mr Brown also relied on *Ex parte Cardiff* [2004] STC 373 to support his case: as I understood this submission, what he was saying was that 'liable at the time to credit' to the taxpayer in s 80(4A)(b) must be understood as relating to perceived liability rather than actual liability and therefore because HMRC had not raised the unjust enrichment point at the time of repayment, they could not raise it later.

153. It may be I misunderstood his point on this case because it seems obvious to me that s 80(4A)(b) was clearly intended to refer to actual liability in contrast to the perceived liability which was paid under s 80(4A)(a).

154. The situation in *ex parte Cardiff* was rather different to the one in this case and did not involve s 80(3) or s 80(4A). It was also rather complex. As I understand the

case, the facts were that the Cardiff Council had mistakenly calculated an inflated output tax liability on a particular supply over a period of about a decade. When it realised its mistake, it reclaimed the amount overpaid, and HMRC paid it in so far as the claim was in time under the s 80 time limits. A large part of the claim was out of time under s 80 and HMRC refused to repay it.

155. The Council then pointed out that it was and always had been a repayment trader, and a significant amount of its repayment was tax repaid under s 33 VATA. There was no time limit on making s 33 claims. So it said that, while the original mistake was miscalculating its output tax liability, what it had actually done was restricted its s 33 claim, and it was now making an in-time claim for the remainder of its s 33 claim.

156. The Court of Appeal did not agree with this ingenious argument. It said that the Council had no remaining s 33 claim as this had been entirely discharged by the actual repayments made by HMRC and the set-off of the remainder against its output tax liability. The Court of Appeal recognised that this set-off was against perceived rather than actual output tax liability but held that no further s 33 claim could be made. The taxpayer's s 33 claims was exhausted. The taxpayer could only have made a s 80 claim to recover the overpaid output tax and it could not do so as it was out of time.

157. As I understand it, the appellant relies on *Cardiff*, as the taxpayer's s 33 claim was exhausted by being set against a perceived not actual tax liability, for the proposition that 'liable at that time' relates to perceived rather than actual tax liability. But I do not think that any authority for such a proposition can be taken from *Cardiff*. The crucial reasoning in *Cardiff* was that the taxpayer's completion of the tax return created a legal liability to pay the output tax declared on it unless and until it was amended. So it was really an actual rather than perceived liability that the s 33 claim was set against, albeit an actual liability that (had the claim been in time) would have been reduced.

158. In this situation, even assuming that the only reason HMRC could have avoided the repayment was by raising the defence of unjust enrichment, it is clear that HMRC paid an amount which exceeded what they were liable to pay. There was no equivalent to a tax return which effectively crystallised liability to pay the wrong sum. HMRC were only ever liable to pay the s 80 claim to the extent the money was actually overpaid and there was no unjust enrichment defence. S 80(4A)(b) therefore refers to actual and not perceived tax liability: indeed it would make a nonsense of s 80(4A) if that were not so.

Liable to credit?

159. I recognise that s 80(1) refers to 'liable to credit' an overpaid amount and s 80(3) refers to a defence to a claim. While I am not certain Mr Brown intended to make this point, it may have been part of the appellant's case that where s 80(4A) referred to 'liable at that time to credit…' it was referring to liability under s 80(1) *before* any defence under s 80(3) was considered.

160. If that was a part of their case, I reject it. Ordinary use of language suggests that 'liable at that time to credit' means what it says and there is no liability where there is a complete defence. S 80(3) is effectively a qualification on s 80(1): there is no liability under s 80(1) where or to the extent a s 80(3) defence exists.

Cometeb

161. Mr Brown referred me to the CJEU decision in *Cometeb* C-192/95. The CJEU there upheld the right of member states to resist refunds where the claimant would be unjustly enriched and used the language of 'resist repayment'. Mr Brown said this indicated that the CJEU did not consider that member States could use the defence to justify an assessment.

162. I do not agree. The point was not an issue in that case and the CJEU cannot be taken to have ruled on something that was not asked of them. They talked in terms of 'resist repayment' because that was factually what the member State concerned was seeking to do. It was not seeking to assess a repayment.

Marks and Spencer

163. Mr O'Brien relied on the *Marks and Spencers* C-309/06 decision of the CJEU which concerned the law then which only allowed HMRC to raise an unjust enrichment defence against payment and not repayment traders. This was held to be against fiscal neutrality and unlawful. At [8] and [53] the CJEU appeared to approve the current version of s 80(3) which post-dated the one at issue in that appeal.

164. Mr O'Brien also made the point that, in his view, interpreting the law such that it meant that HMRC could only raise the unjust enrichment defence at the time of payment, and not after the time of payment, would also be a breach of fiscal neutrality

165. I am not certain that I agree with him on this but it is irrelevant. I think the law properly construed, and without any need to refer to EU law concepts of fiscal neutrality and so on, quite clearly allows HMRC to assess where they have repaid an amount of tax which they were not liable to repay because they could have relied on a defence of unjust enrichment.

166. In any event, although I directed that this appeal would be a preliminary hearing, in the event my findings are such that the question of unjust enrichment does not arise and the entire appeal is dismissed for the reasons set out at §§97-139 above.

167. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 14 JUNE 2016