



TC06305

Appeal number: TC/2014/03029

VAT – whether branches of the appellant are persons independent from the appellant for VAT purposes – yes – whether sums received by the appellant and rebated to branches are received as agent or are consideration for supplies by the appellant – held consideration for supplies

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE NATIONAL FEDERATION OF OCCUPATIONAL PENSIONERS **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 7
and 8 November 2017**

**Julian Hickey, instructed by Foxley Kingham Chartered Accountants, for the
Appellant**

**Giselle McGowan, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

5 1. The appellant (“NFOP”) is a company limited by guarantee which was
incorporated on 20 August 2009 as the successor entity to an unincorporated
association. It is a membership organisation which represents the social interests of
approximately 83,000 occupational pensioners. This appeal relates to the VAT
10 treatment of part of the membership subscriptions collected by NFOP and paid on to
its branches as a “branch rebate”. The agreed issues for determination are as follows:

(1) whether the branches are to be treated as part of NFOP for the
purposes of VAT or as separate persons that are autonomous and
independent; and

15 (2) whether the branch rebate should be included in the membership
subscriptions paid to NFOP for VAT purposes, or should be treated as an
amount collected on behalf of branches and belonging to them.

Issue (2) only becomes relevant if the answer to issue (1) is that the branches are
independent persons.

20 2. NFOP’s position is that the branches are separate persons for VAT purposes, and
that the branch rebate is simply a collection of subscription money on behalf of the
branches, so that it should be excluded from the consideration treated as received by
NFOP from members, with only the balance being taken into account for VAT
purposes. This is the basis on which it has historically accounted for VAT. HMRC’s
25 position is that the branches are not separate from NFOP and that (whatever the
answer on issue (1)) the branch rebate element forms part of the taxable consideration
received by NFOP for VAT purposes, which then falls to be apportioned between
zero and standard rated supplies. There was no dispute that the burden of proof is on
NFOP in respect of both issues.

30 3. The decision which NFOP challenges was originally made by HMRC by a letter
dated 31 May 2011. It was confirmed in a letter dated 11 September 2013 and on
review in a further letter dated 2 May 2014. NFOP appealed to the Tribunal on 30
May 2014.

35 4. Neither party could assist by giving an indication of the amounts at stake in the
appeal. NFOP’s understanding is that, whatever the outcome of the appeal, they will
be due a refund of VAT from HMRC because of a (separately agreed) change in the
method of apportionment between standard and zero rated supplies. As I understand
it, the appeal is being brought principally to establish the position for the future and
because both parties regard the issues as one of principle that should be resolved.
40 From HMRC’s perspective the first issue at least is clearly also potentially relevant to
the VAT treatment of other organisations.

5. The position is complicated by the fact that there are some distinguishing features between branches, such that it might be possible to conclude that some of the branches are separate persons and some are not. Whilst Ms McGowan, for HMRC, did undertake an analysis which sought to group branches having common features, this was not straightforward and HMRC's stated preference at the hearing was that, if it became relevant do so, the Tribunal should make a separate decision in respect of each branch.
6. For clarity and ease of reference only, I will refer on occasion to NFOP and its predecessor unincorporated association (in each case excluding the branches) as "head office".

Evidence

7. The parties provided a helpful "Statement of Agreed Facts and Issues". There was one witness, Edwin Booth. Mr Booth is the Chief Executive Officer (CEO) of NFOP. He joined NFOP in 2007 as the Assistant General Secretary and Treasurer and became CEO in 2012 following the retirement of the then General Secretary and the merger of the existing roles to create the CEO role. His role includes being the "outward face" of NFOP, representing it in meetings with MPs, civil servants, other pension organisations and so on, and being the managing editor of its magazine. Mr Booth provided a witness statement and gave oral evidence. I accept his evidence as to matters of fact.
8. The substantial documentary evidence included a significant amount of material in respect of branches, including individual branch rules (where available), accounts for both 2011 and 2012 for most branches, and some letters from branches to HMRC volunteering their view of their independent status. The documentation also included NFOP's Memorandum and Articles of Association, together with Regulations made under the Articles. For ease of reference I have, where convenient to do so, referred to these documents together as "NFOP's constitution".

The facts

Introduction

9. NFOP is the successor to an unincorporated association originally formed in the 1930s through the coming together of local groups to provide help and support to pensioners of certain occupational pension schemes. The original name of the unincorporated association was The National Federation of Post Office and other Civil Service Veterans. It was subsequently renamed The National Federation of Post Office and BT Pensioners and later The National Federation of Royal Mail and BT Pensioners. As these names indicate, its membership traditionally comprised pensioners connected to the Post Office and what became BT. Following a merger with The National Association of British Steel Pensioners (NABSP) it later included British Steel pensioners, with NABSP becoming a branch known as the British Steel Branch, with its own sub-branches. In its current form NFOP's membership is not limited, and it now exists to help and support occupational pensioners more generally.

This reflects a decision made prior to NFOP's incorporation to allow membership to be made available to a wider group of pensioners.

10. NFOP is a company limited by guarantee. It does not have a share capital. Pensioners and others who become members of NFOP become non-voting members of the company under its Memorandum of Association, as described below. Between
5 2010 and 2014 there were approximately 83,000 members.

11. Each member of NFOP may also participate in a branch, and is invited to specify a branch when they apply to join NFOP. All the existing branches were formed prior to the incorporation of NFOP in 2009 and remained in existence when it was
10 incorporated, although it is possible that one branch was reformed after that date. Some of the branches existed prior to the creation of the original unincorporated association in the 1930s. Since 2009 a number of branches have closed but none have opened. As at 1 September 2016 (the date of Mr Booth's witness statement) there were 139 branches, down from 240 in 1971 and 270 in 1955. It appears that around 10
15 branches have closed since that date.

12. At the time of NFOP's incorporation no document was entered into at the level of any of the branches in respect of the incorporation, whether to govern their arrangements with the new legal entity or to transfer their activities to it. The documentary evidence also included no documents relating to the transfer of head
20 office activities from the previous unincorporated association to NFOP. Mr Booth's recollection was that the transfer was done by resolutions passed at an AGM, but it seems likely that some additional documentation would have been required, in particular in relation to head office employees, assets and liabilities.

13. Originally branches collected membership subscriptions directly. These
25 subscriptions included an affiliation fee which branches forwarded to head office. In 1975 the payment arrangements started to change and by the date of incorporation the standard arrangement was for subscriptions to be deducted from pensions at the point of payment. In order to obtain agreement to this from the pension scheme administrators it was necessary to change the arrangements so that the subscriptions
30 went to head office, and head office paid on part of the amounts received to branches as a "branch rebate". This is now the arrangement used for the majority of members and branches. There are some exceptions, however. Individuals can pay NFOP direct. In addition, a few existing members still pay their subscriptions to branches, with the branch retaining an amount equal to the branch rebate and paying the balance on to
35 head office. The Executive Committee has also recognised that some members, including new members, do not wish to pay by deduction or direct to NFOP, and have stipulated that they may pay their branch, provided the branch pays the full subscription on to NFOP by direct debit. In addition, at least one branch has decided to set its own membership fee and remit the subscription less the rebate to NFOP.

40 14. As described further below, individuals may join NFOP branches as "Friends" without being members of NFOP. Friends' subscriptions are set by the branch and collected by the branch, subject to a minimum of twice the branch rebate. In practice head office keeps records of Friends on its membership system, along with details of

full members, although there is no requirement for branches to identify Friends to head office.

15. It is not essential to participate in a branch. Members of NFOP who choose not to are notionally allocated to what is referred to as the “General Branch”. There is no reduction in subscription rates for those who do not participate in a branch.

Member benefits

16. A leaflet produced by NFOP summarises benefits available from membership. These include free initial advice over the phone on legal, tax, financial and benefit matters, free IT assistance, help in the event of a car accident, a magazine eight times a year, discounts on goods and services, and membership of a local branch giving opportunities for social activities and outings. There is a website and e-newsletter, and members can contact a dedicated helpline.

NFOP’s Memorandum of Association (“Memorandum”)

17. Under clause 3 of the Memorandum, NFOP’s objects are:
- “a) The promotion and protection of pension rights.
 - b) The promotion and protection of health services, transport services and other services affecting the lives of older people.
 - c) The welfare of Members and the promotion of good fellowship.
 - d) To work with other organisations that seek to improve the pensions and welfare of pensioners.
 - e) Provision of opportunities for contact between Branches and Members of all Branches and the co-ordination of their work for their mutual benefit.
 - f) To assist in the solution of problems of Members or their dependents by all suitable means.
 - g) To assist Branches and Regions with their accommodation needs for the purpose of holding business and social meetings.”
18. Eligibility for membership is governed by clause 4 of the Memorandum, which provides that membership is open to all retired and serving staff of companies and organisations which provide an occupational pension scheme, together with their spouses, partners, widows, widowers and dependents. Sub-postmasters are specifically included. Under clause 4.3, applicants for membership are invited to indicate which branch they wish to join. It is not essential that members join a branch, and it is possible to join more than one branch. Under clause 4.4 any member who feels unfairly dealt with by their branch may appeal to the Executive Committee (who may suspend the member) and ultimately to the Appeals Committee, whose decision is “binding on all parties”. (See further below in relation to the Executive Committee and Appeals Committee.)

19. Clause 5 of the Memorandum specifies powers that NFOP has to act in furtherance of its objects. These include the power:

- 5 • to arrange for volunteers to visit members, whether at home or in hospital;
- to provide members with information and advice through periodicals, magazines and newsletters;
- to provide or assist in the provision of social and leisure events and activities for members;
- 10 • to co-operate and enter into arrangements with any authorities, including any Government department, in order to promote NFOP's objects;
- to make reasonable charges for services that NFOP may provide in pursuit of its objects;
- 15 • to affiliate or accept affiliation from any body with objects similar in whole or in part to those of NFOP; and
- to enter into arrangements with any body of persons formed for all or any of the NFOP's objects or for any purpose analogous thereto with a view to the promotion of NFOP's objects, and to contribute to or receive contributions from the funds of any such body.

20 20. Under clause 6 of the Memorandum all income and property must be applied solely towards the promotion of NFOP's objects. Dividends or other profit distributions to members are prohibited. Clause 10 provides that on a winding up, each member undertakes to contribute a maximum of £1 towards debts and liabilities (in practice this is taken from the first year's subscription). Any surplus assets must be
25 transferred to another association or charity having similar objects.

NFOP's Articles of Association ("Articles")

21. Article 1 defines a number of terms used, of which the following are worth setting out in full:

Branch	means a Branch of The National Federation of Occupational Pensioners created by the Executive Committee; Branches are autonomous within the Memorandum and Articles of Association and Regulations of The National Federation of Occupational Pensioners;
Branch Delegate	means a Member in a Branch appointed by that Branch to represent the Branch as a Delegate at General Meetings and Annual Conference of The National Federation of Occupational Pensioners and who is currently resident in the

	United Kingdom;
Executive Committee	means the Executive Committee of The National Federation of Occupational Pensioners, comprising Elected Members (who all act as Directors of the Company) and Ex-Officio Members;
Elected Executive Committee Member	means a Director appointed under Article 9;
Ex-Officio Executive Committee Members	means the General Secretary and the Assistant General Secretary/Treasurer or any other Paid Officer as agreed by the Executive Committee;
Friend of The National Federation of Occupational Pensioners	means a person not eligible to be a Member as determined in clause 4.1 of the Memorandum and who has paid a subscription to a Branch of The National Federation of Occupational Pensioners, the eligibility of such persons to be determined by the Executive Committee from time to time and detailed in the Regulations produced in accordance with Article 21;
Member	means any eligible person as defined in Clause 4.1 of the Memorandum, by paying a subscription to The National Federation of Occupational Pensioners, the eligibility of such persons to be determined by the Executive Committee from time to time and detailed in Regulations produced in accordance with Article 21;

22. Mr Booth is currently the only “Ex-Officio Member”, and is not himself a member of NFOP. Other members of the Executive Committee (“Elected Members”) are drawn from the members of NFOP and are appointed at the Annual General Meeting (AGM). The Elected Members act as the Companies Act directors and only they have voting rights on the Executive Committee (Article 8). Elected Members must have been members of NFOP for at least a year and may not be employees or Ex-Officio Members of NFOP (Article 9.2). In other words it is a non-executive role. Article 13.1 provides that NFOP’s business shall be managed by the Executive Committee, so it effectively functions as the Board of the company.

23. Article 4 requires an AGM to be held each year. This is held in conjunction with NFOP’s Annual Conference. Extraordinary General Meetings may also be held. These may be requisitioned either by the Executive Committee or in some circumstances by Executive Committee Members and a specified number or proportion of Branch Delegates.

24. Proceedings at general meetings and voting are governed by Articles 6 and 7. The quorum is at least 50 Branch Delegates. Each Elected Member and Branch Delegate has one vote. It follows that membership of NFOP does not carry the right to vote unless the individual in question is either a Branch Delegate or an Elected Member.

25. Under Article 9.1, up to 10 Elected Members can be appointed at the AGM. In practice 10 appears to be the maximum number of Elected Members, although Article 8 specifies a minimum of 9 Elected Members and a maximum of 15. Appointments are made by the votes of Branch Delegates only, from names included in a list submitted to the AGM by the Annual Conference, although the Executive Committee must also approve the nominations. There are also limited powers for the Executive Committee to fill gaps in circumstances where the Annual Conference produces insufficient nominations or there is a shortfall for other reasons. Under Article 12 all Elected Members retire at each AGM but are eligible for re-election. Elected Members may also be removed before an AGM by an ordinary resolution voted on by the Elected Members and Branch Delegates (Article 10).

26. Bearing in mind the maximum number of Elected Members (at 10 or even 15) it follows from the quorum requirements that Branch Delegates will always command a substantial majority of the votes at a general meeting, sufficient to pass a special resolution. They also have the sole rights to vote on the appointment of Elected Members.

27. Under Article 21.1 The Executive Committee is empowered to make Regulations “for the proper conduct and management” of NFOP and for the purpose of prescribing classes and conditions of membership, and in particular to regulate:

- a) the creation of Branches on a geographical basis or on the basis of an associated organisation or former employer;
- b) the management of Branches, where the activities of Branches shall be managed by Branch Committees operating by Branch rules;
- ...
- e) the admission and classification of Membership of The National Federation of Occupational Pensioners, the rights and privileges of the Members, the conditions of Membership and the terms on which Members may resign or have their Membership terminated;
- f) the conduct of Members in relation to one another and to The National Federation of Occupational Pensioners’ employees;
- ...”

28. Article 21.2 provides that the Regulations may be amended, added to or repealed by an ordinary resolution of a general meeting. It also states that “so long as they shall

be in force, [the Regulations] shall be binding on all Members of The National Federation of Occupational Pensioners”, subject only to any inconsistency with the Memorandum or Articles.

The Regulations

5 29. The Regulations included in the bundles state on their face that they were made by the Executive Committee of NFOP on 27 April 2009, although the company was not incorporated until some months later. They are stated to be effective from 1 January 2010. It emerged at the hearing that the Regulations have in fact been amended since 2010, but details of the amendments were not available and therefore my findings are based on the version I saw.

30. Regulation 1 makes it clear that in the event of any inconsistency the terms of the Memorandum and Articles prevail. Regulation 1 also contains a number of definitions, including the following:

15 “‘Branch’ means a Branch of The National Federation of Occupational Pensioners created by the Executive Committee;

‘Branch Delegate’ means a Member and a Member of a Branch appointed by that Branch to represent the Branch at General Meetings and the Annual Conference;

20 ‘Branch Rebate’ means the amount, paid to Branches from the subscriptions based on a formula determined by Members at a General Meeting of The National Federation of Occupational Pensioners;

‘Member’ is as defined in clause 4 of the Memorandum;

25 ‘Member of a Branch’ means a Member who lives within the area of a Branch or who, although not living within this area, elects to be a Member of the Branch;

‘subscription’ means money paid to the funds of The National Federation of Occupational Pensioners by a Member of The National Federation of Occupational Pensioners or Friend;”

30 31. Regulation 2 deals with membership of NFOP, defining “Members of The National Federation of Occupational Pensioners” as “persons who are eligible as set out in clause 4 of the Memorandum who indicate their interest in the well-being of Members and have paid a subscription” to NFOP. Subscriptions are to be in the amounts determined by ordinary resolution at a general meeting of NFOP, as is the branch rebate. Regulation 2.7 gives the Executive Committee the right to terminate membership of any Member for “good and sufficient reason”, subject to a right to be heard and a right to appeal to an Appeals Committee. (Under Regulation 12.4, the Appeals Committee comprises three members elected by the annual conference and two members appointed by the Executive Committee.)

40 32. Regulation 4 of the Regulations makes provision for “Friends of The National Federation of Occupational Pensioners”. Friends are referred to in clause 4.7 of the Memorandum, which states that they are persons who are not eligible to be members and who are invited by a branch to take part in the social activities of the branch.

Friends may not vote at any NFOP meeting. Regulation 4.3 provides that Friends shall pay a subscription to the branch which must not be less than two times the amount of the branch rebate. Regulation 4.4 permits branches to revoke invitations to Friends and exclude them from “NFOP” activities. Mr Booth explained this as poor
5 wording: the reference should be to branch activities. I accept that explanation.

33. Regulation 5 deals with branches. Regulation 5.1 provides that branches:

“...may be created by the Executive Committee on a geographical basis or on the basis of an associated organisation or former employer.”

10 Regulation 5.2 states that the activities of the branch:

“...shall be managed by a Branch Committee, normally consisting of a Chairman, Secretary, a Treasurer and such other Members as the Branch shall from time to time determine, but shall always have a majority of Members.”

15 Regulation 5.4 provides:

““Each Branch shall enjoy autonomy but shall be managed in accordance with this Regulation and any guidance issued from time to time by or on behalf of the Executive Committee and shall carry out its activities in accordance with the Memorandum, Articles and these
20 Regulations. A Branch may adopt a constitution to establish how its activities are managed and this constitution should follow the model at Appendix 1. Any modification of this model that is in any way contrary to the Memorandum, Articles or these Regulations shall be invalid.”

25 Regulation 5.9 states:

“Branch Committees and Branch Officers shall at all times act in the execution of their offices to further the aims and objects of The National Federation of Occupational Pensioners and in accordance with the Memorandum, Articles, these Regulations and Branch
30 Regulations.”

Regulation 5.10 requires branches to hold AGMs. Regulation 5.11 deals with branch closure and provides:

“In the event of a Branch closing the Members attending the closure meeting shall choose one of the following options for the remaining
35 Branch funds after the reallocation of funds for members transferring to other Branches:

(i) To donate the funds to The National Federation of Occupational Pensioners.

(ii) To donate the funds to The National Federation of Occupational Pensioners Welfare Fund.
40

(iii) To donate the funds to The National Federation of Occupational Pensioners and The National Federation of Occupational Pensioners Welfare Fund, in a proportion agreed at the meeting.

5 Following closure, all the Branch funds remaining after all outstanding liabilities have been met will be sent to Headquarters by cheque payable to N.F.O.P. The funds [will be] held on account for 3 months at the end of which time a proportion of funds equal to the number of members wishing to transfer to another Branch(es), calculated on the number of existing branch members at the date of closure, will be paid to the Branch(es) to which the Members choose to be transferred and the remaining funds distributed according to the agreement at the closure meeting.”

15 Regulation 5.13 provides that, on closure, each member will transfer to the General Branch (see [15] above) and will be invited to indicate the branch to which they wish to transfer. It states that headquarters will consult with the receiving branch, and contemplates that that branch may refuse to take on a transferring member provided it gives written reasons. A member who feels he has been treated unfairly can appeal to the Executive Committee and failing that to the Appeals Committee, whose decision is “final and binding”.

20 34. Regulation 6 gives the Executive Committee power to suspend branch officers and anyone elected to a branch committee if it deems it necessary in the interests of NFOP subject to a right to be heard by the Appeals Committee whose decision is again said to be “final and binding”.

25 35. Regulation 7 deals with Branch Delegates. These must be appointed annually at a general meeting of the branch. At least one member must be appointed by each branch to represent it at NFOP general meetings and at the Annual Conference. The total number that a branch can appoint depends on branch membership numbers, and ranges from a minimum of two (for a membership of 400 or fewer) to a maximum of 10.

30 36. Regulation 9 allows branches to nominate branch members to stand for election to the Executive Committee. It contemplates that nominees will first be voted on by branches at the Annual Conference, on the basis of one vote for each 100 branch members, and then confirmed at the NFOP AGM.

35 37. Regulation 12 provides for the Annual Conference, which is stated to consist of the Executive Committee and Branch Delegates. It must take place immediately before the start of the AGM and serves as a “forum for the debate of motions and the discussion of matters of interest or concern”.

Branch rules

40 38. The documents bundle included 49 sets of rules provided by individual branches. Other branches did not provide rules. At least 11 branches chose not to provide their rules to head office (there being no obligation to do so). In other cases branch rules were not available. It was not clear whether in some of these cases there have never

been any written rules, but in most if not all cases the most likely explanation is that the written rules have simply been lost over time. Mr Booth explained that documentation may not be passed on when branch officers die, and branches have simply continued to operate in accordance with past practice.

5 39. As referred to in Regulation 5.4, a model constitution for branches is appended to the Regulations. This is a brief document. It states that the function of the branch is to further the objects of NFOP, in particular by providing and maintaining social links, and that it must work within the Memorandum, Articles and Regulations. It also states that management of the activities of the branch “shall be subject to the control of the
10 Executive Committee” and that only members of NFOP may vote at meetings and be elected to the branch committee. AGMs must be held. It provides for a branch committee consisting normally of a Chairman, Secretary, Treasurer and such other members as the branch determines, with the officers and committee members being elected at each branch AGM. It provides for branch closure in a way that is broadly
15 consistent with Regulation 5.11.

40. Of the sets of rules identified for the hearing, only 10 appear to have been closely based, or relatively closely based, on the model constitution appended to the Regulations and had clearly been adopted since NFOP’s incorporation (although one of these includes no requirement to work within NFOP’s constitution). A number of
20 other branches have amended their rules, or adopted revised rules, since NFOP’s incorporation but have not done so in a way that follows the model, and the amended rules do not generally include any reference to a requirement to work within NFOP’s constitution, or to its objects being to further the objects of NFOP. Of the 16 I identified in this category, 11 have amended their rules since 2009 with no reference
25 to either of these points, four have referred to the requirement to work within the constitution (or similar, in one case continuing to refer to NFOP’s predecessor organisation) but not to NFOP’s objects, and one has referred to the requirement to further NFOP’s objects but not to any need to work within its constitution.

41. The rules I saw virtually all made provision among other things for the objects of the branch, eligibility for membership, branch officers and a branch committee, and
30 AGMs. A very few dealt with branch officers, the committee and referred to AGMs but did not have express objects clauses and/or criteria for membership. Membership subscriptions are generally provided for by cross-reference to the national body (NFOP or a predecessor).

35 *Branch rebate and other income*

42. The annual subscription rates for NFOP are determined by an ordinary resolution at NFOP’s AGM. The amount of the branch rebate is determined in the same way, under a separate ordinary resolution. The documentary evidence included details of the resolutions passed in 2013. After resolutions appointing Elected Members and
40 auditors and approving the accounts, Resolution 4 agreed an increase in monthly subscriptions from 1 January 2014 to £1.70 for individuals and £2.55 for joint members (equivalent to £20.40 and £30.60 respectively on an annual basis), and

Resolution 5 set the branch rebate at £3.60 per member per annum (30p per month) from that date. Mr Booth confirmed that these rates have not increased since 2013.

43. Branch income comprises the branch rebate together with income raised at the level of the branch. The Branch Guide, referred to at [65] below, describes the branch rebate as “paid primarily to assist with the running of the branch and communication with members”.

Branch bank accounts and financial activity

44. All active branches have bank accounts in the name of the branch which are used for the purposes of their activities, and NFOP pays the branch rebate to these accounts. The branches all incur expenditure, again in the name of the branch (or through branch members who are reimbursed from the branch bank account), on items such as hire of meeting spaces, tickets, hotels for conference attendance, raffle prizes, food, hire of transport and stationery. Expenditure will generally include money spent on social events and trips (which may be subsidised by branches), and a number of branches provide a token gift at Christmas or for significant birthdays. Mr Booth’s evidence was that the rebate is mainly spent on attending the annual conference, overheads such as printing and stationery, and meeting venues, and that income raised at the branch level, including from Friends, either fully or significantly covers the branch’s social activities. A significant number of branches also make donations to charities. There is no requirement to pass any annual surplus to NFOP.

Branch financial accounts

45. Each branch is responsible for accounting for its funds. Branch Treasurers produce financial accounts detailing their annual income and expenditure. The normal approach is that these are checked and signed by two other branch members who act as auditors. The results are not, and have at no time been, incorporated into NFOP’s own accounts.

46. It appears that these accounts are produced pretty much without exception, because payment of the branch rebate is dependent on them having been produced and provided to head office. Mr Booth confirmed that, although there were examples of delays, all active branches eventually provide their accounts.

47. No branch has sufficient turnover to require it to consider whether it should register for VAT.

48. The accounts I saw were in various formats, some typed and some handwritten. Many used a pre-populated form which I infer was supplied by NFOP and which was completed in manuscript. They also contained different levels of detail about expenditure, income, assets and activity levels. There were significant variations in levels of social activity (including funds raised for that purpose) and charitable donations. The accounts were generally signed, although it was not always clear in what capacity. Many indicated how many meetings had been held in the year. A number refer expressly to branch officers, to committee or officer expenses and/or are

signed by a person identified as the treasurer, as well as by individuals acting as auditors.

Branch AGMs and branch officers

49. The evidence indicates that branches routinely hold AGMs.

5 50. My understanding of the evidence was that all active branches have one or more
officers, who will be elected at the AGM, and that it is usual to have a branch
committee. As already mentioned a treasurer is required in order to prepare the
accounts, and in practice branch officers will be needed to operate the branch bank
10 account (although on occasion another branch committee member might be an
account signatory).

Branch correspondence with HMRC

51. A total of 14 of branches have written to HMRC to state that they are autonomous.

Mr Booth's evidence

15 52. Mr Booth's witness statement explained that the "Federation" that is now NFOP
was formed in the 1930s by the coming together of local groups of GPO pensioners to
fight proposals of the then Labour government to reduce their pensions. The
Federation was the collective voice of branch members. Its rules were set by branches
at an annual conference and it was managed by volunteers elected by the branches. A
professional "head office" was only created in 1986 when the first full-time General
20 Secretary was appointed and staff were recruited. The head office continues to
provide support to the branches and members and has expanded the services and
benefits available to them.

25 53. In Mr Booth's view the Federation was created by separate branches affiliating to
it, with the branches remaining autonomous and agreeing to adopt and abide by the
Federation's overarching rules. The Federation was formed on a "bottom up" basis by
branches, and they form its "backbone". The concept of autonomy was reflected in
the Federation's rules, and this was carried forward to NFOP's constitution on
incorporation, in the definition of Branch in the Articles. The documents bundle
30 included the version of the Federation rules in force from April 2008, rule 4(a) of
which stated:

"The Federation shall be organised in Branches and sub-sections where
desired. All Branches shall enjoy autonomy and equal rights within the
Rules of the Federation..."

35 54. In cross examination Mr Booth confirmed that this also meant that branches
effectively agreed to comply with the Rules, and the same now applies to NFOP's
constitution. However, in practice Branches essentially operate independently, in
accordance with their perception of NFOP's objects. In his view most of the
Regulations are simply mechanics.

55. Mr Booth explained that the incorporation reflected professional advice. The reason for it was to limit risk. NFOP employs staff and enters into contracts, and the Executive Committee comprised lay members who were potentially at risk. The intention was that, on incorporation, the Memorandum and Articles would replicate the old rules so far as legally possible. Provisions that could not be included in those documents were reflected in the Regulations. There was no intention to change the relationship between the Federation, branches and members or the status of branches, and in his view this was a key element to obtaining agreement to the incorporation. Branches are passionate about their independence and consider that they guide, and set the course of, the Federation.

56. Mr Booth's explanation of the references to branches being "created by the Executive Committee" in the definitions of Branch in the Articles and Regulations was that it was intended to allow new branches to be created in the future in a way that did not conflict with existing branches, and it was not intended to change the status of established branches. In fact the Executive Committee of NFOP had never created a branch. However, he accepted that other provisions, for example the concept of Branch Delegates and Article 21.1(b) (see [27] above), must be read on the basis that "Branch" includes existing branches.

57. Mr Booth's witness statement provided some illustrations intended to show the autonomy of branches. In particular:

(1) Mr Booth pointed to the variation between branch rules, commenting that the only standard requirement is that an AGM is held and (if not covered at the AGM) a meeting to deal with annual conference business, should the branch choose to participate. NFOP has no power to amend branch rules or to force their submission to NFOP, and would not normally be aware of any amendments to them. As regards the provision in regulation 5.4 that any modification to the model branch constitution would be invalid if it was contrary to NFOP's constitution, he commented that most branch rules existed prior to incorporation and in practice NFOP would not become aware of inconsistencies.

(2) Mr Booth explained that branches' range of activities varies, in response to the needs and wishes of their members. A number undertake social activities as their main function, whilst at the other end of the spectrum some are "business orientated", dealing with local and national issues affecting pensioners and with little social activity.

(3) Generally each branch is able to undertake whatever activities it wishes, although from time to time the Federation has issued guidance and cautionary notes to protect branch officers. In the absence of a complaint from a member, the Executive Committee would generally be unaware of individual branch activities. If there were a complaint then the Executive Committee would act as arbitrator but in Mr Booth's view it would not be in a position to impose a solution.

(4) Although changes might be made to NFOP's constitution or other changes might be agreed at NFOP's AGM which branches were expected

to adopt, in practice at least there is no mechanism for ensuring this. For example, although all branches are supposed to have names in the format NFOP XXXX branch, the Northern Ireland branch has refused to change its name to comply.

5 (5) Mr Booth also stated his opinion that any liabilities incurred by the branch are its sole responsibility. However, there was no evidence of any disputes relating to liabilities.

10 58. On point (3), Mr Booth was referred in cross examination to the Appeals Committee and clause 4.4 of the Memorandum. His explanation was that the Appeals Committee would be comprised solely of representatives of branches: he could not be on that Committee. The structure was in place prior to incorporation but in fact the Appeals Committee has never met.

15 59. Mr Booth explained that branch financial information has never been incorporated into the Federation's accounts. NFOP's own accounts are prepared on the basis that they comply with UK accounting standards. Those accounts show membership subscriptions as a gross amount and the branch rebate is shown separately as an expense, rather than a net subscription figure being reported. This is notwithstanding that UK accounting standards require sums received as agent not to be included in revenue. Mr Booth explained this on the basis that the accounts need to be clear to members and "properly reflect in an understandable way how the Federation functions". He said that the method of presentation has been discussed with NFOP's accountants and reflects the fact that there is some discretion in the accounting treatment applied. I infer that this is most likely to be a reference to a "true and fair view" override.

25 60. The practice of withholding branch rebates unless accounts have been received (even though NFOP's position is that this is branch income) was described by Mr Booth as a "motivator", intended as a protection for NFOP's members. Mr Booth considered that NFOP has a duty to ensure that members are being looked after and their money is being managed. The non-receipt of accounts is likely to indicate that the branch is struggling, or possibly that the relevant officer has died. Withholding funds would usually prompt a response and NFOP would be put on notice of the potential need for support. In the meantime the branch rebate due to the branch would be recorded as a liability in NFOP's accounts.

35 61. Mr Booth confirmed that in his view funds received from Friends belong to the branch and that the definition of "subscription" in the Regulations, which suggests that Friends pay NFOP, does not correctly reflect the intended position.

40 62. Insurance for branch activities (excluding travel insurance) is organised by NFOP. Mr Booth's explanation was that it was more economic and simpler for those activities to be covered by NFOP's own insurance policy as branch liabilities are insignificant and they do not own or operate their own premises. There is no specific recharge to branches, or deduction from the branch rebate, in respect of insurance. Instead the insurance premium attributable to branches is charged to a separate

discretionary fund NFOP maintains in its accounts to enable it to provide further support to branches. Some branches also choose to make contributions to this fund.

5 63. Mr Booth referred to instances that he was aware of where a branch had sought guidance from NFOP having been asked to complete a corporation tax return, usually as a result of the level of interest earned on bank deposits. (HMRC accepted that one branch had filed corporation tax returns between 1993 and 2009.) Mr Booth also stated that VAT is charged on any supplies made by NFOP to branches (this has happened in some cases where administration services have been provided at the request of the branch).

10 64. Mr Booth also explained that the use of branch funds to make charitable donations has been a cause of contention. He said that the Federation (now NFOP) has guidance in place which restricts donations to charities with similar objectives, on the basis that individual members pay their subscriptions in anticipation of NFOP fulfilling its objectives. In practice some donations have been made that do not fall within these
15 guidelines. The Executive Committee has felt it inappropriate to seek to take legal action against volunteer branch officers, but instead has chosen to remind branches of the requirements. This was also the reason that specific requirements are incorporated into the Regulations dealing with dissolution (Regulation 5.11, discussed above). However, in reality branches have circumvented the requirements by distributing
20 funds in advance of calling a closure meeting or simply advising head office that the branch has closed and including a cheque for the remaining balance or stating how the funds were used. In practice this has been accepted, rather than incurring the cost of seeking to reconvene the branch and implement a formal closure process. Mr Booth also confirmed that the Welfare Fund referred to in Regulation 5.11 is a separate
25 charitable entity, and that most closures involve some amount being gifted to it.

Guidance to branches

30 65. The documentary evidence included a detailed “Branch Guide” produced by NFOP in 2013. This includes an initial statement that branches “should conduct their business in accordance with the Company Memorandum and Articles of Association and Regulations and procedures”. Specific guidance is provided on a number of areas, in particular the procedure for branch closure, a summary of the insurance cover, brief notes about the roles and duties of individual branch officers (Chairman, Secretary and Treasurer), the conduct of meetings (stating that the Chairman should have a copy of the Memorandum, Articles and Regulations available, as well as the branch rules),
35 membership records and membership subscriptions, financial matters including the operation of bank accounts and the preparation and auditing of accounts (making it clear that payment of the branch rebate will be withheld if the annual return and auditors certificate for the most recent financial period have not been received), the annual conference and AGM, magazine content and other matters such as dealing
40 with the media.

The statutory and case law background

66. The starting point is sections 1 and 4 of the Value Added Tax Act 1994 (“VATA”). These provide for VAT to be charged on supplies of goods or services made in the UK by a “taxable person” in the course or furtherance of any business.
5 Section 3 defines a taxable person as a “person” who is or is required to be registered under VATA (s 96, the general definitions section, cross refers to the definition in s 3). Section 3 reflects Article 9(1) of Council Directive 2006/112/EC (the “Principal VAT Directive” or “PVD”) which provides:

10 “ ‘Taxable person’ shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity...”

67. The concept of “person” is not defined either in the Directive or in VATA. There is a definition in Schedule 1 to the Interpretation Act 1978, which under s 5 of that Act must be applied in interpreting any Act “unless the contrary intention appears”.
15 That definition provides as follows:

“ ‘Person’ includes a body of persons corporate or unincorporate.”

68. There are a few references to unincorporated entities in VATA, in terms of “a club, association or organisation”. In particular, s 46 VATA makes provision for registration of such a body in the name of the club, association or organisation and
20 states that no account is to be taken of a change in members. Section 94 deems the provision by a club, association or organisation of facilities or advantages for members to be the carrying on of a business. In addition, there is an exemption which is aimed at membership organisations and is clearly not limited to corporate entities: see Group 9 of Schedule 9, governing supplies to members by certain non-
25 profitmaking organisations, reflecting the terms of Article 132 of the PVD.

69. There is limited relevant case law in a VAT context. The Court of Justice of the European Union (CJEU) considered the concept of “taxable person” in *Skandia America Corp. (USA), filial Sverige v Skatteverket* (Case C-/173) [2015] STC 1163 (“*Skandia*”) and in *Gmina Wroclaw v Minister Finansów* (Case C-276/14) [2016]
30 STC 267 (“*Gmina Wroclaw*”). *Skandia* concerned the VAT treatment of supplies made by a US company to a branch of that company that was a member of a VAT group. The CJEU referred to Article 9(1) and said at [25] (citing *Ministero dell'Economia e delle Finanze and another v FCE Bank plc* (Case C-210/04)) that it was necessary to determine whether the branch carried out an independent economic
35 activity, and in that regard “to determine whether that branch may be regarded as being independent, in particular in that it bears the economic risk arising from its business”. The court found at [26] that the branch did not operate independently and did not itself bear economic risks. In addition it did not have any capital of its own and its assets belonged to the US company. It was therefore dependent on it and could
40 not be characterised as a taxable person. (The CJEU went on to conclude that membership of the VAT group meant that the supplies were deemed to be provided to the VAT group and were taxable on that basis.)

70. In *Gmina Wrocław* the CJEU considered whether a municipality and its budgetary entities (including schools, cultural centres and police services) should be regarded as the same taxable person. The budgetary entities did not have separate legal personality. The CJEU held at [28] that Article 9(1) gave “the notion of ‘taxable person’ a broad definition focused on independence in pursuit of an economic activity to the effect that ... all persons – natural or legal, both public and private, even entities devoid of legal personality – which, in an objective manner, satisfy the criteria set out in [Article 9] are regarded as being taxable persons for the purposes of VAT” and at [30] that “for a body governed by public law to be regarded as a taxable person within the meaning of the VAT Directive, it must, in accordance with Article 9(1) ,... independently carry out any economic activity”. The CJEU went on to say at [33] and [34] that it was necessary to determine whether there was an employer-employee relationship¹, by checking “whether he performs his activities in his own name, on his own behalf and under his own responsibility, and whether he bears the economic risk associated with carrying out those activities”. The conclusion was that the entities were not separate because they did not bear economic risk: they did not own their own property, generate their own earnings or bear costs of those activities.

71. In *Old Parkonians Association v Commissioners of Customs and Excise* (1993) (VAT Decision 10908, LON/92/2573) the VAT Tribunal considered whether an association and three affiliated sports clubs (a cricket club, football club and lawn tennis club) constituted a single taxable person for VAT purposes. The association owned the sports grounds and facilities that the three clubs used, and they were treated as “affiliated” to the association under the association’s rules. The clubs had their own officers, fixed their own subscriptions, had their own rules and prepared separate accounts from those of the association. Rule 8 of the association’s rules dealt with affiliated clubs. Among other things it provided for the executive committee of the association to have the power to authorise the formation of an affiliated club to deal with an activity not already catered for by an existing affiliated club (subject to confirmation at the next AGM) and the power to examine and report on the finances of any club. Clubs were required to elect their own officers, formulate their own rules, keep proper books of accounts and submit audited statements to the association each year. Rule 8 also provided that on a winding up the net assets or liabilities of a club should be transferred to the association, that so far as reasonable affiliated clubs should be self-supporting and that executive committee consent was required before a club incurred a liability which it could not meet from its own funds. In addition it stated that the executive committee could require a club to amend any rule that was not consistent with the association’s own rules, the sanction for failure to do so being cessation of affiliation. Only one of the three clubs’ own rules (the lawn tennis club) properly reflected these requirements and the rules of the football club predated the rules of the association. Members of the clubs were also members of the association but association members were not automatically entitled to join a club.

¹ Article 10 of the PVD provides that the condition in Article 9(1) that economic activity be conducted independently excludes persons bound by contract of employment or other legal ties creating the relationship of employer and employee.

72. The Tribunal held that the question was whether the association and clubs were a single entity in law or whether they were legally independent, not whether they appeared to be independent in fact. It considered that previous case law provided some useful pointers as to whether or not there was more than one legal entity. Where there were rules, that would determine the issue if they were sufficiently clear and not a sham. A club with a written set of rules is more likely to be independent of its promoter. However, the absence of written rules does not necessarily mean that it is not independent: the relationship between the two clubs will be inferred from the way in which they are in fact conducted. The Tribunal also rightly noted that it is a feature of clubs that frequently there is an element of inconsistency in the rules, that they are not comprehensive and are not strictly followed.

73. The Tribunal concluded that all three clubs were independent entities. Starting with the lawn tennis club, although it did have rules consistent with the association's rules, it had its own officers, held its own meetings, prepared its own audited accounts and fixed its own subscriptions. The question was whether it was simply an arm of the association, so that the assets were throughout the association's property and the association was responsible for the club's liabilities. However, the association's rules clearly contemplated the clubs having assets: they provided for clubs to keep proper books and submit audited accounts, and also provided for assets or liabilities to be transferred to the association on winding up. The association also had no power to amend the rules of a club but only a power to disaffiliate if an inconsistent rule was not amended. The Tribunal noted that there was no provision stating that an inconsistent club rule should be of no effect (a provision which would make the power to disaffiliate superfluous), and that the tennis club could choose to disaffiliate and even to distribute its assets to its members prior to winding up. On the basis of this conclusion, the other two clubs were "a fortiori" separate.

74. *Old Parkonians* referred to the earlier VAT Tribunal cases of *The Watchet Indoor Bowling Club* (1980 Decision No 931) (LON/80/341) and *Belvedere and Calder Vale Sports Club v The Commissioners of Customs and Excise* (1981 Decision No 1026) (MAN/79/129). *Watchet* related to whether an outdoor bowling club and associated indoor bowling club were a single association or separate entities for VAT registration purposes. There were separate rules, a broader membership in the case of the indoor club (which included but was not limited to all members of the outdoor club), separate committees (albeit with the same President and Treasurer) and different payment arrangements for those who were not members of the outdoor club. Separate accounts were prepared until 1977 when a new treasurer was appointed and failed to appreciate that there were two separate clubs. The Tribunal concluded that there were two separate entities. The principal reasons given were essentially that trouble had been taken to keep separate accounts (until a treasurer was appointed who was not aware of the background) and there were differences in the membership and composition of the committees. The fact that all invoices were addressed to, and purchases were made in the name of, the outdoor club was understandable because it was the original body.

75. *Belvedere* concerned the VAT treatment of match fees paid to a club that had been formed by amalgamating three other sports clubs. The Tribunal concluded that match fees were payments to the club rather than to what was now its branches. Under the

club rules the executive committee had power to delegate conduct or management of any branch to a subcommittee. There was also provision for the main sections of the club to have separate AGMs. The Tribunal found that the effect of the rules was that the executive committee retained overall control of the activity of branches and that anything done in relation to match fees was done on the club's behalf by express or implied delegation.

76. In *Eastbourne Town Radio Cars Association v Customs and Excise Commissioners* [2001] STC 606 the House of Lords considered whether an unincorporated association whose members were taxi drivers was making taxable supplies to the members within s 94 VATA. Lord Hoffmann noted at [28] that the association had a constitution which stated its objects, provisions for admission to membership, governance by an elected committee which could make byelaws, and subscriptions, and said at [30] that there was no doubt that the association was a person, referring to ss 4 and 94 VATA and the definition in the Interpretation Act. Lord Hoffmann then made the following comments at paragraphs [32] and [34]:

“32. My Lords, an unincorporated association is, as I have said, not a legal entity. It is a number of legal persons having mutual rights and duties in accordance with rules which constitute the contract under which they have agreed to be associated. The property of the association is owned by or on trust for the individual members and subject to the rules. The liability of the individual members for the debts incurred for the purposes of the association is governed by the ordinary law of contract and agency. The rights of the members, as against each other, to avail themselves of the common property and facilities are governed by their contract...

34. ... An association cannot be defined by the enumeration of a set of necessary and sufficient conditions. What can be done is to list features which are normally present in an association. So, for example, it will usually have a set of rules which constitute a mutually binding contract between the members, a statement of its objects and provisions for its governance by a committee or committees, the admission of members and the cessation of membership (giving the association a continuity beyond its original members) and provisions (or a rule-making power) for the terms and conditions upon which members may enjoy the benefits of membership. This list of the paradigm characteristics of an association is not intended to be exhaustive. Furthermore, it is perfectly possible for contractual arrangements to lack one or more of these features and still be regarded as constituting an association. But the further the arrangements depart from those of the standard case, the less likely they are to be treated as an association for the purposes of the 1994 Act.”

Lord Cooke, Lord Hobhouse and Lord Scott all agreed with Lord Hoffmann's judgment.

77. Mr Hickey also referred to a number of cases in other contexts. In *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522 (“*Burrell*”) the Court of Appeal considered whether the Conservative and Unionist party was an

“unincorporated association” and therefore within the definition of “company” for corporation tax, being “... any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association”. The conclusion was that it was not. Lawton LJ said at page 525c:

5 "I infer that by 'unincorporated association' in this context Parliament
 meant two or more persons bound together for one or more common
 purposes, not being business purposes, by mutual undertakings, each
 having mutual duties and obligations, in an organisation which has
10 rules which identify in whom control of it and its funds rests and upon
 what terms and which can be joined or left at will. The bond of union
 between the members of an unincorporated association has to be
 contractual."

He went on to say that the starting point for examining the legal nature of the party was to consider how anyone could join it, concluding that no one could join directly
15 and there was no direct contractual link between members of local constituency
 associations and Conservative MPs or peers, and no mutual rights and obligations or
 rules governing all the members. The indications were that the separate bodies which
 make up the party co-operate with each other for political purposes but maintain
 independent existences.

20 78. In *Jane Sarah Williams v Devon County Council* [2015] EWHC 568 (Admin) the
 High Court considered whether an action group called the Sustainable Totnes Action
 Group was “a body of persons ... unincorporated” for the purposes of the definition of
 person in the Interpretation Act, in the context of the Road Traffic Regulation Act
 1984. The Deputy Judge said at [35] that the first issue to determine was whether the
25 group constituted an unincorporated association, and concluded that it did, applying
 Lawton LJ’s test in *Burrell*. It had an identifiable membership, and although there
 also needed to be some agreement between the members that requirement was
 satisfied by reference to the group’s specific aim (paragraphs [48] to [51]).

30 79. Mr Hickey also referred to a decision of the First-tier Tribunal (General
 Regulatory Chamber) which considered the meaning of “unincorporated body” in the
 context of the Localism Act 2011, *Mendoza Ltd v London Borough of Camden* [2016]
 UKFTT CR/2015/0015 (GRC). The Tribunal judge found at [19] and [20] that there
 was no sound reason to confine the meaning of the expression to an unincorporated
 association of the kind described by Lawton LJ in *Burrell* (which required the
35 members’ mutual duties and obligations to stem from contract), and referred to the
 Concise Oxford Dictionary definition of body as “an organised group of people with a
 common function”, which he said may arise from a contractual relationship but could
 arise less formally by a number of individuals coming together to further a common
 interest. He commented that in the *Jane Sarah Williams* case the expressions
40 “unincorporated body” and “unincorporated association” appeared to have been used
 interchangeably, which was not appropriate in the context of the legislation in
 question in *Mendoza*. The judge’s approach to the meaning of “body” has been
 followed in two other Tribunal cases in the same area, *Hamna Wakaf Ltd v London
 Borough of Lambeth* [2016] UKFTT CR/2015/0026 (GRC) at [72] and *Marshall &
45 others v Arun District Council* [2017] UKFTT CR/2016/0025 (GRC) at [26].

80. Finally at this point I should note the importance of heeding the warning of the Supreme Court in *WHA Ltd v HMRC* [2013] STC 943 at [26], that “decisions about the application of the VAT system are highly dependent upon the factual situations involved”. It is necessary to consider the facts carefully and have regard to all the circumstances, looking at the matter as a whole to determine the economic reality.

The procedural basis of this appeal

81. I should also refer briefly to the provisions under which this appeal is brought. The parties’ view, as expressed at the hearing, is that the appeal is being brought under s 83(1)(a) and (c) VATA.

82. Section 83(1)(a) relates to registration or cancellation of registration, and HMRC’s position is that none of the branches are entitled to be registered because they are not separate persons. I found this somewhat difficult to follow because no branch is in fact seeking to be registered. (It also appears to beg the question in the sense that, if the branches are separate persons, then it is clear that they are not party to this appeal: the appeal is brought by NFOP.)

83. To my mind the appeal is more obviously brought under s 83(1)(b), which relates to the VAT chargeable on a supply. Both the issues raised affect the calculation of the VAT chargeable by NFOP on its supplies to members in exchange for the membership subscriptions, and if the branches form part of NFOP then it should be accounting for VAT on supplies currently assumed to be made by the branches. (In the event that NFOP wins on the first issue but loses on the second, there is conceivably also a question as to whether VAT is potentially chargeable on branch rebates, as being consideration for supplies made by branches, but as regards output tax at least that would be a matter for the branches rather than NFOP.)

84. Section 83(1)(c) relates to the amount of input tax which may be credited to any person. I agree with the parties that this is potentially relevant. If the branches form part of NFOP then their expenditure should be taken into account in calculating its input tax.

85. Given my assessment of the nature of the appeal, I think that the issues I am being asked to address at this stage are only capable of determining the appeal in principle.

Submissions

The appellant’s submissions

86. Mr Hickey, for NFOP, submitted that the relationship between NFOP and the branches is effectively similar to that between a company and its shareholders. The branches control NFOP via the mechanism of Branch Delegates voting in general meeting. They appoint and remove management and can change NFOP’s constitution. They can call an EGM. The branch subscription, in the form of the branch rebate, is agreed by the branches separately from the subscription to NFOP through the same mechanism. Branches also set the Friends’ subscriptions.

87. Mr Hickey submitted that the branches are autonomous, each with their own constitutions, some of which have been updated by individual branches, and with their own management committees, bank accounts, activities and expenditure, financial accounts and AGMs at which officers are elected. Each branch has an identifiable membership. NFOP cannot influence day-to-day activity of the branches, and would not be in a position to compel branches to forward information to NFOP if it was required to be included in a VAT return. Branches may use their funds as they see fit and in practice make their own decisions about how funds are utilised.

88. Mr Hickey submitted that HMRC was wrong to rely on *Skandia* and the concept of economic independence. The starting point is what the branches are. If they meet the test for an unincorporated association described by Lord Hoffmann in *Eastbourne* then they are separate persons. The question of whether the branches carry on economic activities would only be relevant if the question of VAT registration arose in respect of them. All the branches existed before NFOP was incorporated and have always been governed by their own rules (i.e. contracts between branch members). Those contracts have survived incorporation, as indicated by the fact that some have been amended since then. Each branch can decide how it interacts with NFOP.

89. In relation to the second issue, Mr Hickey submitted that the branch rebate is not consideration for a supply made by NFOP. NFOP simply acts as an agent or cash collector in respect of the branch rebate, and the collection mechanism is for ease of administration only. The branches set the subscriptions amounts and the branch rebate through the Branch Delegate mechanism, and through separate votes. As explained by Lord Neuberger in *HMRC v Airtours Holidays Transport Ltd* [2016] STC 1509 at [47] to [50] (“*Airtours*”), the nature of the transactions carried out must be considered, and there is a supply for consideration only if there is a legal relationship pursuant to which there is reciprocal performance, with the remuneration received constituting the value actually given in return for the service supplied. Although the normal rule is that the contractual relationship is central, it is necessary to consider whether this reflects the “economic realities”. In this case, taking account of the fact that the branches existed before NFOP was incorporated and that they originally paid affiliation fees, the economic reality is that NFOP collects money for each branch.

HMRC’s submissions

90. Ms McGowan, for HMRC, submitted that the question is whether any of the individual branches constitutes a person independently carrying out any economic activity, within Article 9. The position needs to be considered separately in relation to each branch, but HMRC’s view is that the answer is the same for each branch, namely that they are not independent from NFOP for these purposes. Mr Hickey’s reliance on the Interpretation Act and cases on the meaning of person in different contexts was the wrong way to look at the real question, which is whether the branches are separate from NFOP and not whether the branches could be persons if NFOP did not exist.

91. The primary reason for HMRC’s view that the branches are not independent is that, by its self-identification as a branch of NFOP, each branch is bound by NFOP’s constitution and it is clear from that that branches are not independent. This point

should determine the issue. Individual branch rules are of limited relevance because Regulation 5.4 provides that any inconsistent rules are invalid, a key distinction from *Old Parkonians* where the association had no power (itself) to amend the rules of a club. It is irrelevant that NFOP may not in practice choose to enforce this. Although
5 branches are referred to as autonomous this is limited: see the definition of Branch in the Articles and Regulations 5.4, 5.9 and 6. Autonomy is in reality autonomy only at the pleasure of NFOP, and as in *Belvedere* ([75] above) NFOP has control and simply delegates some functions to branches. This is further illustrated by the “Branch Guide” and model branch constitution. The position did not change on incorporation:
10 the branches were part of the Federation before incorporation and everything transferred to NFOP on incorporation, with the branches agreeing to be bound by NFOP’s rules. Their continued participation in NFOP, including sending Branch Delegates to the annual conference and AGM, amounted to an acknowledgement of their acceptance of NFOP’s constitution and agreement to be bound by it.

15 92. Other relevant factors included membership, assets, liabilities, accounts and records and subscription arrangements. As regards membership, this is not controlled by branches: individuals joining NFOP are entitled to join a branch of their choice, and the Executive Committee can terminate membership. Mr Booth’s view that the Executive Committee would act as arbitrator but would not be in a position to impose
20 a solution was incomplete because it failed to reflect the role of the Appeals Committee under clause 4.4 of the Memorandum. Through this mechanism NFOP is the final arbiter. Although Friends join branches this is specifically provided for in NFOP’s constitution and under Article 1 their eligibility is to be determined by the Executive Committee. They are also “Friends of NFOP”, not the branches.

25 93. Ms McGowan submitted that the branches do not in reality own assets. Although there are bank accounts in the names of branches they are not free to deal with the assets as they wish. Activities must be carried out in accordance with NFOP’s constitution and branch officers must act in accordance with NFOP’s aims and objects (Regulations 5.4 and 5.9). The position is illustrated by the guidance relating to
30 charitable donations, which was binding by virtue of Regulation 5.4. Mr Booth acknowledged that legal action could be taken, and the fact that the Executive Committee had chosen not to make no difference. A further illustration was provided by the position on dissolution: branches could only dispose of their assets in accordance with NFOP’s rules. *Old Parkonians* was wrong on this issue. Again it was
35 irrelevant that action had not been taken in practice. In addition, Friends had no role in the decision, whereas if as suggested by NFOP they were branch members distinct from NFOP then it would be expected that they would have a say.

94. HMRC’s position is that any liabilities incurred by the branches are liabilities of NFOP, although it is accepted that branches appear to contract under either the branch
40 name or the name of individual members. Ms McGowan submitted that the fact that NFOP has obtained public liability insurance for all activities within the UK suggests that it accepts some degree of responsibility.

95. Although the fact that separate accounts are prepared is relevant, it did not change the reality of the situation. The lack of independence was supported by the fact that

branches must submit their accounts to NFOP annually. The Tribunal should take a different approach on this to *Old Parkonians*, to the extent that supports an alternative conclusion.

5 96. The fact that NFOP sets the level of membership subscriptions and branch rebates supports HMRC's position: branches relied primarily on monies from NFOP. Branches only contribute to decisions on subscription levels and rebates as part of NFOP, and Friends' subscriptions are regulated.

10 97. Other points relied on by Ms McGowan were the fact that NFOP's marketing material refers to a network of local branches (with no suggestion that by joining a branch an applicant is joining another organisation), the fact that a number of the branches' constitutions contain the NFOP logo, the fact that as NFOP requires numerous branch names are in the format NFOP followed by the branch identifier, and the fact that branch stationery generally includes the NFOP name and logo.

15 98. On the agency issue, HMRC's position is that the whole membership subscription is paid to NFOP for its membership package, including the opportunity to join a branch. There is no reference in marketing material to members paying part of the fee to branches, and the subscription is defined in the Regulations as money paid "to the funds of [NFOP]". There is no reduction in the fee if a member does not join a branch. NFOP and not the branches sets the branch rebate. If branches were charging
20 sums to their members through NFOP as agent it would also not make sense to charge Friends at least twice as much. NFOP's own accounting treatment of the branch rebate, and its ability to withhold it if accounts are not provided, are also inconsistent with those monies belonging to the branches.

Discussion: Issue (1) – are the branches separate from NFOP for VAT purposes?

25 *The principles to apply*

99. The first point to make clear is that I do not agree with Mr Hickey that *Skandia* and other EU case law is irrelevant. It provides guidance on the meaning of taxable person in Article 9(1), which must be applicable in construing the corresponding references in VATA. So whilst the definition of "person" in the Interpretation Act is
30 relevant (a point that Ms McGowan did not disagree with), it is not the only relevant criterion. The question of economic independence must be considered, and in my view earlier VAT Tribunal case law, including *Old Parkonians*, should be read in the light of this, quite apart from the caution needed in view of the fact specific nature of those cases.

35 100. The position is clearly illustrated by reference to the role of employee. Employees obviously are separate "persons", and indeed separate legal entities, from their employers. However, employees are not treated as separate persons for VAT purposes in relation to their role as employee, and the status of employee could be described as the paradigm example of the absence of independent economic activity.
40 This is made explicit by Article 10 of the PVD, but the employer-employee relationship has been relied on more broadly by the CJEU as a descriptor of whether

independent activity is being carried on: see *Gmina Wrocław* at [33] and [34]. The key question is whether there is independence in pursuit of an economic activity, and it is necessary to consider whether activities are carried on in the person's own name, on his own behalf, and whether he bears the economic risk. The CJEU also made it
5 clear that it is quite possible for an entity that does not have legal personality to meet the definition of taxable person.

101. In the light of the case law I think the most appropriate approach to adopt in this case is to consider first whether the branches are "persons" within the Interpretation Act definition on the basis that they are unincorporated associations, and then to
10 consider whether they meet the test of economic independence. (On the basis of Mr Hickey's submissions, and the conclusions I have reached, I do not need to consider whether it is possible for the test of economic independence to be met where the body in question does not meet the domestic law definition of person.)

102. Although Mr Hickey's skeleton argument included reference to case law of the
15 General Regulatory Chamber in relation to the Localism Act, which suggests that "unincorporated body" might extend to something that is not an unincorporated association, I think he was right not to pursue that in his oral argument, which focused on the status of the branches as unincorporated associations. Those cases were decided in a very different statutory context. In any event I do not think it necessary to
20 reach a final view on the point for the purposes of this decision.

Are the branches unincorporated associations?

103. The judgment of Lord Hoffmann in *Eastbourne* provides authoritative House of Lords guidance on this issue in a VAT context. I think the comments of the Court of Appeal in *Burrell* need to be read in the light of that guidance, but are essentially
25 consistent with it.

104. The key principle is that, whilst an unincorporated association is not a legal entity, it is comprised of a number of legal persons (individuals in this case) who have entered into a contract between themselves, under which they have agreed to be associated and have agreed to certain mutual rights and obligations. So as a minimum
30 there must be a contract between the members, who must by definition be an identifiable set of persons. Any assets of the association will be owned on trust for the members and liabilities will be governed by the ordinary law of contract and agency.

105. Beyond this, there are no necessary or sufficient requirements. Lord Hoffmann simply lists features that are normally present. One or more of these may be lacking
35 but the greater the departure from the normal case, the less likely the organisation is to be treated as an association for VAT purposes. The one feature I would suggest adding to Lord Hoffmann's list is that it is normally the case that the contract between members of an unincorporated association (in the form of rules) can be varied by a resolution passed at a meeting of members, rather than requiring the agreement of all
40 parties.

106. Applying the features listed by Lord Hoffmann at paragraph [34] of *Eastbourne* (see [76] above), the following features are supportive of the branches existing as unincorporated associations:

5 (1) I have no doubt that there is a contract governing the relationship between the members of each branch. Branch members, and Friends, are clearly identifiable. Although around half of the branches neither provided written rules nor had them but refused to provide them, this does not mean that no rules exist. I have concluded that the most likely explanation in most cases is that the written rules have been lost, but that the branch continues to operate in accordance with past practice. In both those cases, and in any case where for whatever reason no written rules were ever produced, the contractual arrangements between members will be based on convention and operating practices (i.e. inferred from conduct). This will include the effect of any relevant resolutions passed at meetings of the branch.

10 (2) As mentioned above, the rules I saw virtually all made provision for the objects of the branch, eligibility for membership, branch officers and a branch committee, and AGMs. A very few dealt with branch officers, the committee and referred to AGMs but did not have express objects clauses and/or criteria for membership. However, in my view any apparent deficiency is met by their affiliation to NFOP and the procedures that operate for members to become members of branches by membership of NFOP, making express provision for objects and branch membership unnecessary. I have also concluded that the branches routinely hold AGMs ([49] above).

15 (3) Membership subscriptions are generally provided for, by cross-reference to the national body (NFOP or a predecessor). Again, express provision is in my view unnecessary, except in relation to Friends where I infer that the relevant terms, and in particular subscription rates, are dealt with by resolutions passed at branch meetings.

20 (4) In each case where rules were not available it is clear that there is some form of branch officer arrangement, not least because accounts are produced and signed, and activities are organised and carried on. A number of the accounts refer expressly to individual branch officers, to committee or officer expenses and/or are signed by a person identified as the treasurer, as well as by individuals acting as auditors.

25 107. Both Lord Hoffmann and Lawton LJ in *Burrell* refer to assets or funds of the association. Lord Hoffmann refers to them being held on trust, and Lawton LJ to the rules identifying in whom control of the funds rests. In my view it is clear that the branches do hold their own assets, and that control of these assets is with the branches. In particular:

30 (1) All active branches have bank accounts in the name of the branch, the signatories for which are branch members who need have no link with

NFOP, other than (in most cases²) being a non-voting member. If branches were part of NFOP and funds belonged to it then, as a minimum, one would expect there to be some process of authorising branch signatories, as well as some level of practical control over funds, for example through the use of spending limits.

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(2) In reality branches have full control over how their funds are spent. They may make a surplus and there is no requirement to pass it on to NFOP. They can choose exactly what social or other activities they wish to spend their funds on. They may, and many do, make charitable donations, and although NFOP's position is that these should be to organisations with aligned objectives, and Mr Booth's evidence was that guidance to this effect is in place, it is clear that in practice branches clearly feel able to depart from NFOP's preferred approach. At the most (and as discussed further below) the effect of Regulation 5.4 is that guidance from the Executive Committee amounts to a contractual limitation which in my view does not affect the ownership of branch assets.

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(3) The position on dissolution also supports the existence of separate branch assets, and I disagree with Ms McGowan that *Old Parkonians* reached the wrong conclusion on this point. Even leaving to one side the fact that branches can circumvent any requirements by exhausting their assets prior to any resolution being passed to dissolve the branch, and the fact that only a few branches have adopted the model constitution and are therefore clearly complying with Regulation 5.11, that Regulation not only contemplates that branches have some scope to determine the destination of their assets, but also clearly envisages that they do hold assets and that these need to be transferred elsewhere on a dissolution. It also contemplates that funds may be transferred either to NFOP, to the Welfare Fund (a separate charity) and/or to other branches. If the funds all belonged to NFOP there would be no need for Regulation 5.11 because there would be no assets to transfer, and there would also be no need to distinguish between transfers to NFOP and transfers to other branches. I do not think it matters that Friends have no role in deciding the destination of funds, because as discussed below they are simply non-voting members of the branches.

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(4) Separate accounts are prepared for NFOP and each branch. This is not only supportive of the branches having separate assets but reflects the reality that activities at the branch level are those of the individual branches. There was no suggestion that the preparation of separate accounts was incorrect as an accounting matter. But if the assets and activities of the branches are assets and activities of NFOP it is hard to see how NFOP's accounts would reflect a true and fair view of its financial position without reflecting them in its accounts.

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² There appears to be nothing to prevent a Friend, or indeed anyone else authorised by the branch, from acting as an account signatory.

5 (5) I do not think that the position is affected in any way by the
requirement for branches to submit their accounts to NFOP annually. With
the exception of Friends, branch members are members of NFOP and pay
subscriptions to it. NFOP offers a range of services to its members, which
is stated to include the opportunity to participate in a local branch. I accept
Mr Booth's evidence that NFOP considers that it owes a duty to protect
members, and that non-receipt of accounts puts it on notice of a potential
need for support. In reality it underlines the fact that the branches and
NFOP are separate. The ability to withhold the branch rebate is the only
10 clear mechanism available to check on the branch.

15 108. There was limited evidence available in relation to branch liabilities. However, it
is clear that branches do incur expenditure and take on some liabilities, for example in
relation to the hire of meeting spaces. In my view the available evidence supports the
conclusion that any such liabilities are liabilities of the individual branch, to be met
out of its assets. I do not agree that this is affected by the fact that NFOP arranges
public liability insurance. The terms of the insurance cover were not included in the
documentary evidence, but it is common for insurance to be taken out by one person
not only for itself but for the benefit of others (such as group members or officers).
The mere fact that NFOP has taken out insurance which extends to branch activities
20 does not imply that NFOP itself bears branch liabilities, but simply that it is most
convenient and economic for NFOP to deal with insurance not only for itself but for
all branches. I also infer that it in part reflects the fact that NFOP considers that it
owes a duty of care to its members (and quite possibly also a concern that insurance
might not always be dealt with if left to the branches).

25 109. Lord Hoffmann referred specifically to the fact that it is usual for rules to provide
for admission and cessation of membership, and specification of the terms and
conditions upon which members may enjoy the benefits of membership. An important
feature of this case is that members join branches by becoming members of NFOP,
and being allocated to their requested branch. They cannot join independently as
30 voting members and there is no power, or at least no express power, for branches to
refuse to accept a member at the point that they join NFOP and request a particular
branch. They also pay a subscription set by NFOP in general meeting. In practice
branches do control the membership of Friends, but Friends are non-voting, the
Articles appear to allow the Executive Committee to determine their eligibility and (at
35 least according to the Regulations) subscription rates for Friends are partially
controlled by NFOP. Cessation of (full) membership is also not controlled by the
branches, at least if the Regulations are complied with: see [31] above. Clause 4.4 of
NFOP's Memorandum also gives the Appeals Committee, a body of NFOP, powers to
adjudicate over disputes between branches and members. However, branches can
40 refuse to take on members from a branch that has closed ([33] above).

110. Overall I do not think that these membership related aspects are such as to
prevent each of the branches from constituting an unincorporated association. I see no
reason in principle why eligibility for membership of an unincorporated association
should not be defined by reference to membership of another body, or why members
45 of an unincorporated association should not agree that subscription rates should be

controlled or partially controlled by another entity. In reality, the chances of an individual choosing to join a branch through NFOP in circumstances where members of the branch do not want that person as a member would be very small. Generally the individual would know one or more members of that branch and would be joining because they wish to participate in its activities with those other members. In most cases other members will probably have encouraged the individual to join. Even if an issue did arise it is certainly not the case that all unincorporated associations have terms which provide for members to be admitted, or indeed excluded, only if agreed or proposed by one or more existing members (indeed in *Burrell Lawton LJ* referred to the ability to join or leave “at will”). The provision for reference to an Appeals Committee – assuming for present purposes that it is enforceable in a branch context – is analogous to a contractual agreement which provides for arbitration or some other agreed disputes mechanism. It, together with some of the other provisions in NFOP’s constitution in respect of branches, can properly be explained by reference to the duty of care that NFOP considers that it owes members, with whom it has a direct relationship under NFOP’s own membership and subscription arrangements.

111. In relation to Friends, I should clarify that I infer that the provision in Article 1 for their eligibility to be determined by the Executive Committee is an error, probably arising from a partial copying of the definition of Member in the same Article. The same applies to the reference to Friends in the definition of subscription in the Regulations: Friends’ subscriptions are clearly paid to and retained by the branches and not NFOP. I also do not think that any significance can be attached to the labelling of them as “Friends of The National Federation of Occupational Pensioners” rather than Friends of the branches, as suggested by Ms McGowan. In any event I do not consider these points to be significant. I have already concluded that there is no difficulty in principle with membership eligibility being set by reference to membership of another body. The same must apply to other criteria set by another body. Friends are simply non-voting members of branches. They are not in fact members of NFOP. As non-voting branch members it is hardly surprising that, for example, they do not have a say about the destination funds on a dissolution.

112. I should also clarify that I do not consider that the references to branches being “created by the Executive Committee” in the definitions of Branch in the Articles and Regulations has any effect on the status of the branches. I accept Mr Booth’s explanation that the reference was included to allow new branches to be created following incorporation, but it can have no application to existing branches. As far as existing branches are concerned it is effectively an error in the drafting, and references to a Branch must be read as including existing branches where appropriate.

113. Accordingly, I consider that each of the branches is an unincorporated association within the test described by Lord Hoffmann in *Eastbourne*. I now turn to the question of economic independence.

Independence: nature of relationship between NFOP and branches

114. Mr Hickey submitted that the relationship between NFOP and the branches is similar to that between a company and its shareholders. Ms McGowan disagreed and

submitted that this illustration was the wrong way up: NFOP controls the branches rather than vice versa. Mr Hickey also argued that the branches, rather than NFOP, set the branch rebate.

115. I did not find either of these approaches particularly helpful. The members of NFOP are individuals, most but not all of whom will be members of branches (some are notionally allocated to the General Branch). Most of the members are non-voting. NFOP's Articles confer voting rights on the elected Branch Delegates and on members elected to the Executive Committee (Elected Members). As a company law matter, subscription rates to NFOP and the level of the branch rebate are both set by NFOP through the mechanism of an ordinary resolution passed in general meeting. Whilst the Branch Delegate mechanism, combined with the quorum requirements, means that in practice the branches can be said to set the branch rebate (and indeed to control NFOP) on a collective basis, I do not think that the legal mechanism can be ignored. The fact that two separate resolutions are passed, one to set subscription levels and one to set the branch rebate, does not affect this. It is also certainly not the case that any individual branch has any control, whether over the level of the branch rebate or over NFOP more generally.

116. However, it is also not correct to say that the true picture is the "other way up". NFOP does not in any sense own the branches. Whether and to what extent it controls them, and the extent to which that is relevant, is discussed below.

The effect of NFOP's constitution – the "model branch"

117. Ms McGowan's primary submission was that the reason why branches are not independent is that this is made clear by NFOP's constitution, by which each branch is bound. The definition of Branch in the Articles makes it clear that branches are only autonomous within NFOP's constitution. Article 21.1 empowers the Executive Committee to make Regulations, including in respect of the management of branches. Regulation 5.4 is explicit that branches must be managed in accordance with Regulation 5 and any guidance issued by the Executive Committee, with any modification to the model constitution being invalid. Regulation 5.9 makes it clear that branch committees and officers must at all times act to further the aims and objects of NFOP and in accordance with NFOP's constitution, with Regulation 6 giving the Executive Committee power to suspend branch officers. Mr Booth also accepted in cross examination that branches effectively agreed to comply with NFOP's constitution (see [54] above).

118. I have concluded that this submission fails. In doing so, I have first considered the position of a notional "model branch" from NFOP's perspective (albeit that there was no evidence demonstrating that such a thing exists), namely a branch that adopts and follows the model constitution and all guidance issued by the Executive Committee (as referred to in Regulation 5.4). Among other things, this means that the activities of the branch further NFOP's objects and that it at all times works within NFOP's constitution. The model constitution also includes a statement that the management and activities of the branch are subject to the control of the Executive

Committee. If such a model branch is independent for VAT purposes, then there can be no doubt that all actual branches must be independent.

119. As a starting point, my conclusion that the branches are each unincorporated associations applies to the model branch. There are branch rules, it is governed by a committee and has branch officers, it has identifiable members (including the ability to take on non-voting members in the form of Friends), it owns and controls property, takes on liabilities and prepares its own accounts.

120. Applying the principles described in *Skandia*, the model branch is also independent. It is clear from the reference to “in particular in that it bears the economic risk arising from its business” in paragraph [25] of the judgment (see [69] above) that the key focus is on economic risk. It is not a focus on control in a voting or management sense, or a comment about the scope of the activities that may be carried out. It is an economic test. In *Skandia* the branch did not have capital or assets and did not itself bear any economic risks. Similarly in *Gmina Wroclaw*, the focus was on whether there was something akin to an employment relationship, or whether the budgetary entities performed activities in their own name, on their own behalf and under their own responsibility, and whether they bore economic risk. The conclusion was that they were not separate because they did not bear economic risk, since they did not own their own property, generate their own earnings or bear costs.

121. In this case the model branch does bear economic risk. It has its own income, in the form of the branch rebate together with income raised from its own activities. It owns its own property (essentially the balance on its bank account or accounts) and is fully responsible for managing its own resources. This is recognised by Article 21.1(b), which refers to the management of branches by branch committees operating under branch rules, as well as by Regulation 5.2. It decides what activities to carry out and incurs liabilities in that connection. It has the capacity to take, and in practice will take, some economic risk, for example in booking trips, hiring halls, acquiring refreshments for events that may or may not be well attended, and so on.

122. I do not think it is relevant to this that the nature of the model branch’s activities are to some extent circumscribed by the fact that it has committed to work within NFOP’s constitution and to follow its objects, or to accept guidance from the Executive Committee, or indeed that under the model constitution it has adopted it accepts that the management and activities of the branch are subject to the control of the Executive Committee. Quite apart from the fact that these limitations still leave a lot of leeway to the branch in determining what activities it may carry out, they are best described as aspects of control of the way in which the branch is managed and the types of activity it undertakes, which is not the test. Although I think control is of some relevance, the key focus is on control of economic resources, and in particular control of risk. An analogy would be to consider the position of a subsidiary within a corporate group. The directors of the subsidiary will typically have power to manage its affairs, but their ability to do so will be circumscribed by the control of the parent company, not only in terms of its ability to remove and replace the board, but also in practice for other reasons, for example through dependence on other members of the group for resources, including financial resources and other support. Yet there is no

question that a subsidiary, even with heavily circumscribed activities and close control by the parent, is quite capable of carrying on independent economic activity. It does so because it owns its own assets and takes on its own liabilities, albeit within any limitations set by the group. In contrast, a branch of a company would almost certainly not be capable of doing so, for the reasons described in *Skandia*.

123. In this case the activities of the model branch are somewhat restricted. Among other things it has agreed to follow Executive Committee guidance as well as NFOP's constitution, and under Regulation 6 the Executive Committee can suspend branch officers or anyone elected to the branch committee. However, I do not see any difference in principle between this and the position of a subsidiary in a corporate group. Like that subsidiary, the branch is subject to some restrictions but there are good reasons for this, since it (or more strictly its members) benefits from being part of a wider organisation, including in relation to the receipt of the branch rebate and the other assistance and support provided by head office. I do not think that it is correct to conclude that an organisation necessarily sacrifices its independence for VAT purposes because, for the benefit of its members and in order to generate income (in the form of the branch rebate), it agrees to abide by rules set by another organisation. It would only do so if the arrangements are such that the organisation does not meet the economic test referred to in *Skandia* and *Gmina Wroclaw*.

20 *The effect of NFOP's constitution – other issues*

124. Even if I am wrong in my approach to the position of a notional model branch and the relevance of any control NFOP has over branches, I think there are a number of other problems with HMRC's approach that deserve consideration.

125. An initial point is that it is clear that any branch has power to amend its own rules. A number of sets of branch rules make specific provision for future amendments, sometimes by a simple majority vote and sometimes by a specified proportion of votes cast. For those sets of rules that do not have any express provision, including the model constitution, the power to make alterations must be implicit. It is worth pointing out that the few branches that do now follow the model constitution can only have achieved this by agreeing to alter their existing rules, no doubt by a resolution passed by a majority in a branch meeting. A branch that has chosen to adopt the model constitution could change its rules in future.

126. Secondly, Ms McGowan's submissions effectively assume that NFOP's constitution, including the Regulations and any guidance provided by the Executive Committee, prevail over branch rules, and will do so to the extent of striking down any inconsistent provisions. She placed particular reliance on the reference in Regulation 5.4 to conflicting provisions being invalid, and submitted that this also meant that any future alteration of branch rules in a way that was inconsistent with NFOP's constitution would have no effect. Ms McGowan made no specific submissions about the legal basis for this beyond the express terms of the provision, but I understood her to rely on those provisions being binding in contract between all members of NFOP.

127. There are a number of potential difficulties with this approach. The legal basis for the contractual nature of the relationship between a company and its members is now contained in s 33 Companies Act 2006 (“CA 2006”). Section 33(1) provides:

5 “The provisions of a company’s constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions.”

128. Under s 17 CA 2006 a company’s constitution comprises its articles (together with certain resolutions and agreements referred to in s 29, which is not relevant). As a company created before 1 October 2009, the provisions of NFOP’s Memorandum are treated as provisions of its articles (under s 28). Therefore, for the purposes of s 10 33(1) NFOP’s constitution comprises its Memorandum and Articles. In the absence of any submissions on the point I am not persuaded that the provisions of the Regulations are included. I accept that Article 21 contemplates Regulations being made, and that Regulation 21.2 states that the Regulations shall be binding on all 15 members, but it is not apparent to me that this is necessarily sufficient to mean that s 33 applies to their content.

129. The response to this might be that Article 21.1 itself contemplates regulation of the management of branches, and also that the definition of “Branch” in the Articles makes it clear that they are autonomous only within the terms of NFOP’s constitution, 20 including the Regulations. However, even if that was sufficient, or the terms of the Regulations are in fact made fully enforceable under s 33 by being included via Article 21, then there would still be a question of the precise extent of the effectiveness of the covenants created by what is now s 33(1) CA 2006. As is apparent from the case law this is not a straightforward issue, but the general principle 25 is that the covenants created by a company’s constitution confer rights on, and bind, members only in their capacity as members of the company (see for example *Rayfield v Hands* [1958] 2 All ER 194 and *Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Herald Newspaper and Printing Co Ltd* [1986] 2 All ER 816). Again, in the absence of submissions on the point I am not persuaded that a member 30 of NFOP is acting in that capacity in conducting most branch activities. Instead, he or she is acting in the capacity of a member of that branch, which I have concluded is a separate unincorporated association. In contrast, a Branch Delegate voting at a general meeting of NFOP is clearly acting in his or her capacity as a member of NFOP. Another example would be the subscription arrangements between an NFOP member 35 and NFOP: those clearly relate to the member in his or her capacity as such. I do not think that it makes a difference that a necessary qualification to be a branch member (disregarding Friends) is that the person is a member of NFOP, any more than it makes a difference that a company’s constitution might require a director to hold some shares. The director would still only be bound by, and benefit from, the articles 40 of association in his or her capacity as shareholder, not as director.

130. If I was wrong about this, there would still be a further question, namely whether Regulation 5.4 and other provisions on which Ms McGowan relies would in fact have the effect of taking precedence over decisions made at branch level. The covenants that members give under NFOP’s constitution do not necessarily have the effect that 45 they are unable to enter into a conflicting agreement. The result might simply be that

they are in the breach of those covenants, rather than that their actions are a nullity. It would depend among other things on the parties' (contractual) intentions. For example, it might be that those branches who have not updated their written rules to permit membership by occupational pensioners generally have in practice agreed a variation to those rules by admitting a broader class of member than the express rules permit. In contrast a branch that has chosen not to follow a "model" approach in other respects, such as making a donation to a charity in a way that is inconsistent with NFOP's objects, will no doubt have intended to take that action, and will have done so by agreement, usually in the form of a resolution at a branch meeting. Since the assets in question are those of the branch it seems highly unlikely that a court would find that those actions are a nullity. Again, I do not think that I need to reach a final decision on this point, but I find it far from clear that HMRC's apparent assumption that NFOP's constitution would take precedence over a different contractual arrangement in the event of inconsistency is necessarily correct. For completeness, I also do not agree with Ms McGowan that continued participation in NFOP, for example by sending Branch Delegates to the annual conference, amounts to an agreement that NFOP's constitution will prevail in the event of conflict.

131. I also think it is important not to lose sight of the realities. It is quite clear from the evidence that the existing branches were all established before NFOP was incorporated. This means that in the case of each branch there would have been an existing contractual arrangement, in the form of written or unwritten rules. It is also clear that there is a strong feeling among branches that they are independent. This is supported by the significant variations between individual branches, whether in the form of the rules they have adopted (and which they retain the freedom to change), the kinds of activity they carry on and the level of that activity. The actual level of control, or attempted control, from head office is very limited. It appears that the only practical step that is taken is to withhold payment of the branch rebate when accounts are not received. In reality branches decide how they conduct their activities and spend their money, including the branch rebate. NFOP's role is much more one of support, guidance and coordination than direction or control. This is entirely consistent with its own objects and powers, as set out in clauses 3 and 5 of the Memorandum.

132. I also do not accept Ms McGowan's submission that the branches formed part of NFOP's predecessor unincorporated association and that their activities transferred to NFOP when it was incorporated. Mr Booth's evidence was that the intention was that incorporation would not disturb the relationship between the branches and the Federation. It is no doubt for this reason that rule 4(a) of the Federation rules (see [53] above) is broadly consistent with provisions in NFOP's constitution that refer to autonomy within its terms. However, I was not shown any pre-existing rule similar to Article 21 or Regulation 5.4 or 5.9, which are central to Ms McGowan's submissions, so even if I am wrong about their relevance under the current structure it must be less likely that the branches were part of the same unincorporated association as NFOP's predecessor. I therefore cannot see by what mechanism the activities of the branches would have transferred to NFOP. It is unfortunate that no documentation was available in relation to NFOP's incorporation, but I think Mr Booth's evidence that there was no intention to disturb the role of the branches was sufficiently clear for me

to infer that the scope of that documentation would have been limited to the transfer and assumption of head office assets and liabilities.

Discussion: Issue (2) – is the branch rebate received as agent?

133. I can deal with this issue more briefly. Notwithstanding the historical background of the pre-1975 payment arrangements, the evidence does not support NFOP's contention that it receives the branch rebate as an agent or cash collector for the branches. My reasons for this are as follows:

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(1) The legal terms on which subscriptions are paid to NFOP are determined by the applicable provisions of NFOP's constitution. These are the relevant contractual arrangements for this purpose, and will determine the position unless they do not accord with economic reality: *Airtours* and earlier cases including *HMRC v Newey* (Case C-653/11) [2013] STC 2432 and *Secret Hotels2 v HMRC* [2014] UKSC 16, [2014] STC 937.

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(2) The Memorandum contemplates NFOP making reasonable charges for its services (clause 5). The definition of Member in the Articles contemplates that an eligible person will become a member by paying a subscription to NFOP. There is no suggestion that an additional sum must be paid to NFOP to be passed on to branches. In contrast the definition of Friends does contemplate payment of a subscription to a branch. The Regulations define the branch rebate as an amount paid to branches "from the subscriptions", which are defined as money paid to the funds of NFOP. There is nothing in this language that is consistent with an agency arrangement.

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(3) The level of both the subscriptions and the branch rebate are set by NFOP in general meeting. Again, the approach taken is not consistent with an agency arrangement, either legally or realistically. The amount of the subscription resolved upon is inclusive of the branch rebate, whereas if there was an agency arrangement one would expect there to be a reference to the net amount. The mechanism itself is also not consistent with an agency arrangement. As explained at [115] above, the use of a general meeting resolution means that as a company law matter subscription rates to NFOP and the level of the branch rebate are both set by NFOP, and the fact that two separate resolutions are passed does not affect this.

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(4) The description of the branch rebate in the Branch Guide (see [43] above) is also not consistent with an agency analysis. It explains that it is paid primarily to assist with the running of the branch and communication with members. That is consistent with payments being made by NFOP from its resources, but not with payments being collected on behalf of members. It does not indicate that the branch rebate represents the element of the subscriptions that belong to branches.

(5) Some NFOP members do not join branches. Rather than receiving a reduction in their subscriptions they are notionally allocated to the General Branch. If branch rebates were received as agent for the branches then it

might be expected that there would be a reduction for those who do not to join a branch, or at least that the “excess” subscriptions would be passed directly to other branches.

5 (6) The leaflet describing membership benefits ([16] above) lists the opportunity to join a local branch as one of a number of benefits provided in return for the subscription. The clear flavour is that a single subscription is paid in exchange for a variety of different benefits that members can access to a greater or lesser extent, one of which is the opportunity to join a branch. In VAT terms there is reciprocal performance, with the
10 remuneration (in this case the subscription) received by the service provider (NFOP) constituting the value actually given in return for the service supplied (*Newey* at [40], cited by Lord Neuberger in *Airtours* at [49]).

15 (7) Friends’ subscriptions must not be less than twice the branch rebate, even though Friends are non-voting. I agree with Ms McGowan that this is hard to reconcile sensibly with the notion that branches are charging their (full) members, through the agency of NFOP, half or less than they charge Friends.

20 (8) Whilst I am reluctant to express any concluded view on the correct accounting treatment in the absence of expert evidence, it is clearly the case that the actual accounting treatment adopted does not provide any support for NFOP’s position in terms of commercial or economic reality.

25 (9) In addition, whilst I do not think that NFOP’s approach of withholding the branch rebate from branches who have not provided their accounts is necessarily inconsistent with an agency analysis, it certainly does not support it. That practice is much more clearly explained on the basis that NFOP has effectively agreed to provide certain services to its members in exchange for subscriptions, one of which is membership of a local branch. NFOP considers that it owes a duty of care to its members to ensure that
30 branches conduct at least some level of activity, and are properly run, so that members receive what they are expecting to obtain in exchange for their NFOP subscriptions. It is for this reason that branch rebates may be withheld.

Conclusion and disposition

35 134. As already explained, the nature of the issues agreed for determination is such that I am able to determine this appeal in principle only. I have concluded that NFOP has established that the branches are separate persons from NFOP, and accordingly allow NFOP’s appeal in respect of issue (1). NFOP’s appeal in respect of issue (2) is
40 dismissed on the basis that NFOP has not demonstrated that the branch rebate is collected on behalf of branches and belongs to them. Instead it forms part of the consideration for supplies made by NFOP to members. I am also issuing case management directions for the future management of this appeal.

135. By way of closing remark, I wish to emphasise that my decision is restricted to the two issues referred to above. There was some discussion at the hearing about the nature of the payment of the branch rebate by NFOP to the branches, and in particular a suggestion by HMRC that it might form “third party” consideration for a supply made by the branches to members, rather than (for example) some form of subsidy that does not form consideration for a supply. I have not considered this question and nothing in this decision should be read as indicating any view on my part that HMRC’s approach is or is not correct. If the parties cannot agree the position and it is relevant to the VAT position of either NFOP or any branch then that dispute will need to be resolved in the normal way, and in the case of NFOP through a further hearing before this appeal can be finally determined.

136. 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.

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**SARAH FALK
TRIBUNAL JUDGE**

RELEASE DATE: 23 JANUARY 2018

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