[2020] UKFTT 430 (TC)

TC07907

Appeal number: TC/2019/05249

VALUE ADDED TAX – whether the Appellant had demonstrated that events it organised were fund-raising events within Item 1 of Group 12 of Schedule 9 – no – alternatively whether the Appellant had demonstrated it was a youth club within item 6 of Group 6 of Schedule 9 – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

LEEDS BECKETT STUDENTS' UNION **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the appeal in chambers on 12 August 2020 on the basis of the documents on the Tribunal file and in the appeal bundle, with the consent of the parties and the agreement of the Tribunal.

DECISION

Introduction

1. This appeal is against the Respondents' decision to assess VAT in the total sum of £5,694 in respect of VAT periods 09/16 and 09/17. The underlying substantive issue between the parties is whether certain events organised by the Appellant are fund-raising events within the exemption set out in Item 1 of Group 12 of Schedule 9 to the Value Added Tax Act 1994 ("VATA 1992") or, alternatively, whether the Appellant is a youth club providing facilities to its members within Item 6 of Group 6 of Schedule 9.

2. As appears below, there are also a number of points at issue between the parties relating to the validity of the assessment. The current appeal is not the first time the parties have been before this Tribunal, and it is necessary to set out some of the detail concerning the parties' correspondence and the Appellant's earlier appeal in order to establish the context for the current appeal.

3. Therefore, this decision sets out some of the events relating to the earlier appeal and also some of the procedural history of this appeal, before addressing the issues before this Tribunal.

The Appellant's claim to the Respondents and earlier Tribunal appeal

4. On 30 March 2016, the Appellant's agent submitted a voluntary disclosure, seeking net VAT of £43,272 for the VAT periods 6/13 to 12/15. The overpaid tax related to input tax being treated as irrecoverable and the Appellant's partial exemption annual adjustment, less a small amount of under-declared output tax in relation to catering sales. None of these issues are currently before the Tribunal. However, the schedules submitted to support the Appellant's voluntary disclosure showed that the Appellant was treating events it organised as exempt fund-raising events. Whether that treatment is correct is one of the substantive issues for this Tribunal to decide.

5. By letter dated 7 October 2016, the Respondents asked the Appellant's agent for a schedule of relevant events, what each event was and to what supplies the income related. On 25 October 2016, the Appellant replied with a number of schedules, breaking down the sales for 2013, 2014 and 2015 into sub-categories. Presumably because it fell outside the period of the voluntary disclosure, there were no details regarding events which had just taken place, in September 2016.

6. On 12 December 2016, the Respondents asked for evidence by way of tickets, posters and organisation meetings to establish that the events were promoted as being for fund-raising. It appears that such evidence was sought to satisfy the requirement in Item 1(c) of Group 12 that events should be "promoted as being primarily for the raising of money".

7. In a letter dated 19 November 2016 but apparently sent on 19 December 2016, the Appellant's agent replied stating that it was not known what evidence had been retained by the Appellant. The Appellant's agent also stated:

> You state that it is the position of HMRC that events do not qualify for fundraising unless it can be demonstrated that their primary purpose was for the raising of charitable funds for the Students Union.
>
> Although this statement relates to Item 1(b), and not 1(c) of Group 12, and all of your other comments in this section relate to Item 1(c), my understanding of the Commissioners policy is subtly different to that which you have stated.
>
> Item 1(b) requires that the primary purpose of the event is the raising of money. Your colleagues then require a statement to that effect from the Union. They will then consider the matter on its particular merits – whether that statement is, or may be, correct.

8. Despite that conclusion on the part of the agent, it does not appear that any statement from an officer of the Appellant about the primary purpose of the events was ever provided to the Respondents.

9. On 16 January 2017, the Respondents reiterated their request for evidence. The Appellant's agent replied on 30 January 2017, asserting that it was not necessary for the Appellant to retain documents of the sort described as the only requirement was that straplines mentioning fund-raising were in place at the time of the event.

10. On 17 February 2017, the Respondents again reiterated their request for evidence. By letter dated 21 February 2017, the Appellant's agent replied stating that the Appellant had not yet been asked to provide material as the documents suggested by the Respondents were not in a category the Appellant was required to keep. The agent asked that the Respondents demonstrate that the Appellant was required to keep the posters, ticket and meeting minutes requested, following which the agent would ask the Appellant to supply what was available.

11. There was no reply until 8 December 2017, when the Respondents wrote again on all the issues still in dispute. In respect of the events, the Respondents set out their position that as no evidence had been provided to show that the events had been "organised and promoted" primarily to raise money for the benefit of the charity, and as such events provided an unfair advantage over commercial events, the Appellant's events should be treated as taxable. The Respondents requested the Appellant to submit a voluntary disclosure for July 2015 onwards, in the absence of which an assessment would be raised.

12. The Respondent wrote again on 13 December 2017, specifically in relation to the events, setting out the Respondents' position that events did not qualify for the exemption unless it could be shown that their primary purpose was the raising of charitable funds. The Respondents also again asked the Appellant to provide evidence that the events were promoted as being fund-raising events.

13. On 2 January 2018, the Appellant's agent indicated that the Appellant was gathering evidence that the events were held out as being to raise funds. On 19 February 2018, the Respondents again reiterated the request for a voluntary disclosure. The fresh deadline was 2 March 2018.

14. The Appellant's agent replied on 19 February 2018, referring to a 2016/17 wall planner which evidenced the promotion of events in that year. The agent continued:

> However, after a staff change in the reprographics team, for the year 2017/18, the person in charge of holding these out as fundraising events was not made aware of the requirement to promote the event as such. Therefore, no strapline was included on the tickets or on the wallplanner.
>
> I have advised the Union that they will need to make an adjustment for this as the law is clear that in order for the event to qualify as a fundraising event it must be "promoted" as such.
>
> I have asked for the figures from the Union for this period and will send them over in excel format once received.

15. On 20 February 2018, the Appellant submitted a spreadsheet, referring to a Beach Party taking place on 19 September 2017, and a Fiesta taking place on 22 September 2018. The net adjustment required was calculated as £277.34.

16. On 22 February 2018, the Respondents reiterated their request for evidence. This was stated to be in respect of all events from January 2014.

17. On 16 March 2018, in the absence of details of the income, the Respondents issued a best judgement assessment relating to the fund-raising events. This covered the periods 3/14 to 12/17. The tax assessed was in the total sum of £22,594.

18. On 12 April 2018, the Appellant's agent supplied the Respondents with the 2016/17 wall planner (described in more detail below). The agent asked for the assessment to be revised on the basis that the period 09/13 was out of time to be assessed, and also that evidence regarding promotion had been provided for 2016/17. Spreadsheets showing a breakdown of the events for 2013, 2014, 2015 and 2017 were supplied.

19. On 16 April 2018, the Appellant's agent sought a review of the Appellant's decision to assess the Appellant. The Respondents acknowledged this request and sought the information for 2016.

20. On 27 April 2018, the Appellant supplied the Respondents with details of the events for 2016, and stated that the wall planner was sufficient evidence.

21. On 25 May 2018, the Respondents issued their review conclusion, upholding the original decision to assess the Appellant. In this review, the Respondents stated their conclusions that the requirements of Item 1(c) of Group 12 had not been met, and that four events over a two week period would exceed the number of events permitted. On 11 June 2018, the assessment was revised to reflect the actual figures produced by the Appellant.

22. On 22 June 2018, the Appellant appealed against the Respondents' review decision to the Tribunal. That appeal was given reference TC/2018/04027. The basis

of the Appellant's appeal was that Item 1(c) was either ultra vires or, when read in conjunction with Article 132(1)(o) of the PVD, was irrelevant.

23. On 27 June 2018, the Tribunal released its decision in *Loughborough Students Union v HMRC* [2018] UKFTT 357. In this decision, the Tribunal (Judge Kempster) concluded that Item 12(1)(c) was ultra vires Article 132(1)(o) of the PVD. However, despite that conclusion being in favour of the appellants, all four appellants were unsuccessful in their appeals as the evidence they put forward either failed to demonstrate that the events they organised were for the primary purpose of fund-raising (and thus they did not satisfy Item (1)(b) of Group 12), or demonstrated that there was distortion of competition (and thus there was contravention of Note 11 to Group 12).

24. On 15 August 2018, the Respondent issued a revised decision letter to the Appellant, referring to *Loughborough Students Union*. The Respondents stated their belief that, in addition to the reasons already supplied, the Appellant's events did not satisfy Item 1(b) of Group 12 and that there was distortion of competition.

25. On 21 August 2018, the Appellant's agent replied to the Respondents, noting the revised decision and stating as follows:

> You cannot simply revise a decision letter which has been through statutory review and has been appealed.
>
> Accordingly there are two options available to you:
>
> Option 1: You could cancel your original decision letter and assessment as well as your revised decision and then re-issue your revised decision letter with a new assessment. If you do this consideration will be given to whether or not to request a Statutory Review of the revised decision and/or whether or not to appeal this decision directly to the Tribunal based upon the new arguments that you have raised.
>
> Option 2: If you wish to maintain the argument in your original decision letter, we can continue with the appeal … on the grounds stated in your original decision letter dated 16 March 2018.

26. On 10 September 2018, the Respondents filed and served their Statement of Case in TC/2018/04027, setting out their case that the Appellant had not met the requirements of Item 1(b) and that there was distortion of competition.

27. On 26 October 2018, the Tribunal issued Directions for the case management of the appeal. It is unclear to what extent either party complied with Directions 1 and 2 (to provide a list of relevant documents and to file and serve witness statements) but the Respondents complied with Direction 3, providing their listing information.

28. On 22 February 2019, the Appellant made an application described as an application to amend its grounds of appeal. This would be more accurately described

as an application to restrict the Respondents from arguing any point that had not been set out in the Respondents letter of 16 March 2018.

29. On 11 April 2019, the Respondents wrote to the Appellant. In that letter the Respondents agreed that periods 03/14 to 12/15 were out of time to assess. The Respondents also notified the Appellant of their intention to withdraw the assessment issued on 16 March 2018, and to issue fresh assessments in respect of periods 9/16 and 9/17.

30. In a second letter dated 11 April 2019, the Respondents set out their reasons for considering that the events which took place in September 2016 and September 2017 were not exempt. These reasons were that the Appellant did not meet the requirements of Item 1(b) and that there was a distortion of competition. The tax assessed for periods 9/16 and 9/17 was in the total sum of £5,694.

31. On 12 April 2019, the Respondents notified the Tribunal that they had withdrawn the assessment issued on 16 March 2018, and issued a fresh assessment on 11 April 2019.

32. On 15 April 2019, the Appellant withdrew its appeal in TC/2018/04027. On 26 April 2019, the Tribunal notified the parties that the appeal had been withdrawn and that the Tribunal file would be closed.

33. On 17 May 2019, the Respondents wrote again to the Appellant, correcting a typographical error in the 11 April 2019 decision letter. On 17 May 2019, the Appellant's agent replied, requesting that the new assessment be revised to remove period 09/16 on the basis that it was out of time to assess. The Appellant asked for a review if the Respondents did not make this revision.

34. On 28 May 2019, the Respondents explained that the assessment relating to 09/16 had been made under the one year rule, and the assessment relating to 09/17 had been made under the two year rule. On 11 June 2019 the Appellant confirmed that a review was required and, on 10 July 2019, provided further submissions regarding the operation of Section 85 VATA 1994 .

35. On 18 July 2019, the Respondents issued their review conclusion letter. The Respondents concluded that the assessment was in time for period 09/16, and that Section 85 VATA 1994 did not apply to the withdrawal of the first assessment. The Respondents upheld the decision to assess periods 09/16 and 09/17.

The current appeal, including procedural history

36. On 13 August 2019, the Appellant appealed to this Tribunal against the Respondents review decision dated 19 July 2019.

37. In accordance with Tribunal Directions, the Respondents filed their Statement of Case on 4 November 2019, and on 30 December 2019, the Tribunal issued Directions for the case management of this appeal. Those directions included the requirement that each party provide the names of all witnesses to be called on that

party's behalf. The Respondents complied on 31 January 2020, providing the names of two witnesses.

38. On 4 February 2020, at the Appellant's request, the Tribunal extended the deadline for the parties to provide the names of their witnesses. The Appellant had explained that a member of the Appellant's staff had departed and it was necessary to find a replacement member of staff to give evidence. On 11 February 2020, the Appellant provided the Tribunal and the Respondents with the name of one witness.

39. On 12 May 2020, the Tribunal wrote to the parties asking them to confirm whether the appeal was ready to be listed, and whether it was suitable for determination on the papers. On 26 May 2020, the Appellant's agent replied to the Tribunal, with a copy letter sent to the Respondents:

> On behalf of the Appellant, in response to the letter of 12 May I wrote to the Tribunal requesting further instruction as to precisely what was meant by the phrase "decided on the papers". If this includes the simultaneous exchange of a document akin to a skeleton argument then the Appellant is content for the matter to be decided in that manner, without the necessity for an oral hearing.

40. No correspondence from the Appellant was received by the Tribunal between 12 and 26 May 2020 so I do not know what further detail the Appellant had required.

41. The Appellant's agent also stated:

> Witness statements have been exchanged with the Respondents in this matter. However, they merely indicate actions taken by the various parties. At this stage it is not known whether or not these witnesses would, if there was an oral hearing, be required to give evidence. Certainly, from the position of the Appellant, such witness statements should not be a barrier to determination on the basis of all of the papers, including the witness statements.

42. The first sentence of that paragraph, and the reference to "exchanged" would suggest that the Appellant had served one or more witness statements upon the Respondents. However, subsequent correspondence from the Respondents confirmed that only they had served witness statements, and no witness statement had been served by the Appellant. Neither party filed witness statements with the Tribunal.

43. In their letter to the Tribunal dated 27 May 2020, the Respondents confirmed their consent to a paper hearing and agreed their understanding that the appeal was ready to be heard. A copy of that letter was sent to the Appellant's agent. The Respondents also stated:

> If the dispute is to be decided on the papers without an oral hearing, HMRC hereby applies with the Appellant's consent, for a direction that each party shall send or deliver an outline of the case it wants to put to the Tribunal (a skeleton argument) including details of any legislation and case law authorities to which it wants to refer to at the determination.

44. The Respondents also stated:

> If the appeal is not determined on the papers, HMRC intends to call two witnesses for the hearing as follows:
>
> - Mr Graham Colin Speight (an Officer of HMRC); and
> - Mr Muhammad Nadeem Anwer (an Officer of HMRC).

45. Later in that letter, in reply to the Tribunal enquiry concerning the size of the bundle and the possibility that an electronic version could be produced, the Respondents stated:

> The hearing bundles represents 432 pages; the Appellant has confirmed today that it is forwarding a witness statement for inclusion in the bundle.

46. On 5 June 2020, on the basis of the parties' responses, the Tribunal (Judge Williams) agreed that this appeal would be determined on the papers. Judge Williams issued directions on the explicit basis that the Appellant had already received a copy of the bundle and that it contained all the documents on which it relied. The Appellant was directed to notify the Tribunal within 14 days if that was not the case. No such notification has been received.

47. Judge Williams also directed:

> **1. Appellant's submissions:** Not later than 19 June 2020, the Appellant may serve on HMRC and Tribunal a document containing any submission the Appellant wishes the Tribunal to consider when determining the proceedings before the Tribunal.
>
> **2. HMRC's right to reply to submissions:** Not later than 14 days after the Appellant serves any such submissions (or, if none, 14 days after the due date for the Appellant's submissions) HMRC may serve on the Appellant and Tribunal a document containing HMRC's submissions.
>
> **3. Appellant's right to response:** Not later than 14 days after service of any such reply by HMRC, the Appellant may provide to HMRC and the Tribunal a response to it.
>
> No reminders will be sent: if submissions are not received by the due date it will be assumed that the right to make submissions is not being exercised.

48. Oddly, given both parties had requested directions giving the opportunity to make written submissions, neither party filed written submissions.

49. When filing a copy of the electronic bundle with the Tribunal on 13 August 2020, the Respondents confirmed:

- The hearing bundle contained the witness statements from HMRC;
- HMRC did not receive any witness statement(s) from the Appellant;

- HMRC did not receive any submissions from the Appellant; and
- HMRC did not make any submissions and rely upon the contentions made in the statement of case served on 4 November 2019.

50. I have set this correspondence between the parties and the Tribunal in some detail as it forms the basis on which I reach the conclusion that:

- the Appellant received a copy of the bundle containing the two witness statements relied upon by the Respondents;
- the Appellant was aware that witness statements could be served and would be taken into account by the Tribunal, but it chose not to file or serve witness evidence in support of its appeal; and
- neither party has chosen to file written submissions further setting out or explaining their case.

51. Therefore, I proceed on the basis of the documents in the bundle and on the Tribunal file, and in the absence of witness evidence from the Appellant or written submissions from either party.

Issues before the Tribunal

52. The Appellant's Notice of Appeal set out the following grounds of appeal:

- that the proceedings are res judicata;
- that it was an abuse for the new assessment to be raised;
- that the new assessment was issued out of time;
- that the events were exempt fund-raising events under Item 1 of Group 12;
- that the events were exempt fund-raising events under Article 132(1)(o) of the Principal VAT Directive; and
- in the alternative, that the tickets element of the income is exempt under Item 6 of Group 6.

53. It is sensible first to consider the issues which go to the validity of the assessment as, if the assessment is invalid, the substantive issues do not arise.

Validity of the assessment

54. The three issues which arise under this heading are res judicata, whether it is an abuse of process for a new assessment to be raised and whether that new assessment was issued within time in respect of period 09/16. In respect of these issues the onus is on the Respondents to demonstrate that the assessment has been validly raised. The standard of proof is the balance of probabilities.

<u>Ground 1 – the appeal is res judicata</u>

55. Under this ground of appeal the Appellant argues that the Respondents could not issue an assessment in April 2019 because the issues between the parties are res judicata as the 2018 appeal proceedings resulted in the discharge of the first appeal. In support of this position, the Appellant relies upon Section 85 VATA 1994, arguing that the 2018 proceedings were settled and so the Respondents are precluded from assessing the same periods again. The Appellant adds that a further assessment would constitute a "second bite of the cherry" and further that the Appellant would incur costs in "defending an appeal against the same periods which it has already successfully challenged".

56. In response, the Respondents argue that the first Tribunal appeal was withdrawn by the Appellant, and that they did not come to an agreement with the Appellant to settle that appeal.

57. I start my consideration of this issue by setting out the relevant part of Section 85 VATA 1994. Subsection 85(1) provides as follows:

> (1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, HMRC and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated—
>
> (a) as upheld without variation, or
>
> (b) as varied in a particular manner, or
>
> (c) as discharged or cancelled,
>
> the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement.

58. Therefore, it is necessary to consider whether there was an agreement reached between the parties and, if so, to establish the terms of that agreement.

59. The material in the bundle before me that relates to the 2018 proceedings makes it clear that the parties did not reach an agreement about the "decision under appeal" which resulted in that decision being "discharged or cancelled". I conclude that the Respondents took the decision to withdraw the assessment in order to issue a further assessment under cover of a decision which set out their additional reasons for their belief that the VAT in dispute was due. As a consequence of that decision by the Respondents, the Appellant withdrew the Tribunal appeal. But there was no offer by either party that if the one took a certain step then the other would respond in a certain way. I cannot identify an offer, acceptance or consideration from the parties' actions or from the correspondence. I can see that in its agent's letter of 21 August 2018, the Appellant identified what it believed was the correct procedural step, and (several months later) the Respondents acted in accordance with that suggestion, but I cannot see that the Appellant offered to withdraw the appeal if the Respondents withdrew the assessment. From the material I have seen, there was no agreement between the parties.

60. I have noted the Appellant's comments regarding the additional costs of a second appeal, and I agree that making two appeals is more costly than making one appeal. However, that consequence for the Appellant does not mean that the Respondents are prevented from issuing a revised assessment.

61. I decide this issue in favour of the Respondents.

Ground 2 - is it an abuse of process for a new assessment to be raised?

62. Under this ground of appeal, the Appellant argues that it is abusive for the Respondents to rely upon different arguments to support the 2019 assessment to the arguments relied upon to support the 2018 assessment, when no new information has come to light since the 2018 assessment was withdrawn. (This argument seems at variance with the suggestions in the agent's letter of 21 August 2018 that a new assessment should be raised if the Respondents wished to rely on fresh reasoning.)

63. In response to this ground, the Respondents rely upon *BUPA Purchasing Limited v HMCE* [2007] EWCA Civ 542 in which the Court of Appeal held that the reasons for an assessment do not form part of an assessment.

64. In this case it is clear that the Respondents desire to revise their arguments came after the Tribunal issued its decision in *Loughborough Students Union*. That decision cast fresh light on the understanding of Item 1(c) and ultimately led the Respondents to withdraw the March 2016 assessment. It is therefore difficult to see on what basis the Appellant argues that no new information has come to light.

65. If the Appellant's point is that the arguments concerning item 1(b) and distortion of competition were always available to the Respondents, and nothing new has occurred to reveal the existence of those arguments then I agree that is the case. But I cannot see that this prevents the Respondents from relying on these arguments in this second Tribunal appeal (any more than the Appellant is prevented from arguing Ground 6, also an argument which was always available to the Appellant but which was not raised in the first Tribunal appeal).

66. Alternatively, if the Appellant's point is that the Respondents previously accepted that Item 1(b) was satisfied then I cannot agree that was the case. The correspondence I have set out above shows that the Respondents focussed upon item 1(c) but I have not been able to identify any point where they accepted that the Appellant satisfied the requirement in Item 1(b). Indeed, some of the correspondence, for example the letter of 8 December 2017, strongly indicates that the Respondents were not satisfied that Item 1(b) was satisfied.

67. I do not agree that it would be abusive for the Respondents to be permitted to rely on the reasoning which accompanied the 2019 assessment in an appeal against that 2019 assessment. It follows that I do not agree that the Respondents desire to rely on the reasoning they provided when the assessment was raised is either ultra vires or flawed.

68. I decide this issue in favour of the Respondents.

Ground 3 - was the assessment issued within time?

69. Under this ground of appeal, the Appellant relies upon Section 73(6)(b) VATA 1994 and argues that it was not possible for the Respondents to include period 09/16 in an assessment raised on 11 April 2019 because the assessment was raised more than two years after the end of the VAT period.

70. The Respondents contend that actual figures were provided to them by the Appellant on 27 April 2018, and that the assessment was raised on 11 April 2019, within one year of the date on which the figures were supplied.

71. The relevant parts of Section 73 VATA 1994 provide as follows:

> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

72. As the Respondents note, Section 77 VATA 1994 is also relevant. The relevant part of Section 77 provides:

> (1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—
>
> (a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, or
>
> (b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, 4 years after the event giving rise to the penalty.

73. I agree with the Respondents that it was not until 27 April 2018 that the Appellant provided the Respondents with the details of its income from the events in period 2016. I note it was also not until 12 April 2018 that the Appellant provided the Respondents with a copy of the 2016/17 wall planner that identified four events.

74. The details of the income enabled the Respondents to raise an assessment in the correct figures. Until 27 April 2018 any assessment could only have been in estimated figures. It was not until receipt of the 2016/17 wall planner that the Respondents could have known that four freshers' events took place in September 2016, rather than the two identified by the Appellant (a point noted by the Respondents in their letter of 25 May 2018).

75. As there is no requirement that the information provided be the sole information relied upon to justify the making of an assessment, and it is possible that the information provided can supplement other information already held, I am satisfied that the assessment raised on 11 April 2019 was issued within one year of "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge".

76. As the period was 09/16 and the assessment was raised on 11 April 2019, the Respondents have also satisfied the requirement in Section 73(6)(b). Therefore, I am satisfied that the assessment was raised within time.

77. I decide this issue in favour of the Respondents.

Substantive issues

78. Having concluded that the assessment has been validly raised, the onus switches to the Appellant to demonstrate that the assessment overcharges it to tax and so the amount of tax should be reduced or the assessment discharged. The standard of proof is the balance of probabilities.

79. The substantive grounds raised by the Appellant in support of its appeal are:

- that the events were exempt fund-raising events under Group 12;
- that the events were exempt fund-raising events under Article 132(1)(o) of the Principal VAT Directive; and
- in the alternative, the ticket element of the income is exempt under Item 6 of Group 6 of Schedule 9

<u>Ground 4 - were the events exempt fund-raising events under item 1 of Group 12?</u>

80. Schedule 9 to VATA 1994 sets out, in a series of groups, the supplies of goods and services which are exempt from VAT. Item 1 of Group 12 provides that the following is exempt:

> **1** The supply of goods and services by a charity in connection with an event—

(a) that is organised for charitable purposes by a charity or jointly by more than one charity,

(b) whose primary purpose is the raising of money, and

(c) that is promoted as being primarily for the raising of money.

81. The parties have also referred to a number of the Notes to Group 12. These provide:

> (4) Where in a financial year of a charity or qualifying body there are held at the same location more than 15 events involving the charity or body that are of the same kind, items 1 to 3 do not apply (or shall be treated as having not applied) to a supply in connection with any event involving the charity or body that is of that kind and is held in that financial year at that location.
>
> …
>
> (6) In the case of a financial year that is longer or shorter than a year, Notes (4) and (5) have effect as if for "15" there were substituted the whole number nearest to the number obtained by—
>
> (a) first multiplying the number of days in the financial year by 15, and
>
> (b) then dividing the result by 365.
>
> …
>
> (11) Items 1 to 3 do not include any supply the exemption of which would be likely to create distortions of competition such as to place a commercial enterprise carried on by a taxable person at a disadvantage.

82. The Appellant's contentions with regard to the domestic legislation are that the primary purpose of the events organised by the Appellant was the raising of money and that it is for the Respondents to show that there was a distortion of competition.

83. The Respondents contend that the events were organised for the primary purpose of providing social events for students, and also that to apply the Item 1 of Group 12 exemption to such events would lead to a distortion of competition.

84. I start by considering whether the Appellant organised events whose primary purpose was the raising of money. I adopt gratefully the analysis undertaken by Judge Kempster in paragraphs 58 to 62 of *Loughborough Students Union*, and I agree with him, and the Tribunal in *Blaydon Rugby Football v HMCE* [1995] VTD 13901, that a fund-raising event is an event the main purpose of which is to raise funds. Fund-raising need not be the sole purpose but if fund-raising is not the primary purpose of the event then it is not a fund-raising event but an event which has the incidental purpose of being expected to yield a surplus.

85. The difficulty I face when I come to consider whether the events proposed in this appeal are fund-raising events is that there is extremely limited primary evidence before me about the events. As I noted above, there is no witness statement from the Appellant. The only primary evidence is a photocopy of a double sided one page document, described as a "wall planner" (but which seems more akin to a flyer) relating to September 2016. There is nothing for 2017. I look first at that one document before considering what additional information can be elicited from the parties' correspondence.

86. The first side of the September 2016 document is headed "Freshers 2016" and carries a welcome message ("Welcome to Leeds, Welcome to Leeds Beckett, Welcome to Leeds Beckett Students' Union") from the student union "Exec team 2016/17". The welcome message continues:

> Over the summer we've been putting together an amazing freshers programme of events for you to enjoy. We really feel there is something for everyone.
>
> There's food and freebies galore, parties, gigs … and so much more. We can't wait for you to get involved and enjoy everything Leeds has to offer!
>
> We look forward to seeing you out and about during Freshers! Have a great two weeks.

87. Underneath this welcome message is a broad stripe which depicts an "official fresher wristband" with the price "from £25".

88. Underneath that stripe and to the left is the heading "What do I get?", and the following information:

> Your wristband comes with some great benefits
>
> - Entry to all 4 official freshers events
> - 25% off at both City and Headingly Bars between 10am – 4pm, 19-30 Sept
> - Discounted NUS Extra card (save £2 if purchased at Headingly Freshers Fair)

89. Underneath the wristband stripe and to the right is a dark block with white text (which has not photocopied as well and is more difficult to make out). As far as I can identify this lists the four official freshers' events as:

- Stage of Thrones
- Antics @ Pryzm
- The Freshers Ball
- Prefect @ 92 Acade

90. At the bottom of this side of the document, in much smaller text, is stated:

> The information in this schedule was correct at the time of printing. Leeds Beckett Students Union is a charity and Freshers events are organised in order to raise funds for our charitable purposes. All events are free unless otherwise stated.

91. The reference to the wristband granting entry to the four official events suggests that there is no additional charge over and above the purchase price of the wristband. That does not preclude the possibility of tickets for the events being sold separately to students who did not purchase a wristband.

92. The reverse side of this document carries advertisements for two of the four events listed. The top of the page refers to Stage of Thrones but the photocopy is too poor to identify the date. The bottom of the page refers to the Freshers Ball, due to take place on 23 September. Both events are due to take place at the Stage, City Campus, and both events are "10 p.m. til late".

93. In addition to the wall planner, the bundle contains the correspondence between the parties (set out in detail above). From that correspondence I am satisfied that on 12 April 2018, the Appellant's agent supplied the Respondents with the 2016/17 wall planner and a spreadsheet showing the categories of income for 2017.

94. The events for 2017 were said to be a Beach Freshers party on 19 September 2017, with total wet sales of £1,584.43, and a Fiesta Party on 22 September 2017, with total wet sales of £822.87. For 2017, the total ticket sales were said to be £16,404.

95. On 27 April 2018, the Appellant supplied a spreadsheet with the data for 2016. The events for 2016 were said to be "Stage of Thron" on 20 September 2016, with total wet sales of £1,349.39, and a Freshers Ball on 23 September 2016, with total wet sales of £686.48. For 2016, the total tickets sales were said to be £13,319.

96. (Although the data breakdown for earlier years provided separate figures for ticket sales and for wristband sales, there is no such split for 2016 or 2017. It is unclear if the figure for ticket sales in 2016 or 2017 includes sales of the wristband. Given the amounts, I assume not.)

97. There is no other information available to me about the events in 2016 or 2017.

98. It is clear from the correspondence set out in detail above that the Appellant has had ample opportunity to provide evidence about the events which took place and which it asserts were fund-raising events. The Appellant has been aware since June 2018 (when the decision in *Loughborough Students Union* was released) of the extent of the evidence which would be required. The Appellant's agent suggested in December 2016 that an officer of the Appellant should make a statement about the purpose of the events.

99. I reiterate that the onus is upon the Appellant to demonstrate that fund-raising events took place. It is irrelevant that the Appellant is not required by law to keep event tickets or posters or the minutes of event planning meetings; it is obvious that if

the burden of establishing certain facts falls upon the Appellant then it will need to provide evidence to prove its case to the required standard.

100. In respect of the events which took place in September 2016, I am satisfied that there was a series of events organised for freshers (the "amazing freshers programme of events"). Those events included four "official events". The principal message conveyed by the language used in the flyer is that new students are being welcomed with a series of events that have been organised for them. The Appellant has identified two of those four official events as fund-raising events but not explained why the other two events are not considered to be fund-raising events. The 2016 flyer states – in small writing at the foot of the flyer – that freshers' events are organised to raise funds, but that does not explain why only two of the freshers' events are said to be for fund-raising. The flyer also does not establish that fund-raising is the primary purpose for the two events selected (or any of the events), rather than being incidental to the purpose of welcoming new students. There is no internal documentation to show that these two events were organised with the primary purpose of raising funds, or to distinguish the two selected events from the other two events set out in the flyer. No officer of the Appellant has set out his or her understanding in a witness statement.

101. In respect of the events which took place in September 2017, the Appellant's agent has identified two events said to be organised for the main purpose of fund-raising although it has been accepted that neither was held out as such. There is no evidence about whether these were the only events or, as in 2016, there were other events organised during September. Again, there is no internal documentation and no witness statement.

102. There is insufficient evidence for me to conclude, on the balance of probabilities, that any of the events organised by the Appellant in September 2016 and September 2017 were events organised with the primary purpose of fund-raising rather than with the primary purpose of providing events to welcome new students. The Appellant has failed to demonstrate that the events in either 2016 or 2017 were fund-raising events.

103. It is not necessary for me to consider whether there is distortion of competition. As the Appellant has failed to establish that the events proposed are fund-raising events, it follows that they cannot be exempt fund-raising events within Group 12.

104. I decide this issue in favour of the Respondents.

<u>Ground 5 – were the events were exempt fund-raising events under Article 132(1)(o) of the Principal VAT Directive</u>

105. Given my conclusion on ground 4, it follows that the Appellant has also failed on ground 5. I decide this issue in favour of the Respondents.

<u>Ground 6 - the ticket element of the income is exempt under Item 6 of Group 6 of Schedule 9</u>

106. The Appellant's final ground of appeal is that the ticket income is exempt under item 6 of Group 6 to Schedule 9. The Appellant contends that it falls within the definition of a youth club, and the provision of facilities to its members includes the access to the venue for payment of a ticket.

107. The Respondents argue that the Appellant is not a youth club as its aims extend further than the definition of a youth club.

108. Group 6 of Schedule 9 relates to education. Item 6 to Group 6 exempts the following:

> **6** The provision of facilities by—
>
> (a) a youth club or an association of youth clubs to its members; or
>
> (b) an association of youth clubs to members of a youth club which is a member of that association.

109. The Notes to Group 6 provide

> (6) For the purposes of item 6 a club is a "youth club" if—
>
> (a) it is established to promote the social, physical, educational or spiritual development of its members;
>
> (b) its members are mainly under 21 years of age; and
>
> (c) it satisfies the requirements of Note (1)(f)(i) and (ii).

110. There is no Note (1)(f)(i) and (ii). Assuming – as the Respondents suggest – that the reference is a transposition error, then Note 1(e)(i) and (ii) provide:

> (i) a body which is precluded from distributing and does not distribute any profit it makes; and
>
> (ii) a body which applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies.

<u>Does the Appellant meet the criteria to be a youth club?</u>

111. Note 6 to Group 6 sets out three criteria to be a youth club. The onus is on the Appellant to demonstrate that it meets all three criteria. The first and third criteria can be considered by reference to the Appellant's Articles of Association, included in the bundle.

112. The second criteria concerns the age of its members. Even if I were to be satisfied that the Appellant otherwise qualifies as a youth club – and I need not express an opinion on this point – there is no evidence before the Tribunal to demonstrate that the Appellant's members are mainly under 21 years of age.

113. The Appellant's Articles of Association were included in the bundle but they neither contain an age restriction for members nor refer to the age of its members. In

the absence of evidence specifically relating to the students at Leeds Beckett, I would have been willing to make findings on the basis of statistical evidence (for example, the average age of undergraduate students in England and Wales, the number of undergraduates who attend university straight after leaving school, the percentage of undergraduates who are mature students, the ratio of undergraduate students to postgraduate students, et cetera) or any other relevant evidence. However, there is no evidence at all before me to demonstrate, on the balance of probabilities, that the Appellant's members are mainly aged under 21.

114. I cannot see anywhere within the Respondents' Statement of Case that this point has been conceded. The Respondents do not refer to this requirement but, applying the logic in *Burgess v HMRC* [2015] UKUT 578, any concession or waiver would have to be clearly given and the Appellant could not assume that silence implied any such concession. The Appellant was aware that it must prove each aspect of its case that it is not explicitly agreed, and it has failed to do so. It follows that this ground of appeal must also fail.

115. I decide this issue in favour of the Respondents.

Conclusion

116. All six issues in dispute are decided in favour of the Respondents. This appeal is dismissed.

Request for a full decision

117. A summary decision was issued to the parties on 2 September 2020. On 30 September 2020, the Appellant made an in-time request for full findings of facts and reasons for the decision.

118. This document contains the 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.

JANE BAILEY

TRIBUNAL JUDGE

RELEASE DATE: 29 OCTOBER 2020