Neutral Citation: [2023] UKFTT 904 (TC)

Case Number: TC08972

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video/telephone hearing]

Appeal reference: TC/2021/01275

Value Added Tax - whether admission to a broadcast of a live event performed by a company other than the appellant is subject to tax- yes -whether HMRC were out of time to raise assessments-no-, Value Added Tax Act 1994, sections 73 and 77 and schedule 9 - VAT Directive 2006/112/EC, Article 133. Appeal dismissed.

Heard on 27 July 2023
Judgment date: 23 October 2023

Before

TRIBUNAL JUDGE RUTHVEN GEMMELL WS
GILL HUNTER

Between

DERBY QUAD LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Gavin West, Partner of PKF Smith Cooper, Derby ("counsel for DQ/ GW")

For the Respondents: Mr Max Schofield, of Counsel, instructed by HM Revenue and Customs' Solicitor's Office ("counsel for HMRC")

DECISION

INTRODUCTION

1. The form of the hearing was by video, and all parties attended remotely. The remote platform used was the Tribunal video hearing system. The documents which were referred to comprised of a Hearing bundle of 718 pages and Skeleton Arguments for both parties.

2. Prior notice of the hearing had been published on the gov.uk website with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND

3. The Appellant, Derby Quad Limited ("DQ"), appealed against assessments, raised for VAT periods 03/17 to 12/18 inclusive, for under declared VAT on admission charges to live event performances broadcast to DQ from other locations ("Live Events"). If the Tribunal find that VAT is due, DQ claim that the Respondents ("HMRC ") were out of time to raise the assessments. A third ground of appeal regarding 'legitimate expectation' was not proceeded with.

4. DQ was registered for VAT from 1 July 2007, under VAT registration number 125522538, with a registered address at Market Place, Derby, DE1 3AS.

5. DQ's business activity is described as a venue that provides "visual arts and media centre, art exhibition and workshops, cinema, café bar, corporate room hire and training".

6. On 12 July 2016, HMRC received DQ's voluntary disclosure for overpaid VAT for the periods 30 June 2012 to 31 December 2015 inclusive. The claim was made under Item 2, Group 13, Schedule 9, VAT Act 1994.

7. On 17 October 2016, DQ provided more information in relation to their voluntary disclosure for overpaid VAT.

8. On 24 October 2016, HMRC issued an assessment for periods 09/12 to 12/15, inclusive, in the sum of £129,509.00.

9. On 14 March 2017, DQ wrote to HMRC to advise that, following the CJEU decision in Case C-592/15, *Commissioners for Her Majesty's Revenue and Customs v British Film Institute*, they would like to pay the assessment on a 'without prejudice' basis.

10. DQ made a further voluntary disclosure in relation to Live Events for periods 03/16 to 12/16, inclusive, in the sum of £14,000.69.

11. On 17 March 2017, HMRC issued DQ with a Notice of Error Correction for periods 03/16 to 12/16 inclusive, in the sum of £13,997.00.

12. On 7 June 2017, HMRC wrote to DQ to advise that they had incorrectly processed DQ's voluntary disclosure, dated 14 March 2017.

13. On 29 June 2017, HMRC wrote to DQ advising that the Notice of Error Correction issued on 17 March 2017 had been withdrawn and that a payment in the sum of £14,005.00 would be made. This letter said that the payment had been made without a detailed review of the information supporting the voluntary disclosure.

14. The parties subsequently entered discussions about DQ's Partial Exemption Special Method (PESM), which is not under appeal. During these discussions further information was provided in relation to the Live Events that DQ had previously claimed as being exempt from VAT.

15. On 12 December 2018, HMRC wrote to DQ advising that they had been informed by one of their staff members that DQ charged no VAT on admission to screenings of broadcasts of Live Events and that these admission charges would not qualify for exemption, under the provisions of Group 13, Schedule 9, VAT Act 1994.

16. HMRC went on to state that the previous claims in relation to Live Events should not have been repaid.

17. On 22 January 2019, DQ's agent emailed HMRC to advise that HMRC were out of time to issue assessments and that DQ had a legitimate expectation that their VAT treatment of admission to Live Events was correct until they received HMRC's letter of 12 December 2018.

18. On 4 April 2019, DQ's agent emailed HMRC advising that DQ had accounted for VAT on all income from Live Events since receipt of HMRC's letter of 12 December 2018.

19. Further correspondence was exchanged by the parties in relation to whether the assessments were raised on time.

20. On 30 May 2019, HMRC wrote to DQ's agent further discussing HMRC's view as to what constitutes a Live Event in order to qualify for exemption under Group 13, Schedule 9, VAT Act 1994.

21. HMRC stated that the screenings of Live Events did not amount to a 'live performance', and that DQ's letters notifying HMRC of voluntary disclosures could not amount to HMRC having sufficient information to make an assessment at that time.

22. On 8 July 2019, DQ's agent provided information in support of their application for an amended PESM, which included a breakdown of income received from broadcasts of Live Events.

23. On 4 September 2019, HMRC wrote to DQ advising that HMRC were enforcing the assessments for periods 09/12 to 12/15 inclusive of £129,509.00.

24. On 23 December 2019, HMRC issued a Notice of Assessment covering the periods 03/17 to 09/19 inclusive, in the sum of £26,751.00.

25. On 22 January 2020, DQ's agent wrote to HMRC appealing the assessments covering periods 03/16 to 12/16 inclusive, in the sum of £14,000.69 and the periods 03/17 to 12/18 inclusive, in the sum of 26,751.00.

26. On 27 August 2020, HMRC wrote to DQ with a review conclusion letter upholding the decisions as initially made.

27. On 12 January 2021, DQ's agent emailed HMRC providing detailed information about their agreements with various theatre production companies and forwarded contracts and advertising documentation. This included detail of an agreement between the Royal National Theatre ("the NT") and DQ which gave DQ a licence to exhibit certain plays performed live on stage at selected theatres by way of a near simultaneous digital satellite feed.

28. There was also a copy of a contract with Trafalgar Releasing dated 17 January 2017 which related to a licence to receive a satellite broadcast of the Royal Shakespeare Company's ("the RSC") performance of The Tempest by satellite broadcast on 11 January 2017 and by recording on 16 January 2017.

29. On 17 February 2021, HMRC wrote to DQ advising that cinematic screenings/performances were specifically excluded from the cultural exemption. HMRC went on to state that the NT had granted a right/licence to present screenings rather than a right of admission and that this is not covered by the cultural exemption.

30. In relation to the RSC contract, HMRC advised that this involved a "distributor" granting a right to present screenings of various performances to DQ. HMRC went on to advise that the contract with the "distributor" does not fall within the cultural exemption and so is classed as a taxable supply.

31. On 16 April 2021, DQ submitted an appeal to the Tribunal.

LEGISLATION

32. Article 133 of the Principal VAT Directive 2006/112/EC

Sections 73 (6)(b), 77 and, Item 2, Group 13, Schedule 9, Value Added Tax Act 1994 (VAT Act 1994)

Article 13(A)(1)(n) of the 6th VAT Directive (77/388/EC).

AUTHORITIES REFERRED TO

33. *Royal College of Nursing of the United Kingdom v DHSS* [1981] AC 800

Pegasus Birds Ltd v Customs and Excise Commissioners [1999] STC 95

R (oao Quintavalle) v Secretary of State for Health [2003] 2 All ER 113

Chichester Cinema at New Park Limited v The Commissioners for Her Majesty's Revenue and Customs [2005] 19344 147 - 155

The Corn Exchange Newbury v Her Majesty's Revenue and Customs [2007] VTD 20268

C-357/07 TNT Post UK Ltd, 15 January 2009 161 - 168

Revenue and Customs Commissioners v Hok Ltd [2012] UKUT 363 (TCC)

Revenue and Customs Commissioners v Noor [2013] UKUT 071 (TCC)

Case C-592/15 Commissioners for Her Majesty's Revenue and Customs v British Film Institute, 15 February 2017 208 - 214

DCM (Optical Holdings) Ltd v HMRC [2022] UKSC 26

C-144/00 Hoffmann, 14 November 2022 233 - 252

Opinion of AG Geelhoed in C-144-00 Hoffmann, 14 November 2022 253 - 277

News Corp UK & Ireland Ltd v HMRC [2023] UKSC 7

BURDEN OF PROOF

34. The burden of proof is on DQ to show that the supplies they make of the right of admission to Live Events qualify for the exemption set out in Item 2, Group 13, Schedule 9, VAT Act 1994.

35. If that burden is not discharged, the burden is on HMRC to show that the assessments made were issued in accordance with the legislation.

36. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

EVIDENCE

37. The Tribunal had a bundle of documents before it and heard evidence from Mr Adam Lloyd Buss ("AB") who was the CEO of DQ, between March 2014 and October 2022, and, therefore, during the period under appeal, and from Julie Lyddon, ("JL"), a VAT Charity Higher Officer employed by HMRC.

38. JL was a proxy witness as the original decision-maker, Gary Kennedy ("GK"), had retired from HMRC. JL was allocated the DQ case in August 2020, and for the earlier period, her witness statement and testimony were based on the available correspondence and records.

39. Both were credible witnesses.

40. DQ was incorporated in May 2005 and registered for VAT from 01 July 2007 and is in the heart of the city of Derby. It is a registered charity and is 'Derby's cultural hub'.

41. It is described on Google as a "comprehensive creative centre with indie cinema, art gallery, café-bar and event spaces for hire". It has two cinema spaces and the gallery space and within this there is a larger stage with no wings and a smaller stage.

42. DQ's website, under the title "Cinema" explains: – "QUAD's film and cinema programme shows the best in Independent, International and Hollywood cinema as well as event cinema such as NT Live".

43. DQ contracts with theatre companies for licences to a non-exclusive right to exhibit certain plays performed on stage in selected theatres. The right to present the screenings, by way of digital production on DQ cinema screen can be "near simultaneous" or "non-simultaneous" following satellite transmission of the plays.

44. DQ also shows "Encores" which are repeat screenings of 'Live Events'.

45. DQ pays the theatre companies a percentage of the proceeds from ticket sales to the screenings, and a small flat fee per simultaneous screening to help offset the satellite transmission costs.

46. Examples of such broadcast screenings include performances at the NT under what is termed "NT Live", which was launched in 2009, and the RSC under what is RSC Live" and "Exhibitions on Screen".

47. The live broadcast of theatre performances was part of a wider study conducted by NESTA, formerly the National Endowment for Science, Technology and the Arts, 'the UK's innovation agency for 'social good' within the industry, in approximately 2011, to consider the opportunities and challenges faced by performing arts organisations in relation to digital technology ("the NESTA study").

48. In particular, it considered the use of digital media to deliver a performing arts experience and take art forms in new directions and allow audiences who were previously excluded from attending such Live Events to attend in locations appropriate to them.

49. AB has 20 years of experience in the art and digital sectors not only as CEO of DQ but also as a professional actor and involvement in media generally and related PR. A summary of his evidence is as follows.

50. AB set out his opinion that a Live Event was different from a cinematic film ("a film") where the admission price is subject to VAT. It is an "experience" which starts with booking and reserving seats in advance (which is not the case for a film shown in DQ and, AB said, at most independent cinemas).

51. AB stated that NT Live is thought of as an experience on its own and is of artistic merit. It allows for audience participation and interaction even remotely.

52. He supported this with reference to the [at 'Artistic Considerations - Liveness' section] NESTA study which stated that "eighty-four percent of NT Live audiences "felt real excitement" because they knew the performance was being broadcast live that evening. Watching the show with others was also an important factor. Audiences tended to applaud at the end of the screening: they appear to feel connected to the performance and the South Bank audience".

53. The NESTA study also concluded that the live experience could also be felt where broadcasts were delayed and occurred after the live event.

54. He referred to the NESTA study [at Artistic Consideration - Scale section] as providing examples of the extent to which live events were distinguished from cinema screenings. A studio approach to filming was adopted with flexible camera positions and the broadcast elements were integrated into the theatre production process. A close connection between the Stage Director, Camera Director and the creative team within the theatre is established.

55. Where broadcasts were delayed these were not edited in any way. A decision was taken to preserve the sense of event for the audience and to maximise the collective experience for them.

56. It was found that it is possible to communicate the atmosphere of live theatre through satellite transmission and capture the sense of a live performance which enhances the audience's experience.

57. A much larger team is required to work on a Live Event. The Tribunal was referred to a figurative representation of a broadcast production sequencing overview which had been contained within the NESTA study. AB stated that it was not simply the case of filming the production and broadcasting the recording to the cinemas.

58. NT Live Event ticket prices are influenced in part by cinema ticket prices but also in relation to production costs.

59. AB said that as Live Events are different to cinema screenings and provide an enhanced audience experience, their admission prices have been, and as far as AB is aware remain, more expensive than admissions to general cinema screenings.

60. Increased pricing for admission to Live Events also applied to 'Encores', the delayed broadcasts and repeat screenings.

61. The broadcast of Live Events was seen as an extension of the theatre production and AB stated that studies have shown that a significant number of customers attended the Live Events due to the production at the theatre being sold out.

62. The NESTA study stated [at 'Exploring a new interface with theatre' section] that "Cinema audiences reported high levels of emotional engagement with the play, even compared with their peers, at the theatre performance. … NT Live audiences also enjoyed the live aspect".

63. AB said this further demonstrated that broadcasting Live Events is akin to a theatre or cultural performance rather than a film screening in a cinema where audience participation is substantially lower, if at all.

64. The majority of audiences attending Live Events enjoyed the collective experience of watching as a group. This differs from audiences at cinemacasts of films and or recordings who typically watch as an individual or as a couple.

65. The audience can book a programme for the Live Event, which is the same as the programme that could be purchased at the actual theatre, and order drinks for the interval. There is usually no interval in the screening of a film.

66. NT Live Events have intervals mirroring theatre, and this is also the case for delayed broadcasts and repeat screenings, as the event seeks to create the cultural experience of theatre through digital innovation.

67. In AB's opinion there is a different atmosphere when audiences arrive for a Live Event including a greater formality of dress. DQ's "feedback" was that the audience feel like part of the audience at the actual theatre and see the actual audience arriving there.

68. The Live Event is enhanced by the participation of a creative team and those concerned with the set and costume design, for instance, are sometimes interviewed. Usually, but not always, there are two directors one for the Live Event broadcast and one for the stage production and there is a dialogue between them.

69. AB stated that there is a difference between a live screening of the film in that the latter requires cutting and editing which is not present for a Live Event.

70. In AB's opinion, the broadcast of NT Live and other events is an extension of theatre through digital innovation and new technology. Artform is being taken in another direction.

71. Production teams are used to ensure that a theatre experience is created, and that the audience experience a sense of 'liveness'.

72. Audience participation is as a whole rather than the individual level experience of watching a film in the cinema.

73. Overall, the intention is to extend theatre and live events experiences to a wider audience through digital innovation and new technology.

74. HMRC also referred to the NESTA study [at Reflections from the NT section] where it stated "from the beginning, we saw cinema broadcasts as an alternative experience, aware that you can never replace the unique experience of being in the actual theatre. However, we felt that we could potentially offer a top-quality "second class experience that would greatly

increase the opportunity for people to see a National Theatre production, especially those outside London".

75. It continued "As we near the end of the second season, we have become more confident in seeing NT Live as an experience on its own. No, it is not the same as being in the theatre and never could be. But we have seen that it can be an experience of artistic merit, and it can honour the integrity of the work and have seen significant connection with audiences-it is not second class, but a different experience".

76. HMRC referred to the NESTA study [at the Scale section];- "there is more to the experience and imitation, however,. The natural advantages of film-the close-up, the cut, the quality of sound-also allows the NT Live audience new ways of engaging with the work".

77. In cross-examination, AB confirmed that the atmosphere of live theatre could be communicated through satellite transmission, and this captured the sense of a live performance, enhancing the audiences experience.

78. The NESTA study [at the Artistic Challenge section] stated, "Filming live performance is challenging. Even if technical quality is high, screen work is judged by the same standards set for the stage performances-and the sternest critical appraisal is likely to come from within the project……For the night of the live transmission, filming the show was the priority. By producing the broadcasts in-house, NT Live integrated the broadcast elements into the theatre production process, establishing a close collaboration between the Camera Director and the Stage Director as well as the wider theatre creative team".

79. The NESTA study set out the different key roles in the production team including Producer, broadcast production manager and floor manager. It stated [at the Quality section] "Theatre practitioners have tended to approach live broadcast with low expectations of quality, fearing that the buzz of live performance will be lost in the transmission. They forecast cold, static records of far distant events that only reinforce the idea that 'you had to be there'. But time and again, the actual experience is more positive. Audiences enjoy the HD quality and surround sound, the close-ups of performers, a convincing sense of 'liveness', as well as an opportunity to see additional material such as backstage interviews and post-show Q and A".

80. AB did not believe the differences between Live Events from actual or traditional theatre were significant in terms of a live theatre production.

81. AB confirmed some of the conclusions from the NESTA study were appropriate at the time it was written, some 12 years ago but that, for instance, some aspects such as sound quality in the actual theatre were not dissimilar from the sound experience at Live Events. Similarly, although interviews with staff members were not available during actual theatre productions, the latter occasionally had interactions with particular directors.

82. Live theatre performances now also from time to time include film screenings as part of the production and AB fundamentally disagreed with HMRC that Live Events are "just screenings".

83. AB confirmed that the production team for a Live Event screening was in addition to the team required for the actual theatre production but that there was a considerable degree of cooperation and interaction between the respective teams.

84. Overall AB's view was that the NESTA study was reflective of the initial years of the advent of life screenings and was not applicable to the years of assessment under appeal.

85. There had been changes in the understanding of performances by audiences within the arts sector with the impact of technological change. This, he stated, was in line with life in general, including tribunal hearings. In this regard he believed that the use of digital technology would become as important as oxygen.

86. He believed the Arts sector was at the vanguard of instigating technological change generally and that the same experience can be achieved in different ways by the use of technological change in presenting the arts.

87. The NESTA study [at the Quality section] suggested that it was necessary to be at the theatre and the fear had been that the "buzz of a live performance" communicated by satellite would be lost. AB stated that he believed that the NESTA study in relation to the necessity to be at the theatre was an outdated comment and that the "buzz of a live performance", was present at a Live Event as the study itself largely confirmed.

88. AB was asked whether he believed HD quality was available in the theatre and he confirmed it was generally not. Some theatrical productions, however, in particular musicals may or may not use HD quality enhancement to the performers' voices or dialogue depending on the construction/acoustics of the theatre in which they were appearing.

89. AB did not agree that being able to book your seat at DQ was that different from booking a seat at a theatre where there might be a column or pillar restricting the view of the stage because he stated that seating was very much a personal choice and that there were advantages and disadvantages of the view from a particular seat or seats at a Live Event.

90. In response to the reference in the NESTA study concerning 'the continuing sense of liveness", AB stated that there was a 'continuing sense of liveness' in a similar way to watching something like the 'Parliament Channel' which televises proceedings of the Houses of Parliament. AB thought that a live screening of a theatrical performance was different from the live screening of a football match.

91. AB was cross examined on the agreement with the NT which was included within the Bundle of documents. This document referred to DQ under "Cinema Name/Group… (the "Licensee")" and referred to the non—exclusive right to exhibit certain Plays performed live on stage at selected theatres by way of near simultaneous 'digital satellite feed to a paying audience".

92. The agreement referred to a "Prime Fee" which was defined as "for any Player, MTS edited version of that Play consisting of NT selection of output from cameras in the relevant theatre, shot in high definition -1080i - -Dolby resolution 25 frame rate as recorded and/or immediately edited by NT (with the addition of subtitling, introduction, preshow material, pre-recorded interval material and production and other credits as NT may reasonably require and played out to the relevant uplink provider for Satellite Transmission".

93. "Satellite Transmission" was defined as "transmission of the Prime Feed at virtually simultaneity with the performance of a Play from the satellite Intelsat 10-02 for reception by the Venues and other digital locations worldwide".

94. It also covered non-simultaneous screenings which were defined as "the exhibition at the Venue of the Prime Feed non-simultaneously with the performance of a Play (by means of either a digital tape or file of the Prime feed or satellite retransmission of the Prime Feed at NT's discretion), with the prior agreement of NT". These would include what DQ refer to as Encore screenings.

95. The agreement stated that NT Live would provide live performances to be shown at "multiple screenings".

96. "Play(s)" were defined as "one or more plays presented by NT or a Third Party Producer and performed live on a stage at a theatre in the English language and chosen by NT to form part of NT live".

97. AB confirmed the terms of the agreement, sections of which counsel for HMRC read to him, as AB did not have and could not access a copy of the agreement to refer to during his cross-examination.

98. AB confirmed that the credits shown as part of the screening would not be shown in theatres although they may be reflected in the theatre programme.

99. AB believed that there are a number of distinguishing factors which demonstrate that NT Live is much more than a regular cinema screening. Cinemacasts and live theatre are two distinct experiences and AB accepted that live screenings were not the same as being in the theatre where the performance was taking place.

100. JL confirmed the content of her witness statement and was not cross examined. A summary of that evidence is as follows.

101. GK first became involved when DQ's agent applied for a PESM for DQ and when it became clear at that time that DQ were treating the income received from admissions to Live Events as exempt from VAT.

102. GK then became aware of an earlier voluntary disclosure that had been submitted by DQ, that had been repaid on a without prejudice basis. He started actions to recover this VAT from DQ, as HMRC consider that the supplies were taxable.

103. HMRC's position was that admission charges to cinematic performances, and to live performances broadcast from other locations, were taxable.

104. The First Tier Tribunal (FTT) and Upper Tribunal (UT) hearings in British Film Institute (BFI) case had ruled that they were entitled to apply the exemption.

105. However, in February 2017, the CJEU ruled that it was up to the Member States to decide what supplies were entitled to qualify for cultural exemption, thus overturning the FTT and UT decisions. Accordingly, the UK was entitled to treat these cinematic performance supplies as taxable.

106. GK issued a ruling on 12 December 2018, detailing that the admissions to Live Events were not covered under the admissions exemption and, therefore, were taxable at the standard rate.

107. On 14 October 2016, following further correspondence between the parties about supporting evidence, HMRC received a letter from DQ together with documentation providing a breakdown of the output tax and input tax in the claim. The letter explained that whilst the

first part of the claim (£53,001.37 net) related to Live Events, £129,517.33 of the claim related to cinema income following the FTT BFI case.

108. On 24th October 2016, HMRC wrote to DQ and advised that following the Upper Tier Tribunal case in British Film Institute a repayment of £129,534 had been sent for repayment. However, this money would have to be repaid back to HMRC should the Court of Appeal overturn that judgment.

109. HMRC processed and repaid claims for £53,016 and £129,534 on or about 21 October 2016 and at the same time raised a protective assessment for £129,534, pending the outcome of HMRC's appeal in the British Film Institute case.

110. On 17th March 2017, HMRC received a letter dated 14 March 2017 which expressed a preference to pay the £129,534 protective assessment to mitigate potential interest, following a preliminary ruling from the Court of Justice of Europe in the British Film Industry case.

111. On 12 June 2017, HMRC received a letter dated 07 June 2017, advising that they believed the voluntary disclosure had been processed incorrectly.

112. On 29 June 2017, HMRC wrote to DQ to advise that the voluntary disclosure was processed incorrectly and that this would be rectified.

113. On 30 April 2018, GK wrote to DQ asking for more information on their business activities and asked for a worked example of the proposed new input tax apportionment method that had been applied for.

114. On 18 June 2018, DQ replied and set out details of income received and the VAT liability which clearly stated that Cinema admissions were standard rated and Live Performances VAT exempt.

115. On 10 September 2018, GK replied giving further advice and asking what exempt supplies were being made by DQ.

116. On 12 December 2018, GK wrote to DQ and referred to a call with an unspecified person at DQ who had stated that admission charges for Live Events were treated as exempt from VAT. The letter set out the background to the British Film Institute case and HMRC's view that charges to broadcasts/streamed performances did not qualify for exemption under Group 13 of Schedule 9 of the VAT Act 1994 and gave a ruling that VAT should be accounted for by DQ.

117. On 17 January 2019, there was a telephone call between GK and GW where GW stated that assessments would be out of time and that the issue would be subject to Legitimate Expectation.

118. On 01 March 2019, GW e-mailed GK wanting to understand next steps as the legitimate expectation claim had not been upheld.

119. On 01 March 2019, GK wrote to GW asking for recalculations due to the liability error on admission charges to broadcast and streamed events.

120. On 04 April 2019, GW emailed HMRC attaching reworked partial exemption calculations. The reworking included Live Event income as being taxable rather than exempt.

121. On 25th April, GK wrote to GW regarding the retrospective recovery of VAT on the admissions to Live Events and advising that HMRC were in time to recover some repayments that had been made to DQ in error.

122. On 22 May 2019, HMRC received a reply from GW expressing a view that the recovery assessment for the periods 03/16 to 12/16 were out of time.

123. GW also confirmed that DQ had accounted for VAT on cinema screenings from 12 December 2018.

124. On 4 Sept 2019, GK wrote to DQ advising that the protective assessment raised for £129,509 issued on 24th November 2016 was being enforced as the CJEU had reversed the First Tier and Upper Tribunal decisions in the British Film Industry case.

125. On 20 Dec 2019, GK raised an assessment for £26,751 for periods 03/17 to 12/18.

126. On 22 Jan 2020, GW requested an independent review of the decision made by GK in respect of the 'live' streamed events and the fact that HMRC were to issue a recovery assessment for periods 03/16 to 12/16.

127. That request was not actioned in error and GW sent a further chaser letter so that the review request was forwarded to the Independent Review team on 29 July 2020.

128. On 27 August 2020, HMRC conceded that the recovery assessment that was intended to be processed for periods 03/16 to 12/16 was out of time but that the further assessment made for 03/17 to 12/18 was in time and upheld and confirmed that the supplies of streamed live events were taxable at the standard rate.

129. Due to GK's retirement, JL took over and GK explained that the Independent Review had been completed and that a Tribunal appeal was expected.

130. During a telephone call between JL and GW in January 2021, JL asked for more information about the contracts and supplies being made.

131. In response GW e-mailed on 12 January 2021 with a licence agreement and promotion material and ticket price examples and on 4 February 2021 sent an example agreement.

132. JL raised queries during a telephone call with GW on 15 February 2021, regarding the contracts between DQ and the NT and the RSC to establish exactly what was being supplied and by whom.

133. On 17 February 2021, JL issued a new ruling letter confirming again that streamed live events were taxable.

134. A Notice of Appeal was notified to HMRC by the Tribunal Service 26 May 2021.

135. JL confirmed that the decision made by GK that supplies of streamed 'live' events were standard rated and the assessments raised for periods 03/17 to 12/18 were correct and issued in time.

DQ'S SUBMISSIONS – CULTURAL SERVICES GROUP 13

136. Item 2, Group 13, Schedule 9, VAT ACT 1994 provides:

> "The supply by an eligible body of a right of admission to -
>
> (a) a museum, gallery, art exhibition or zoo; or

(b) a theatrical, musical or choreographic performance of a cultural nature.

Notes

(1) For the purposes of this Group "public body" means -

(a) a local authority;

(b) a government department within the meaning of section 41(6); or

(c) a non-departmental public body which is listed in the 1995 edition of the publication prepared by the Office of Public Service and known as "Public Bodies".

(2) For the purposes of item 2 "eligible body" means any body (other than a public body) which -

(a) is precluded from distributing, and does not distribute, any profit it makes;

(b) applies any profits made from supplies of a description falling within item 2 to the continuance or improvement of the facilities made available by means of the supplies; and

(c) is managed and administered on a voluntary basis by persons who have no direct or indirect financial interest in its activities.

(3) Item 1 does 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.

(4) Item 1(b) includes the supply of a right of admission to a performance only if the performance is provided exclusively by one or more public bodies, one or more eligible bodies or any combination of public bodies and eligible bodies."

137. It is not in dispute that DQ is an "eligible body" as defined in Group 13 to Schedule 9 VAT Act 1994.

138. Live Events of the type shown at DQ, are "of a cultural nature".

139. DQ supplies a "right of admission". The audience is paying an admission charge to DQ. By purchasing a ticket for the RSC or NT Live Events, the customer is entitled to entry to DQ to watch the performance.

140. The live events are different to cinema screenings and provide an enhanced audience experience. As such, admission prices to live events have been and appear to continue to be more expensive than admissions to general cinema screenings.

141. The *Chichester* case states that a "theatrical performance" must be a "live performance" and not a "cinematic performance", but it is silent on geographic location which HMRC claim is an integral part of the natural and ordinary meaning of the words "theatrical performance".

142. The evidence as to the nature of the performance is shown in the audience reaction. Live Events are thought of as an experience on their own and are of artistic merit. They communicate the atmosphere of live theatre through satellite transmission and capture the sense of a live performance which enhances the audience's experience. It is not simply the case of filming the production and broadcasting the recording to the cinemas.

143. Live Events have intervals, mirroring live theatre and this is also the case for delayed broadcasts and repeat screenings (Encores) as the event seeks to create the cultural experience of theatre through digital innovation.

144. In a Live Event, a studio approach to filming is adopted with flexible camera positions and the broadcast elements are integrated into the theatre production process. A close connection between the Camera Director and Stage Director and the creative team within the theatre is established.

145. The NESTA study was published 12 years previously and was commissioned by NT Live to continue to improve digital performances.

146. The NESTA study sets out the process of creating the Live Event and is much more than pointing a camera at a stage. DQ say that the NESTA study confirms that Live Events are an extension of theatre and NT audiences at the theatre enjoy the live aspects. It is a real experience and a collective experience.

147. In summary, the NESTA study demonstrates a clear and distinct performance for all purposes that is to say audience, production and pricing.

148. DQ rely on *Chichester* at [paragraphs 9 and 10] which state:

> [9] "We think that the natural interpretation of the phrase "admission to theatrical, musical and choreographic performances of a cultural nature" is that it refers to live performances of theatrical works, whether in theatre or open air or in some other venue, live concerts and music shows and live ballet and dance shows. It seems to us not to be an apt expression to refer to attendance at the cinema to watch a film". There is at least a thread running through the whole phrase which connotes live performance and since cinema is such a well-known medium, often referred to in the phrase of "having a love of theatre and cinema" (where the two are referred to and distinguish), we find it unrealistic to say that the slightly different medium of cinema is encompassed in the relevant statutory phrase when the element of "live performance" that runs through the whole phrase is absent."
>
> [10] "Performance….."; - "In relation to "theatre", or indeed in relation actually to making films, "performance" is a word that refers to "acting in a theatre or in making a film", and the implicit notion is that it refers to current or live performance. In relation to film therefore, it is more apt to refer to the performance at the time of the making of the film".

149. HMRC's concept that there is a temporal and geographic requirement is rejected, and their notion that if Live Events were subject to the VAT exemption it would "open the door to all sorts of exemptions", is misconceived.

150. The examples of concerts at Glastonbury or the football match watched on television on an electronic device do not need a change in legislation because neither are a supply of an admission to a live event. They are transmissions of an event for which there has been no supply of admission.

151. In relation to the contract terms in the NT agreement, the use of the word 'Cinema' and other terms is merely an aid to distinguish the parties between the NT and DQ and is a 'red herring'.

152. The *News Corp* case relates to the difference between printed matter and rolling news provided on a non-printed matter medium. DQ are not seeking an extension of the Group 13 Schedule 9 VAT Acct 1994 legislation but merely submit that they qualify under the natural and ordinary meaning of the words of relevant Item.

153. Note 2 Group 13 - Cultural Services etc states that 'eligible body' means a body which "applies any profits made from the supplies of a description falling within item 2 to the continuance or improvement of the facilities made available by the means of the supplies." DQ say this relates to whether or not DQ is an eligible body which it is conceded it is and as a charity any profits are used for the continuance or improvements of the facilities made available by the supplies of a right to admission to a theatrical performance of a cultural nature.

154. HMRC's Public Notice 701-47 Admission Charges to Cultural Events at paragraph 2.4 defines the meaning of theatrical, musical or choreographic performance of a cultural nature "each event has to be judged on its individual merits. However, where live performances of stage plays, dancing or music are considered to be cultural, as they generally are, they'll qualify for exemption".

155. Further and contrary to HMRC's arguments, the Live Events shown at DQ constitute live performances of a cultural nature for VAT purposes and qualify for VAT exemption under Group 13 Item 2 (b).

DQ'S SUMISSIONS – VALIDITY OF ASSESSMENTS

156. If Tribunal does not agree with the principal argument put forward by DQ, it says HMRC are out of time in raising the assessment for VAT under declared in the amount £26,751.

157. An assessment for an amount of VAT due cannot be made more than one year after evidence of facts sufficient to justify the making of the assessment under section 73 (6)(b) VAT Act 1994.

158. HMRC based their decision to assess on the CJEU decision in the case of The British Film Institute as set out in GK's letter of 12 December 2018.

159. HMRC had been advised of the VAT treatment applied by DQ to admission charges to the broadcast of Live Events in communications relating to a claim for output VAT overpaid on 23 August 2016 and 14 March 2017.

160. HMRC raised an assessment for DQ to repay VAT on cinema admissions following the CJEU decision in The British Film Institute, dated 3 July 2017.

161. HMRC could have made its decision to extend the assessment to Live Event income at this time as it was aware that DQ had treated such income as VAT exempt.

162. No further information was provided to HMRC in the period 3 July 2017 to 12 December 2018.

163. HMRC could have raised a best judgement assessment following GW's conversation with GK in December 2018.

164. DQ contends that HMRC were in possession of sufficient evidence of facts on 3 July 2017 to justify making the making of an assessment for Live Event income, a date which is in excess of 12 months prior to 12 December 2018, the date of GK's letter.

DQ'S SUBMISSIONS - CONCLUSION

165. DQ requests that the Tribunal finds the admission charges to live events shown by DQ meet the criteria for VAT exemption.

166. Live Events are different from cinema screenings and through digital innovation the broadcasts allow for wider audience participation.

167. Digital media is used to deliver a performing arts event and experience and takes art form in a new direction.

168. DQ submits that the audience are paying an admission charge to attend a performance of a cultural nature. This has been supplied by an eligible body and is exempt from VAT.

169. In the event that the Tribunal finds that the admission charges are taxable for VAT purposes, DQ submits that HMRC are out of time to raise assessments for the period 03/17 to 12/18 inclusive.

HMRC'S SUBMISSIONS - CULTURAL SERVICES GROUP 13

170. HMRC say the Tribunal should ascertain the natural and ordinary meaning of the words used in the statute in light of their context and purpose and refer to *News Corp UK and Ireland v HMRC* [2023] UKSC 7, [at 27] "it is clear that the modern approach to statutory interpretation in English (and UK) law requires the courts to ascertain the meaning of words used in a statute in light of their context and the purpose of the statutory provisions".

171. Item 2(b) of Group 13 does not apply to the showing of films by a cinema, even those run by charities with the objective of advancing education of the public as was clearly stated in *Chichester*. The Tribunal held that the natural interpretation of "admission to theatrical… performances of a cultural nature" was a not to be "an apt expression to refer to attendance at the cinema to watch a film".

172. HMRC say that exemptions are an exception to the VAT base and the general tax on consumption and must be interpreted strictly. This is reinforced by the fact that Member States have a degree of discretion under Article 132(1)(n) as set out in *C-592/15 BFI 15 February 2017* and broader divergence from the harmonised system should be avoided as set out [at 48 and 107].

173. Simply fulfilling the same social purpose is not sufficient. In relation to updated construction, Lord Wilberforce referred to in *News Corp* which at [32] imposed a test tantamount to necessity.

174. HMRC say that updated construction for technological developments, by way of the "always speaking" doctrine, will take into account the difference of the medium, even if the content is similar.

175. In this case, the supplies are properly seen as tantamount to cinematic screenings; they are not properly "theatrical performances".

176. In relation to theatre, "performance" references people performing, with the implicit notion that it refers to a live performance. Collins dictionary provides:

> "Performance (countable noun): a performance involves entertaining an audience by doing something such a singing, dancing, or acting e.g., Inside the theatre, they were

giving a performance of Bizet's Carmen, The Festival of Arts & Music will include two days of live performances."

177. When seeing a show by Andrew Lloyd Webber, one of Shakespeare's plays, or the works of Mozart, a person must be seeing the performance or performing thereof by the people presenting or demonstrating those works.

178. "Theatrical" pertains to the appearing in a theatre, rather than merely being dramatic.

179. HMRC say the composite phrase "theatrical performance" refers to the actual live performance in a theatre or similar venue, rather than a recording of it.

180. The running theme of the NESTA study is that Live Events are described as similar to or more like a cinematic screening than a live performance.

181. DQ have provided scant evidence to say the supplies of Live Events are live performances and refer to the NESTA study and the contractual agreement between NT and DQ as objective evidence, which HMRC says they are not.

182. Reading the entirety of Item 2 Group 13:

> i. "Admission" is more readily associated with entry to a venue, that venue being the theatre or the place of the theatrical performance. There is a subtle difference also between being "admitted to" something and "admitted to see" something (e.g. a screening).
>
> ii. There is no "right to admission" to the theatrical performance: one could not use the ticket to enter the National Theatre on the Southbank.
>
> iii. Musical or choreographic performances are equally indicative of the need to see the performer. One would not describe watching the movie of Swan Lake as going to see the ballet. Similarly, seeing a recording of a live performance of a band recorded on stage (or even broadcast simultaneously as with Glastonbury on television) could not fairly be described as attending a musical performance, let alone admission to such.

183. The UK chose not to include cinema screening within the scope of the exemption.

184. "Performance" is different to "showing" or "screening".

185. 'Live' can be used to refer to the temporal but not geographic but HMRC say that the exemption requires both and they cannot be decoupled.

186. At the time the legislation was introduced, it is unlikely that satellite broadcasting would have been in contemplation by the legislature.

187. In this case, as a matter of fact, DQ's Live Event supplies are different and distinguished from live theatrical performances. They are shown on a screen in a cinema with speakers rather than before an audience with live orchestras or similar.

188. HMRC say that a theatrical performance means a live performance happening in a natural setting rather than a dramatic performance on a screen which is not a performance and not a theatrical performance.

189. HMRC also say that it must be a matter of judicial notice that the atmosphere and feeling is likely to be different, like watching a football game live or on the pub TV as an extreme example, with a level of detachment and distance or lack of formality. The use of the latter

words "musical… performance" might provide a more experiential or empirical example where the difference between being there live or listening to a recording will be quite stark.

190. The NESTA study repeatedly describe the supplies as digital cinema broadcasts with differentiation from live theatrical performances:

> "*From the beginning, we saw cinema broadcasts as an alternative experience, aware that you can never replace the unique experience of being in an actual theatre".*

191. The NESTA study, although it stated that Live Events were not second-class, said they were different. HMRC say that the genus of facts were not the same, are not the same and in future will not be the same.

192. As such, the supplies do not fall within the natural and ordinary meaning of the statutory exemption.

193. The NT and DQ contract emphasises that a live performance and a live event are not the same. The agreement refers to screening and there are a number of marked differences. There is a screen not a stage. There is no live orchestra. There is no audience feedback to the cast who can hear or appreciate it. There are edited camera angles and close-ups and cuts to different part of the audience. There is a different team of a camera director and a stage director and there may be subtitles and credits.

194. The agreement considers the issue of satellite failures which are not applicable to the traditional theatre and similarly the speakers and acoustics differ from traditional theatre. There are no boxes at DQ and there are, say HMRC, no restrictions on entering late as they would be at a theatrical performance in a theatre.

195. HMRC say that there is a difference between seeing something, with the latter providing a level of detachment, and attending something.

196. HMRC say that fulfilling a social purpose, which HMRC concede DQ does, as stated in *News Corp* is not sufficient to meet the test for the exemption.

197. On the evidence the supplies made by DQ are closer to cinematic performances than to theatrical performances and these are differences of kind and not degree.

198. There is no requirement to make the extension and any such extension would be an impermissible expansion of the legislation. The latter is a job for Parliament and not for the Tribunal and a broad construction would lead to the Tribunal legislating.

199. 'Live' only means at the same time and at the performance. To extend the exemption to for instance the Tate Gallery or Glastonbury or football on a television or other device would not meet the temporal and geographical requirements of the exemption.

200. When construing the law (and its application), the Tribunal will note the need to interpret the exemption strictly and, in this regard, DQ is referred to as "Cinema Name/Group" under the NT Live Contract.

201. The intended effect of the exemptions is "to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes". The purpose would likely be the reduced financial burden to "lower the threshold for theatre visits by the public" and for the presumed public good of consumption of cultural activities.

202. However, not everything that meets this aim will fall under the exemption, and it has been drafted narrowly for eligible institutions only.

203. HMRC say that it is the content that is important in interpreting the exemption and not the medium but as it is shown on a screen the medium is different and refer to *News Corp* at [52] where a defining characteristic of "a newspaper" meant news communicated through the medium of print in a physical form, on paper, in 1975.

204. In *News Corp* at [53] and the court also identified a defining characteristic that the buyer of a newspaper obtained complete access to news in that paper. There was no requirement of connectivity. HMRC say this is applicable to a Live Event as there is no need for connectivity in a theatre but there is in a live event.

205. HMRC say that *News Corp* defines two characteristics which provide a conceptual difference of kind not merely degree. As in *Chichester*, HMRC are willing to concede that DQ's operation is similarly likely to be "a very worthy venture" with the aim "to promote culture". However, fulfilling the purpose does not require the extension of the exemption. To be within the exemption there must be the same genus of facts.

206. HMRC say that the "eligible body" status requires that the taxpayer: "applies any profits made from supplies of a description falling within item 2 to the continuance or improvement of the facilities made available by means of the supplies". This advances the purpose by ensuring any profits are used to fund what are likely to be costly facilities for the staging of such live performances. It is unlikely that the purpose is served by, or that the intention was to apply to, reinvesting into the projector or screen.

207. The principle of "always speaking" was summarised by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC, and cited, approvingly, in the Supreme Court in the *News Corp* case at [32]:

> "In interpreting an Act of Parliament, it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs... [W]hen a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed."

208. At the time the legislation was introduced, it is unlikely that satellite broadcasting would have been in contemplation by the legislature. HMRC submit that the "genus of facts" is not the same and that the policy purpose does not require this extended exemption to be fulfilled. Furthermore, the framework is one of strict interpretation of exceptions to the general VAT base: restrictive or circumscribed rather than liberal or permissive.

209. Furthermore, the medium is a key distinguishing factor in the application of the always speaking doctrine. A "broadcast screening" would amount to "an impermissible expansion" of the exemption. As with digital newspapers and e-books, it is a matter for the legislature rather than the courts. A broad construction could present a slippery slope, with broadcasting to, say, VR headsets or an online gallery sufficing.

HMRC'S SUBMISSIONS - VALIDITY OF ASSESSMENTS

Section 73(1) VAT Act 1994 provides:

> "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."

Section 73(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."

Section 77(1):

> "Subject to the following provisions of this section, an assessment under section 73 or 76, shall not be made—
>
> (a) more than 4 years after the end of the prescribed accounting period or importation 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."

210. The assessments (for underdeclared output tax with corresponding underdeclared input tax) and periods were [1] 24 October 2016, 09/2012 – 12/2015 for £129,534 (Protective, Paid);[2] 17 March 2017, 03/2016 – 12/2016 for £13,997 (Withdrawn); and [3] 20 January 2020, 03/2017 –09/2019 for £26,751 (Under Appeal).

211. The periods 03/2018 to 12/2018 of the third assessment, fall within the two-year time period under s.73(6)(a) in any event.

212. In respect of the 20 January 2020 date of assessment, the "date of calculation" is 20 December 2019. In respect of the period 03/2-17 to 09/2091 the under-declaration is only until 12/2018.

213. With regard to the periods 03/2017 to 12/2017 (and the subsequent periods also), HMRC submit they are within the one-year time limit under s.73(6)(b).

214. The principles to be applied are from *Pegasus Birds Ltd v HMCE* [1998] EWHC Admin 1096, recently affirmed in *DCM (Optical Holdings) Ltd v HMRC* [2022] UKSC 26. In summary:

> a. HMRC require sufficient evidence, actually within their knowledge (i.e., not constructive knowledge), to justify making the assessment,
>
> b. The Tribunal will look to the last piece of evidence of the required facts that justified making the assessment,
>
> c. The one-year period will run from this last piece of evidence being in the officer's knowledge,
>
> d. An officer's decision that the evidence was insufficient to justify an assessment can only be challenged by Wednesbury principles (e.g., irrationality or perversity).

215. Furthermore, the wording of s.73(6) provides for "an assessment… of an amount of VAT" such that knowledge of the amount (or the figures) is paramount. As referenced in Pegasus Birds, referring to the words of Woolf J as he then was, in *Schlumberger Inland Services Inc v Customs and Excise Commissioners* (1989) STC 228 at page 235, it would be "a misuse of that power if the Commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which would possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment".

216. Although earlier disclosures by DQ may have triggered an investigation or further enquiry into the tax treatment, it was only during a phone call in December 2018 that the issue of so called "live events" being screenings reared its head. Before then, the officer had not understood that Live Events were what he considered to be broadcast cinema screenings. At this time, the figures were not before HMRC.

217. It was on 1 March 2019 that HMRC requested calculations and PESM information so as to determine the assessment amounts.

218. On 25 April 2019, the PESM calculations were still under discussion and, in relation to the broadcast screening supplies, HMRC stated:

> "The VAT under declared in the subsequent periods on the admission charges is recoverable and HMRC would be grateful is you would advise us as to the amount of VAT due on these admission charges (adjusted for any change in VAT recoverable)."

219. On 22 May 2019, agents for DQ wrote a letter confirming that it had been "accounting for VAT on Live Event income" since December 2018 and that "we trust this provides you with sufficient information form HMRC to revisit its proposed assessments".

220. It was on 8 July 2019 that the "last piece of the puzzle" fell into place when responding to HMRC on the PESM calculations. DQ's letter enclosed documents and provided updated apportionment percentages for a more accurate calculation of how VAT is used across the business. The Review Conclusion Letter records:

> "It was only when these figures were provided within the partial exemption recalculation, that Officer Kennedy was able to notify his assessment. This was July 2019."

221. From either DQ's letters of 22 May 2019 or 8 July 2019, the assessment on 20 January 2020 was within one year.

HMRC's SUBMISSION - CONCLUSION

222. HMRC submit that DQ's supplies cannot correctly fall under the wording of the exemption. Furthermore, the assessments were valid and timeous.

223. HMRC say the appeal should be dismissed.

DECISION - CULTURAL SERVICES GROUP 13

224. Group 13 Item 2(b) sets out the test to meet the exemption from VAT for certain activities in the public interest and requires an "eligible body" to "supply of a right of admission to a theatrical, musical or choreographic performance of a cultural nature" ("the Exemption").

225. There was no dispute that DQ was an eligible body. The dispute was whether DQ supplied of a right of admission to a theatrical performance and whether it applied its profits from supplies of a right of admission in accordance with the note to Item 2.

226. As counsel for HMRC rightly reminded the Tribunal, the test in relation to the Exemption is not whether a Live Event is, or is not, a cinematic performance which is not exempt from VAT. Nevertheless, throughout the hearing and in particular with reference to *Chichester* there emerged a requirement to ascertain or disprove that a Live Event was a cinematic screening.

227. The VAT and Duties Tribunal in *Chichester* provided the initial consideration of the wording of the Exemption and carefully considered the relevant words and their meaning in the context of an appeal as to whether a cinematic screening was covered by the exemption, until the appeal to the CJEU for an opinion, which resulted in the cinematic screenings being subject to VAT.

228. In this context, the Tribunal considered that Encore performances of the "Live Events" were cinematic screenings. The supply of a right to admission for these should be subject to VAT. In simple terms, they were in no understandable interpretation of Live Events; there was nothing live about them. They were provided to the audience at a time well after the actual Live Event had taken place.

229. The Tribunal, based on the evidence before it, then considered whether the Live Events met the terms of the Exemption in terms of statutory interpretation as set out in *News Corp*.

230. The opinion of Lords Hamblen, Burrows, Hodge and Kitchen, in *News Corp*

At [27]

> "It is clear that the modern approach to statutory interpretation in English (and UK) law requires the courts to ascertain the meaning of the words used in a statute in light of the context and the purpose of the statutory provision".

At [28]

> "Within the modern approach, it is also a well-established principle of statutory interpretation that, in general, a provision is always speaking…".

At [29]

> "What is meant by the always speaking principle is that, as a general rule, a statute should be interpreted taking into account changes that have occurred since the statute

was enacted. Those changes may include, for example, technological developments, changes in scientific understanding, changes in social attitude and changes in the law. Very importantly it does not matter that those changes could not have been reasonably contemplated or foreseen at the time the provision was enacted. Exceptionally, the always speaking principle will not be applied where it is clear, from the words used in the light of their context and purpose, that the provision is tied to an historic or frozen interpretation".

At [30]

"The great merit of the always speaking principle is that it operates to prevent statutes becoming outdated. It would be unrealistic for Parliament to try to keep most statute up to date by continually passing amendments to cope with subsequent change".

231. The Supreme Court considered a number of leading cases on the always speaking principle which had been relied on by News Corp's counsel, included the *Royal College of Nursing.* In *Test Claimants in the Franked Investment Income Group Litigation and others (Respondents) v Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 0228 'the majority, Lord Reid and Lord Hodge, with whom Lord Lloyd-Jones and Lord Hamblen agreed, stressed that (the always speaking doctrine) was merely an aspect of purposive interpretation"…. The best interpretation of the Act should apply the purpose of the provision to the present, not the past, state of law".

232. In *News Corp* at [38] the Court stated the well-established principle that zero rating provisions must be interpreted strictly because they constitute exemptions to the general principle that all supplies of goods and services for consideration by a taxable person should be subject to VAT. They should not, however, be interpreted so strictly as to deprive the exemption of its intended effect. As stated by Lord Kitchen in *SAE Education* at paragraph 42:

In accordance with well-established principles, the terms used in articles 131 to 133 to specify exemptions from VAT must be construed strictly. Nevertheless, there must also be construed in a manner which is consistent with the objectives which underpin them and not in such a way as to deprive them of their intended effect".

At [39]

"The need for strict interpretation is particularly marked where, as in this case, it does not involve mandated EU exemptions, but rather national law exceptions tolerated by EU law within the constraints of the EU standstill provision."

233. In *News Corp*, the Supreme Court then consider the application of the always speaking principle having regard to the constraints of EU law.

At [48]

"Here these constraints mean that the always speaking principle is significantly limited so as to ensure that it does not conflict with the requirement for zero rating for newspapers to be strictly construed and not extended".

At [49]

"The EU law constraints mean that this is a case in which the court "should be less willing to extend express meanings" than in other cases where a liberal or permissive

approach is called for. In this case the always speaking principle falls to be applied at the less liberal end of the scale"

At [50]

"Lord Wilberforce also made clear that the always speaking principle applies where the new state of affair falls within "the same genus of fact" as that for which the legislation was passed and that it will not do if it is "different in kind or dimension".

234. The Court went on to consider the question of defining characteristics at [52-55] which can be summarised in that case in relation to printed versions of a number of newspapers and their relevant digital editions which were available in e-reader editions, tablet editions, smart phone additions, website additions or on an app.

235. The Court considered what was meant by "newspaper" in 1975 which would be understood to be news communicated through the medium of print in a physical form. Although news was communicated through the medium of radio and television, such news bulletins would not be understood to be or to be akin to newspapers. The medium of print in a physical form would have been regarded as a defining characteristic of a newspaper in 1975.

236. Another defining characteristic was that the buyer of the newspaper obtained complete access to the news in that paper and there was no requirement of connectivity. Access did not depend on owning or buying something else such as a device.

237. The Court held that these two characteristics were a reflection of their being a conceptual difference between newspapers in 1975 and digital editions and that difference was a radical one which opened up all sorts of possibilities for interactive communication.

238. The Court decided that these features, along with a strict and non-expansive interpretation required by EU law, rendered it clear, that digital editions fell outside "the same genus of fact". "In other words, those underlying fundamental features viewed in the light of EU law constraints, mean that the difference between newspapers in 1975 and digital editions was "one of kind not merely degree".

239. A fundamental conceptual difference between print newspapers and digital newspapers was that the former were goods whereas the latter were services. "The inclusion of services within Group 3 of Schedule 8 of the VAT Act in Item 2 would create new legal issues such as deciding where the services are supplied."

240. The Court considered that although the content of the digital editions was the same or very similar to physical newspapers, digital newspapers were in other respects very different from print newspapers.

At [58]

"In our view, therefore having regard to the constraints of EU law, the always speaking principle cannot be applied so as to interpret newspapers as covering digital editions. This is not to close off entirely the operation of the always speaking principle in this context."

241. The Court considered that the adoption of an impermissibly expansive approach would not be acceptable.

At [60]

> "The always speaking principle has to be applied narrowly given the constraints of EU law. The relevant "genus of facts" should be viewed as covering only physical items involving the medium of print and no connectivity requirement. Digital editions do not fall within this categorisation."

242. The Tribunal consider that the interpretation of the connectivity requirement as due by the recipient of the supply, that is to say the reader of the digital edition of the "newspaper" and that it was and is not necessary to have connectivity or a device to obtain a supply of a right of admission to a theatrical performance of a cultural nature when attending a Live Event.

243. The evidence comprised largely the NESTA study, which was 6/7 years earlier than the period under appeal, which was commissioned at the inception of Live Events as a method of improving their delivery to audiences and AB, the CEO of DQ the time of the period under appeal, who gave evidence that there had been significant changes since that study.

244. In *Chichester*, the VAT and Duties Tribunal analysed the individual words of the Exemption, and these were expanded upon by HMRC and DQ, but they require to be read together.

245. This, First-tier, Tribunal was not persuaded that a "right of admission" to a Live Event or to an actual theatrical performance were different from each other. The concept that a ticket to a Live Event of a NT production would not gain access to the NT, was equally applicable to the reverse position.

246. HMRC defined 'performance' as having not only a temporal or live requirement but also having a geographical one so that it could only take place in one geographical place. The principal concern was that if such a geographical condition was not required then it would "open the floodgates".

247. Examples of this concern were given such as visiting the Tate Gallery by using a video headset, watching a football game on a television in a public house, or a concert, such as Glastonbury, on some form of digital device. Whereas these would allow the distribution of a gallery or theatrical performance of potentially a cultural nature, in none of those examples would there be, reading all the words together, an eligible body supplying a right of admission. Accordingly, the Exemption could not apply.

248. The Tribunal considered that there were very few if any other circumstances where the floodgates would open should the Tribunal prefer DQ's submission on the Exemption.

249. The Tribunal was not persuaded that a Live event was the same as a cinematic screening but, nevertheless, did not consider that it fully met the natural and ordinary meaning of the words of a 'theatrical performance'.

250. AB's opinion was that the audience experience, the production and the "buzz" were the same as a live performance in a theatre.

251. The Tribunal could not accept that, despite these similarities, Live Events were the same as being at an actual theatrical performance because the actors cannot hear the Live Event audience and moreover they provided no audience and performer interaction.

252. The Tribunal considered this a crucial distinction. The actors/performers in a theatrical performance receive no 'feedback' from an audience at a Live Event. The audience cannot convey their reactions and responses to the actors/performers.

253. The actors/performers would not know if some or all of the Live Event audience left after an interval, or even during a performance, nor, importantly, how they were reacting to the performance. The actors/performers would not even be distracted, as is widely publicised and criticised, by the use of mobile telephones at a Live Event.

254. Similarly, the performance seen at a Live Event, provided that audience with no reaction from the actors/performers to their applause or other reactions.

255. The Tribunal considered that these interactions which require the audience and the performers to be in the actual same place was critical to a 'theatrical performance'.

256. Consequently, the Tribunal considered this as a significant difference of kind, referred to by the Supreme Court in News Corp, when considering the 'always speaking' doctrine. There was not a relevant genus of facts "as those to which the expressed policy has been formulated" to make a Live Event a 'theatrical performance'.

257. HMRC referred to a Collins dictionary definition which specifically referred to a 'theatrical performance' as happening "e.g., inside a theatre". The definition of 'performance' in *Chichester,* from the Oxford English Dictionary, referred to "the performing of a play, music, or gymnastic conjuring feats or the like, as a definite actual or series of acts done at an appointed place and time; a public exhibition or entertainment".

258. In relation to both these definitions there is an inherent sense that place is essential and despite technological advances that may seek to recreate that, it cannot, in the context of Live Events, provide the interaction that is present in actually being in the same theatre or place.

259. The Supreme Court set out that the always speaking doctrine must be applied narrowly given the constraints of EU law.

260. The Tribunal, accordingly, considered that the supply of a right of admission to a Live Event did not fall within the genus of facts, as referred to by Lord Wilberforce. In the context of *News Corp*, both live theatre and a Live Event are services and neither require accessibility by the audience, who are receiving the supply, on a separate device such as a Tablet, mobile telephone or other electronic device.

261. Nevertheless, the differences in the experiences of members of the audience and the actors/performers between a live theatre performance and at a Live Event are ones of kind, and not just degree, as they go to the essence of what makes and constitutes a theatrical performance and require interaction.

262. A Live Event is, consequently, not capable of being a 'theatrical performance' in terms of Item 2, Group13, Schedule 9, of the VAT Act 1994.

263. The Tribunal considered that DQ, as an eligible body, applied any profits from Live Events to the continuance or improvement of the facilities made available by means of the supplies and that this was not restricted to the just the projector or other equipment for Live Events but also for all the equipment, service and infrastructure of the place where the supplies were made.

264. The Appeal in relation to whether the Exemption applies to Live Events is dismissed.

DECISION - VALIDITY OF ASSESSMENTS

265. The Tribunal preferred the submissions made by HMRC in relation to the validity of the assessments.

266. The Tribunal considered that the period 03/2018 to 12/2018 of the assessment of 20 January 2020, with the "date of calculation, as 20 December 2019 fell within the two-year time period under section 73 (6) (a) VAT Act 1994.

267. In relation to the period 03/2017 to 12/2017 the Tribunal consider that HMRC are within the one-year time limit under section 73 (6) (b) VAT Act 1994.

268. As set out in case law referred to, HMRC require sufficient evidence, actually within the knowledge to justify making the assessment. The Tribunal should look at the last piece of evidence of the required facts that justified making the assessment. The one-year period runs from this last piece of evidence being in the Officer's knowledge.

269. DQ made earlier disclosures which triggered further enquiry, but it was only during a telephone call in December 2018 that the issue of Live Events became known to HMRC. Prior to this HMRC did not understand the "live events" to be events at which the Live Event audience and the performers were at the different venues.

270. As from December 2018, GK advised DQ that they were treating the disputed supplies as exempt. Although he was aware of the issue at that time, he was unable to notify the assessment as he required details of the admission incomes and input tax deducted to notify assessments to the correct position.

271. GK could not raise assessments until he knew the amounts to notify. As of December 2018, there had been no actual check of DQ's records to enable GK or HMRC to raise a best judgement assessment.

272. HMRC still required information on 25 April 2019 and received responses from DQ's agents on 22 May 2019 and 8 July 2019. This provided the "last piece of evidence" to allow GK to notify his assessment.

273. Accordingly, the assessment on 20 January 2020 was within one year of July 2019.

274. The Appeal in relation to the validity of the assessments is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

275. 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.

Ruthven Gemmell WS
TRIBUNAL JUDGE

Release date: 23rd OCTOBER 2023