TC02253

Appeal number: TC/2011/05369

VAT – Single or multiple supplies; five-a-side football; Pitch hire agreements and management services of sports leagues; whether single supply or multiple supplies, whether artificial to split or artificial to combine; tests to be applied and factors to be taken into account; relevance of the principle of fiscal neutrality VATA s31(1), Schedule 9, Group 1 Item 1(m), Note 16 -

FIRST-TIER TRIBUNAL
TAX CHAMBER

GOALS SOCCER CENTRES plc **Appellant**

- and -

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

TRIBUNAL: JUDGE J GORDON REID, QC, FCIArb
PETER R SHEPPARD FCIS, FCIB, CTA

Sitting in public at George House, Edinburgh on 5, 6 & 10 July 2012

Philippa Whipple QC (of the English Bar) for the Appellant

Julian Ghosh QC, and Jonathan Bremner, barrister (of the English Bar), instructed by the Office of Advocate General, for the Respondents

DECISION

Introduction

1. This appeal raises the familiar question of single or multiple supplies for VAT purposes; the question relates to the activities of a company which, in broad terms owns and operates five-a-side football pitches and organises and administers certain competitive football leagues. There is a dispute about the proper description to be given to their activities so the previous sentence should not be taken as indicative of our views; it simply gives a flavour of the nature of the appeal.

2. The appeal was heard at Edinburgh on 5, 6 and 10 July 2012. The Appellant was represented by Philippa Whipple QC of the English Bar, on the instructions of KPMG LLP, Manchester. She led the evidence of William Gow, the Appellant's finance director, Morris Payton, the Appellant's operations director, Gavin Ballantyne, secretary of an 11-a-side football team based in Middlesex and Nick Burrett, a team organiser of a 5-a-side football team which plays in one of the Appellant's leagues at their venue at Leeds. Witness statements were circulated in advance. The Respondents (HMRC) were represented by Julian Ghosh QC, and Jonathan Bremner, barrister, on the instructions of the Office of the Advocate General. Mr Ghosh led no evidence. He cross-examined all the Appellant's witnesses. A Joint Bundle of productions was produced, along with a bundle of authorities. Skeleton Arguments were also lodged in advance of the Hearing.

Procedural Matters

3. At the outset, Mr Ghosh intimated an objection to the admissibility to various parts of the witness statements of William Gow, Gavin Ballantyne, and Nick Burrett. After argument, we decided to allow the evidence to proceed unrestricted, reserving Mr Ghosh's objection for further consideration in closing submissions and in our Decision. We deal with this issue below. However, our decision on this evidential issue has not affected our overall conclusions.

4. At a late stage in proceedings, Miss Whipple, on 10 July 2012, applied to recall Mr Payton. After hearing argument, we granted the application and heard further evidence from Mr Payton. We also discuss this aspect of the appeal below.

Statutory Background

5. Section 31(1) of VATA exempts supplies of goods or services if they are of a description specified in Schedule 9. Schedule 9 Group 1 VATA relates to land and exempts the following supplies from VAT:-

> "1. The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any person right to call for or be granted any such interest or right, other than –
>
> …

(m) the grant of facilities for playing any sport or participating in any physical recreation; …

Notes:

…

(16) Paragraph (m) shall not apply where the grant of the facilities is for –

(a) a continuous period of use exceeding 24 hours; or

(b) a series of 10 or more periods, whether or not exceeding 24 hours in total, where the following conditions are satisfied –

(i) each period is in respect of the same activity carried on at the same place;

(ii) the interval between each period is not less than one day and not more than 14 days;

(iii) consideration is payable by reference to the whole series and is evidenced by written agreement;

(iv) the grantee has exclusive use of the facilities; and

(v) the grantee is a school, a club, an association or an organisation representing affiliated clubs or constituent associations."

6. The Schedule thus exempts certain supplies, excludes certain supplies from the exemption, and excepts certain supplies from the exclusion, thus restoring them into the exemption category.

7. A strict construction is applied to the initial exemption, a broader construction to the exclusions from exemption and a narrower construction to the exceptions from the exclusions. Nothing actually turns in this appeal on these nuances of statutory interpretation.

8. These statutory provisions are authorised by Article 135 of Directive 2006/112/EEC (formerly Article 13(B)(b) of the Sixth VAT Directive). Our attention was drawn to recital (7) of the 2006 Directive which provides that

> "The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain."

The applicable principles and guidance derived from the case law

9. The question whether, for the purposes of VAT, a transaction involves the provision of a single supply or multiple supplies has been considered at great length and depth in recent years by courts of the highest authority. Many cases have been cited to us including in particular *Card Protection Plan Ltd v CEC* 1999 STC 270 (ECJ) especially paragraphs 26-31, *LevobVerzekeringen BV v Staatssecretaris van Financien* 2006 STC 766, especially at paragraphs 22-29, *RCC v David Baxendale Ltd* 2009 STC 825 (Ct of Appl), *RCC v Bryce (t/a The Barn)* 2011 STC 903, and *Purple Parking Ltd v HMRC* 19/1/12 Case C-117/11, and *Talacre Beach Caravan Sales Ltd v CEC* Case C-251/05 2006 STC 1671.

10. Neither counsel disputed the summary of the relevant principles as set out in Roth J's judgment in *Bryce* at paragraph 23, and the Edinburgh Tribunal's Decision in *Drumtochty Castle Ltd v RCC* 2012 UKFTT 429 (TC) paragraphs 13 and 14.

11. In considering whether the relevant activities of the Appellant constitute (i) multiple supplies, (ii) a single (composite) supply with one or more supplies being the principal service or services and the others being ancillary, (iii) a single (composite) supply which comprises a number of distinct elements which are indissociable and none of which is ancillary to the other even although some may predominate, or (iv) a single (composite) supply where it is necessary to preserve the independent character of each element of the supply, the authorities provide a number of factors or guidelines which should assist in identifying how a transaction or activity should be categorised. In the first category, each of the supplies is treated separately for VAT purposes. In the second category, the ancillary services share the tax treatment of the principal service. In the third category, the essential features of the over-arching supply must be considered in order to ascertain the correct tax treatment. In the fourth category, each of the supplies is treated separately for VAT purposes.

12. The following, among other factors seem to be relevant to the facts and circumstances of the present appeal:-

i. The nature and extent of the transaction and the circumstances in which it takes place

ii. The essential features of the transaction

iii. What are its elements?

iv. Would it be artificial to split these elements; alternatively, would it be artificial to combine them?

v. Are they so closely linked that they form a single economic transaction which would be artificial to split?

vi. Is there a principal service consisting of one or more predominant elements?

vii. Is there an ancillary service consisting of one or more elements which does not constitute for consumers an aim in itself?

viii. Is the ancillary service a means of better enjoying the principal service?

ix. Are there various elements which fall to be treated as one over-arching supply?

x. Is one supply of no use without the other?

xi. Has a single price been charged?

Decision Appealed Against

13. HMRC have considered at national level the VAT liability applied to supplies being made by organisers of what they describe as *small sided football (and other sports) leagues to the teams participating in their leagues.* By letter to the Appellant dated 24 January 2011, HMRC intimated their decision that

> *the supplies that are made by football league providers to small sided teams in connection with the participation in a football league are, and have always been taxable at the standard rate.*
>
> and that the supplies were taxable as follows:-
>
> *1 The essential nature of the supply is of participation in a football competition.*
>
> *2 The essential nature of the supply is NOT a supply of land.*
>
> *3 The supply consists of a bundle of elements, which are integral to each other, but it cannot be said there is one principal element to which all others are ancillary*

14. In a detailed reply dated 8 February 2011, KPMG, on behalf of the Appellant, requested reconsideration of HMRC's decision. In their letter, they did not disagree that a charge made by a for-profit body such as the Appellant to a participator to take part in a competition is standard rated. They confirmed that the Appellant declared standard rated VAT in relation to such supplies, and on pitch hire supplies which do not meet the series of lets conditions. However, KPMG asserted that the Appellant's *charges for a series of lets of pitches, including those used to play league games, were land related and therefore VAT exempt.*

15. They also requested a review of a Notice of Assessment issued on or about 24 March 2011.

16. By letter dated 17 June 2011, HMRC reviewed the decision dated 24 January 2011 and upheld it. The review concluded *inter alia* that

the essential nature of the supply is that of league participation and that the hire of the pitch is one of the elements of this supply, particularly as pitch hire is available which does not require league participation

where a football league operator provides land as part of a package of services (including for example the provision of referees, allocations of fixtures)

HMRC has taken the view that where a football league operator provides land as part of a package of services (including, for example, the provision of referees, allocations of fixtures to games, publication of results) the overall supply is not capable of falling within the land exemption and should be categorised as a taxable supply of participation in a sports league rather than an exempt supply of land. HMRC considers this position to be consistent with European and UK case law.

HMRC does not think the supply falls within the land exemption because it is better described as a commercial activity/the provision of a service rather than merely the passive provision of space. HMRC think the supply comprises a bundle of elements, one of which may be land, but that the overarching supply is of participation in a sports league, and not one of land.

To determine whether sports league supplies fall within the UK land exemption it is necessary to decide whether they constitute a 'leasing or letting of immovable property' in European terms. This is because the UK exemptions must be interpreted consistently with the European legislation on which they are based, as far as it is possible to do so (Marleasing SA v La Comercial International de Alimentacion SA Case C.106/89).

It is thus plain that the words 'licence to occupy land' in the 1994 Act ***cannot go wider than*** *the words 'leasing or letting of immovable property' in the Sixth Directive [Emphasis added].*

Essentially, a 'leasing or letting of immovable property' is 'normally a relatively passive activity, not generating any significant added value' (GoedWonen C-326/99). The ECJ has also described it as the 'passive provision of space' (Sinclair Collis).

In these circumstances, to determine the VAT liability, it is necessary to establish the character of the overarching supply (not the individual elements).

Therefore the overarching supply is not one of a pitch. In HMRC's view, but of participation in a league. What attracts teams to your business is the opportunity to participate in a league, not merely the opportunity to use a pitch.

The reviewing officer was also satisfied that the assessment was made to best judgment.

17. While these letters reflect the position of HMRC, neither counsel referred to them at all in their closing submissions, although they are mentioned in the Skeleton

Arguments. We therefore assume that they wish us simply to grant or refuse the appeal in accordance with our decision.

18. On 15 July 2011, the Appellant appealed against the Decision, the Review and the assessments dated 24 March 2011 and 28 June 2011.

Grounds of Appeal

19. The Appellant contends that the supplies constitute multiple supplies of exempt pitch hire services on the one hand and supplies of standard rated league participation services on the other.

20. Alternatively, they say that the pitch hire services constitute the principal overarching supply with league participation services being the ancillary element, therefore all these supplies should be treated as one single exempt supply of pitch services.

21. In their Skeleton Argument, the Appellant advances a further alternative, namely that the elements of the (assumed) single supply should be split (in accordance with the approach in *Talacre Beach* and *European Commission v France* 2012 STC 573) so that the pitch hire element continues to benefit from exemption, while the league participation element is standard rated.

22. A further ground of appeal related to an assessment for a particular period. That assessment has been withdrawn and the ground of appeal has fallen away. No more need be said about it.

23. The broad position of HMRC was that the supply made by the Appellant was in reality a single composite supply of the right to participate in an organised football league, which was a standard rated supply. That comprised a bundle of elements only one of which was the use of the pitch. The overarching supply was participation in a sports league.

Some common ground

24. It is common ground that, to the extent that any of the Appellant's supplies are properly characterised as league participation services, they are standard rated for VAT purposes.

25. It is also accepted by HMRC that non-league block bookings are exempt from VAT provided that the Note 16 conditions are fulfilled. For the purposes of this appeal, none of these conditions was in issue. Accordingly, the sum payable for a block booking, ie a series of periods, of pitch hire by a club (which did not participate in any of the Appellant's leagues) for say an hour once a week spread over ten week was exempt from VAT. HMRC accept that this is a letting of immovable property within the autonomous definition of that phrase in European law as explained by the European Court of Justice (now the Court of Justice of the European Union) in various cases.

26. Most of the facts, which we now set out were not seriously in dispute.

Facts

Appellant's business structure

27. The Appellant registered for VAT with effect from 28 November 2000. Its registered office is at East Kilbride. It took over an existing *five-a-side* business with five venues. That business, in its application for registration for VAT, described its main business activity as *operator of 5-a-side football facilities.*

28. The Appellant proceeded to establish and develop a chain of *five-a-side* soccer centres incorporating state-of-the-art artificial turf technology, with floodlit pitches and high quality amenities such as well-equipped changing rooms, lounge bar facilities and adjacent car parking. It currently has 43 such venues throughout the United Kingdom and one such venue in Los Angeles. They trade under the brand name *Goals Soccer.* About 25% of their portfolio involves long leasing arrangements with private landlords. The balance is with public landlords such as local authorities.

29. These venues are generally established within easily accessible urban locations with a population of at least 150,000. Many of the sites have been acquired under long lease (60-90 years) from local authorities or schools who are under-using pitches. Typical rent is about £50,000 per annum for a site of about 2.5 acres. The arrangements benefit the local community and the public purse, as generally the facilities are made available to Schools and the public free of charge during the day.

30. The creation of a typical venue on such a site costs the Appellant between about £2.5m to £1.5m and takes between about five and three months to complete (the lower figure and period are now nearer the norm). This involves the construction of between about 9-18 five-a-side floodlit soccer pitches each the approximate size of a tennis court (presumably including the run back and side run areas of the court), together with a pavilion with changing and lounge bar facilities, and a car park. Some venues also have larger seven-a-side and even 11-a-side pitches. About one third of the capital cost is expended on the construction of the pitches.

31. The Appellant's annual overheads amount to about £275,000 of which about £135,000 relates to staff costs, about £85,000 relates to property and utility costs and the balance to other general costs. The Appellant employs about 800 staff. Each venue is run by a general manager, supported by deputy and assistant managers, receptionists, bar and maintenance staff, and cleaners. They also have six area managers, each responsible for seven venues, a national operations manager, national marketing manager and further support staff. The majority of overheads relate to the operation of the football area of the business, with the bulk of staff time being devoted to handling pitch enquiries, bookings and reception desk duties. Direct bar and vending costs amount to only about £25,000 a year.

32. The Appellant endeavours to generate a 20% return on capital invested. Its charges are variable depending on the day, time and length of the hire of each pitch. The overall object is to secure a high and continuous level of pitch occupancy.

Nature and Scope of Business

33. The Appellant offers paying customers the opportunity to hire pitches to be used for friendly matches, training, leagues, tournaments, corporate functions and children's parties. The main focus of the Appellant's business is the generation of revenue by renting out soccer pitches to the general public. Pitch hire is the Appellant's core business. In essence, this is done in one of two ways. Firstly, there is the *Casual Booking* whereby a pitch is booked for a single session without any commitment to book a pitch or play at the Appellant's venue ever again. Secondly, there is the *Block Booking*, where a commitment is made to book pitches on a number of occasions, usually ten or more, at frequent intervals, usually weekly.

34. The Appellant also administers the operation of leagues. The general business purpose of doing so is to enhance the playing experience, to increase the number and regularity of bookings, and to create and maintain customer loyalty. What the Appellant offers may thus be supplied in a range of combinations, which we now set out.

Casual Booking

35. A customer may book a pitch (all references are henceforth to five-a-side pitches at an Appellant's venue whether in England or Scotland unless otherwise stated) for a single occasion of say an hour. If he is a new customer he has to sign a life membership form (see below). No other document or agreement is signed. The supply of such a pitch is a standard rated supply. There is no dispute about this. The pitch may be used for an *ad hoc* game among friends or even for a children's party. The number of players in each team is at the discretion of the customer, that is to say there could be, for example, a six-a-side game on a five-a-side pitch.

36. Such a booking may be made by 'phone or online' up to seven days in advance. Payment may be made in advance or on the day of play in cash or by credit or debit card. The charge or rate for such booking varies depending on the time of day, the location and type of pitch booked (5-a-side, 7-a-side or 11-a-side). Such bookings are usually charged by the hour.

37. The Appellant's website enables customers or potential customers to view what the Appellant has to offer. Customers can check pitch availability and make an appropriate booking.

38. When a team organiser makes his first booking (of whatever nature) he has to sign a Lifetime Membership Agreement. It contains *inter alia* the following provisions:-

> I …….agree to the terms and conditions below
>
> - That I confirm that I am fully responsible for all bookings made under this membership number and as such this number should not be divulged to

anyone other than the Goals Soccer Centre Staff when bookings are being made.

- I agree to pay for each casual booking prior to play
- I understand that for casual bookings notice of cancellation is required to be received the day before kick-off otherwise the pitch hire fee will be due in full…….
- I understand that for other categories of bookings, alternative terms and conditions may apply……..
- Goals Soccer Centres may terminate the membership at its discretion at any time including, without limitation, if any amount payable remains outstanding for more than 7 days or I am in breach of the terms and conditions.
- …….

Block Booking without league participation

39. A customer may book a pitch for a series of periods, typically once a week on the same day and time for ten weeks. If he is a new customer he has to sign a life membership form. The supply of such a pitch for such a period is an exempt supply by virtue of Note 16 referred to above, the conditions of which can for present purposes, be assumed to be met. This, as already mentioned, is common ground. Payment for the entire series of pitch hires may be made at the outset, or in instalments (usually weekly). There is no discount for taking such a block booking. The price for a casual booking is simply multiplied by the total number of discrete periods of hire. Nor is there any discount for paying the total amount at the outset. The advantage of block booking for the customer is that it ensures the regular availability of a pitch on the chosen date and time. The advantage to the Appellant is that it increases pitch occupancy rates and thus generates more income.

40. When a block booking is taken without league participation the representative of the team enters into a Pitch Hire Agreement with the Appellant. There are typically ten pitch hires (on dates and times which are specified - usually the same day and time each week) for a sum in the order of £480 (the Pitch Hire Fee). The agreement is signed by the Appellant and the team representative. The Pitch Hire Agreement also contains (un-numbered) terms and conditions of which the following (which for convenience we have numbered) may be noted:

1. The Pitch Hire Fee, as detailed above, is payment for the pitch hires on the days and times detailed in the Pitch Hire Agreement Dates section below.
2. I agree to pay the above Pitch Hire Fee either in advance, or in weekly instalments, prior to play.
3. This Pitch Hire Agreement will expire on the latest end date, as detailed above.
4. I agree that this Pitch Hire Agreement is for a minimum of 10 hires. However, in the event that the Team wishes, I understand that, Goals Soccer Centres may increase the number of

hires covered by this Pitch Hire Agreement as detailed in the optional extension below. In the event that the number of pitch hires is increased above the minimum number, I agree that an additional Pitch Hire Fee will be paid prior to play in respect of each additional hire.

5. I understand that notice of cancellation of a pitch hire made under this Pitch Hire Agreement is required to be received the day before kick-off, otherwise the Pitch Hire Fee will be payable.
6. I agree that in the event of cancellation of a pitch hire which is part of the 10 minimum hires, the team will be required to make an alternative pitch hire booking. This alternative pitch hire has to be (a) at least 1 day, but not more than 14 days, after the previous hire which was not cancelled and (b) not less than 1 day before or after any subsequent pitch hire which has already been booked.
7. Goals Soccer reserves the right to alter the Pitch Hire Fee between the start date and the latest end date as detailed above.
8. I understand that for each hire under this Pitch Hire Agreement, the pitch is made exclusively available to the Team by Goals Soccer Centres.
9. I confirm that players on bookings made under this Pitch Hire Agreement will wear shin pads and will not wear football boots with screw in studs or blades.
10. I agree that any accidents occurring during play will be reported to the Receptionist at Goals Soccer Centres immediately after the accident.
11. I am aware and will make players on bookings made under this Pitch Hire Agreement aware, that all players play at their own risk subject to negligence by Goal Soccer Centres, its management and staff being proven.
12. Goals Soccer Centres may terminate this Pitch Hire Agreement at its discretion at any time including, without limitation, if any amount payable under this Pitch Hire Agreement remaining outstanding for more than 7 days or I am, or any member of the Team is, in breach of these terms and conditions.

41. As previously explained, supplies made under this type of arrangement are agreed to be exempt supplies.

Booking with participation in one of Appellant's Leagues

42. A customer, being a representative of a team or club, may wish to join and participate in one of the Appellant's leagues. There are various ways of doing this but if the customer is new, he has to sign the life membership form. Two written agreements are thereafter entered into. One is a League Pitch Hire Agreement, similar but not identical to the one described above. The other agreement is the League Entry Agreement for which a League Entry Fee and a League Management Fee are payable. The League Entry fee is £20 and the League Management fee is £3 per week. A team typically plays one game each week, although some periods are allocated as training.

43. Essentially, league participation means that a team has a guaranteed number of games against another team throughout the season. The season normally lasts 14 weeks. There are usually eight teams in the league. Each team plays 14 games (playing each other team twice). It has seven *Home* games for which it must book a pitch and has three periods allocated to training; this makes up the usual block booking of a series of ten periods. The only significance of playing *home* and *away* games is that the *home* team has the responsibility for booking the pitch. All the pitches within a venue will be virtually identical and a team is not necessarily

allocated the same *home* pitch for each game, although it will always be at the same venue.

44. At each venue different leagues are organised to take place on different days. Sometimes different leagues play on the same day. Each league is divided into a number of divisions and sometimes all divisions of the same league play on the same evening.

45. Leagues were originally introduced by the Appellant to stimulate the demand for pitch bookings at weekends, which were quieter periods than midweek, particularly in Scotland. In England, the level of demand for casual and block bookings was not as high as in Scotland. Leagues were introduced for midweek evenings in an effort to maximise pitch bookings.

46. When a team participates in league fixtures, it receives the following principal services or benefits (i) the opportunity to play a series of different opponents in a competitive spirit organised by the Appellant, (ii) the provision of a football for each game, (iii) a referee. Participation in a league is intended to enhance the playing experience. There is or may be a competitive edge playing against another organised team consisting of unknown players compared with a casual *kick about* with friends. Teams have their own strips. The Appellant provides a referee who has power to issue yellow, blue (sin-bin) and red cards. Scores are posted online and trophies are awarded to successful teams at the end of each season. Leagues play more or less all year round with a short gap of about one week between the end of one season and the beginning of the next. Successful teams are promoted to a higher league. Unsuccessful teams, much like professional football, are relegated. The advantages of league participation, particularly for the team representative, is that much of the administration is carried out by those managing the league. The fixtures are pre-arranged and can be pre-booked. The team just has to turn up at the right time and play. In that sense, an attractive package is provided.

47. The leagues, fixtures and results are managed by a computer automated software system called League Tournament Management System. The costs to the Appellant of operating the system are low; these costs are mainly for providing referees, trophies and staff time. This part of the Appellant's business more or less breaks even.

48. There are other managed five-a-side leagues in the market place. Some clubs join one of those leagues but play their games at one of the Appellant's venues. Some examples of this were given in evidence. We need not specify the detail. To do so they would either book on a casual basis or on a block booking basis. Although they played in a third party league, the arrangements made with the Appellant would be for pitch hire only. It is also theoretically possible that a team could participate in one of the Appellant's leagues but play all its *home* matches at a third party venue. The Appellant's witnesses did not think that had ever happened.

49. Accordingly, when a block booking with league participation is made, the representative of the team enters into a Pitch Hire Agreement with the Appellant

known as a League Pitch Hire Agreement. There are typically ten pitch hires (on dates and times which are specified) over a 14 week period for the sum of about £448 (the Pitch Hire Fee). The agreement is signed by the Appellant and the team representative. The League Pitch Hire Agreement also contains (un-numbered) terms and conditions of which the following (which for convenience we have numbered) may be noted (they are similar to the Block Booking Pitch Hire Agreement referred to above; the differences are noted).

1. [as above]
2. I agree to pay the above Pitch Hire Fee either in advance, or by 14 equal weekly instalments.
3. Goals Soccer Centres reserves the right to alter the Pitch Hire Fee between the start date and the finish date of the period of hire as detailed above [similar to 7 above]
4. I understand that for each hire under this Pitch Hire Agreement the pitch is made exclusively available to the Team by Goals Soccer Centres. I may, however, permit any other team/players and any referee access to the pitch of the purposes of playing any league fixture.
5. Same as 9 above
6. Same as 10 above
7. Same as 11 above
8. Same as 12 above

50. If the team drops out part of the way through the season, there is an ongoing commitment to use or pay for the pitch over the remainder of the season. Normally, the Appellant is able to find another team to take the place of the team which has dropped out. In those circumstances, there are rules about the number of points the stand-in team is to have and the position it is to take in the league when it joins. If the number of pitch hires which the new team requires to take to complete the league is less than ten (as it normally will be), then VAT is charged on the Pitch Hire Fee because the requirements of Note 16 will not be met.

51. The second agreement entered into between the Appellant and the representative of the team in question is the League Entry Agreement. This was normally entered into shortly before or shortly after the Pitch Hire Agreement. It could be entered into at a later stage in certain circumstances which we discuss below (where a non-league Pitch Hire Agreement is converted into a League Pitch Hire Agreement). The League Entry Agreement specifies the weekly management fee (usually £3 [x14 for a 14 week season) and the League Entry Fee (usually £20) and endures from the first to the last league fixture. It also contains (un-numbered) terms and conditions of which the following (which for convenience we have numbered) may be noted:-

1. I agree to pay the above league entry fee by no later than the start date detailed above and the above weekly management fee for the duration of the above league season.

2. On behalf of the Team, I confirm I have read and understood, and made the members of the Team aware of the League Rules for playing at Goals Soccer Centres, and that I am aware that copies of these are available online at www.goalsfootball.co.uk or on request at my local Goals Soccer Centre at any time. I confirm that the members of the Team will abide by such League Rules.
3. I confirm that the members of the Team and I will wear shin pads and will not wear football boots with screw in studs or blades.
4. Same as 10 and 6 above.
5. I am aware, and have made the members of the Team aware, that all players play at their own risk subject to negligence by Goal Soccer Centres, its management and staff being proven.
6. Goals Soccer Centres may terminate this agreement at its discretion at any time including, without limitation, if any amount payable under this agreement remains outstanding for more than 7 days or I am, or any member of the Team is, in breach of these terms and conditions or such League Rules.

52. The team representative receives a *League Agreement Summary.* This unsigned document contains a table showing the fixtures of the team on specified dates and times and classifies them as home or away (although all matches are played at the same Goals Soccer venue). There are seven home games and seven away games. There are also specified bookings described as *Training Pitch.* As the name suggests, this enables the team to use Goal Soccer facilities to train, and presumably organise their own friendly match on training days if they wish. The document also contains a section entitled *Payment Summary.* This sets out in two columns the season and weekly fees for *League Entry, Pitch Hire and League Management;* season and weekly totals are set out.

53. The *League Rules* describe how the league operates, the registration and scoring system, the number of players allowed to be used in a game (eight for five-a-side). The Rules provide for points to be deducted if the team arrives late, refuses to play or fails to appear. Discretion is given to Goals management to cancel or postpone a game due to adverse weather or other circumstances. The Rules note that all Goal Soccer Center Leagues are affiliated to the Football Association or SFA. Finally the rules record that league results will be posted on branch notice boards and on the Appellant's website.

54. The Appellant has entered into Heads of Agreement with the *Football Association.* It relates only to England (and possibly Wales). It states that it is not a legally binding document but helps to clarify each party's position and expectations. It endured between 1 July 2011 and 30 June 2012. All leagues and teams are to be affiliated to the FA for the duration of the agreement. This is achieved by the Appellant purchasing *Slots* (at £5 plus VAT per slot); one slot is to be purchased for each team that plays in the Appellant's leagues and competitions during the 12 month period. A slot is transferable where a team drops out of a league and is replaced by

another team. This is managed and monitored by an online affiliation system. The Heads also make provision about discipline. The Appellant is to adhere to the FA Small Sided Football Disciplinary Policy (not produced) in all of its competitions and leagues. Provision is made for the reporting of incidents and for suspending players. However, as none of this is legally binding on the Appellant and consequently those who play at its venues, nothing further need be said about it. Moreover, there is no equivalent Heads of Agreement with the Scottish Football Association.

55. Organisations playing at the Appellant's venues but participating in third party leagues have or at least may have different disciplinary rules and arrangements.

56. The Appellant's website provides information as to how the league system works. It provides a list of the available leagues and details about how to join. Results and league tables are also posted online.

League Participation with Block Booking Paid in Advance

57. Under this arrangement, the customer enters into a League Pitch Hire Agreement and a League Entry Agreement. If he or she is a new customer then the Life Membership Agreement also has to be signed. Everything is paid for in advance. HMRC say that VAT falls to be added to the amount specified in each agreement. The appellant says that the pitch hire element of the transaction is exempt and the league participation services element is chargeable to VAT

League Participation with Block Booking Paid in Instalments

58. The difference here is that the customer or team organiser must ensure that the weekly sum due is paid on time.

Joining League Part way through the Season

59. Where a team has a non-league block booking but part way through the block decides to join a league, it is possible, to use the remaining bookings in the block for league games. However, this can generally only occur where these remaining block bookings can be fitted into the existing league programme. Thus, residual block bookings for Tuesday evenings could not be used in relation to a league that plays on Monday evenings. It might, however, be possible to shift the remaining Tuesday bookings to a Monday evening. The non-league bookings tend to be for an hour whereas league games are usually booked for 30-45 minutes. Any extra available time could be used for a warm up before or practice or cool down after the conclusion of the league fixture.

60. There is a price difference between non-league block bookings and league block bookings. There was no clear evidence as to how this was dealt with in practice.

Dropping out of League part-way through the Season

61. In these circumstances, the Appellant allows the team leaving the league to use its remaining slots for the rest of the seasons for non-league games. If Goals find a

replacement team to join the league, we infer that additional slots would have to be found for that replacement team's home games, which the replacement team would pay for. The number of the remaining bookings for the season which the replacement team would make, would be bound to be less than ten.

Mixed Arrangements

It is thus possible for a team to play in a third party league but play its matches at one of the Appellant's venues or play in the Appellant's leagues but play its matches at a third party venue, or to play in the Appellant's leagues and also play its matches at one of the Appellant's venues. We were provided with details of some examples of such arrangements. Several organisations operate their own five-a-side leagues for their teams but play their league games at the Appellant's venues. In these circumstances, block booking Pitch Hire Agreements (without league participation) are entered into as described above. Where these block bookings are for ten or more pitch hires, no VAT is charged by the Appellant.

62. There are similar arrangements with a number of teams, affiliated with the London Football Association, who play 11-a-side games in independent leagues. The Appellant does not provide any league management of those leagues. Some of those teams make block bookings of the Appellant's 11-a-side pitches. Where those bookings are for ten or more pitch hires and the other necessary requirements are met, no VAT is charged by the Appellant.

63. The main and perhaps the only significant difference between the 11-a-side leagues and the five-a-side leagues is that the 11-a-side pitches are provided by one entity and the league management services are normally provided by a different entity. In five-a-side leagues, the norm is that the Appellant provides both the pitches and the league management services.

64. An illustration of some of the various combinations is provided by the evidence of Nick Burrett, which we accept. He plays 11-a-side at the weekends with Gildersome Spurs Old Boys Football Club. It plays in the Yorkshire Old Boys League which is part of the Yorkshire Amateur League. In order to participate in the Yorkshire Amateur League the team has to be affiliated with the West Riding County Football Association. It also has to hire full size pitches for its home matches. They hire full size pitches from Leeds City Council on a block booking basis. The Council does not charge VAT. The Council is not providing leave management services. The team has to comply with the Council's Code of Conduct for Outdoor Sports.

65. Mr Burrett is also team organiser of a five-a-side team which plays at the Appellant's venue at Leeds in one of their leagues. The team makes block booking arrangements for pitch hire for league games, and enters a League Entry Agreement. The five-a-side team is also affiliated with West Riding County Football Association. The total sum payable each week is divided among the participating players and collected each week by the team organiser.

66. We heard similar evidence from Gavin Ballantyne (whose evidence we accept), the secretary of Sandgate Old Boys Football Club, Middlesex. This is an 11-a-side team which plays in the London Commercial Football League. The team has to be affiliated with Middlesex County Football Association. The team requires to name its *home* ground. The team uses pitches provided by Brunel University and enters into a series of pitch hires (ten or more). The University does not charge VAT. It, too, does not provide league management services.

67. Mr Ballantyne also plays in a five-a-side league team at the Appellant's Heathrow venue. The team is affiliated with the local County Football Association. League Pitch Hire Agreements and League Entry Agreements are also entered into as previously described. His team paid weekly.

68. It is also possible for a team to enter one of the Appellant's leagues but to play its league games on third party pitches. This is unusual. However, one example of that relates to a number of student teams from the University of the West of England. The Appellant was promoting its leagues to the student population at Bristol. All these teams joined the Monday Night Student League but chose to play all their league games on pitches which were part of the facilities provided at the University Campus. A League Entry Agreement was entered into between the team organiser and the Appellant, but no Pitch Hire Agreement is entered into with the Appellant. The fixtures and results are emailed to the team organisers and the results and tables published online in the usual way. The Appellant provided the referee. The foregoing arrangements endured for one season.

69. Block booking of pitches for ten or more hires (without league participation) constitute for customers an aim in itself. Likewise, the supply of league management services (for games played on third party pitches) constitutes for customers an aim in itself. Where they are part of a single transaction in which there is a block booking of pitch hire and the supply of league management services both elements are important but the provision of the pitch hire is significantly more important. The hire of the pitch and playing of football on the pitch is the raison d'être of the transaction. It is by far the more significant financially from the point of view of each party to the transaction. They are however discrete elements and there is nothing artificial about viewing them separately as such. Indeed, it would be artificial to view them as a single indivisible economic supply.

Players

70. If a team attended to play a league game but did not have enough players, the Appellant was sometimes able to provide a substitute player. A phone call could be made to someone known to be keen to play as much as possible. From time to time such enthusiasts *hang around* the Appellant's venues looking for extra games.

Appellant's Turnover and Profitability

71. In 2011, the Appellant had a turnover of about £29.8m. Of this, pitch hire income from casual and all block bookings comprised 82%, and league registration

and management fees comprised 2%. About 61% of its income is attributable to non-league pitch hire. Of all the bookings over all its venues, about 70% are non-league bookings and about 30% are league bookings. About 21% of turnover relates to league block bookings. The league management side of the business breaks even.

72. The charges (League Entry fee of £20 and weekly fee of £3 over 14 weeks ie £42) are low. VAT is included within these fees. This may be contrasted with the price charged for a block booking of league pitch hire on ten separate occasions for a season's play of 14 games (seven *home* games for which the customer is responsible, and three training slots); responsibility for the pitch hire for the remaining seven *away* games lies with the customer's opponent ie another customer of the Appellant).

73. As a matter of arithmetic, the cost to the typical consumer of each non-league pitch hire slot of a block booking of ten slots is about £48 (£480/10). Where the consumer joins one of the Appellant's leagues, the cost of each home league game and training session is £51 (£510/10 [7 home+ 3 training]).

74. However, the cost of each league game is £36.43 (£510/14 [seven home and seven away]). The cost of each league game and training session is £30 (£510 [£448 + £20 + £42]/17 [seven home, seven away and 3 training]). The League Entry fee and the League Management fee include VAT which is properly accounted for to HMRC by the Appellant. The impression is given in the League Pitch Hire Agreement that the training sessions are free as payment of the total pitch hire fee must be made in advance or in 14 equal instalments.

75. The weekly figures in the documents produced are slightly different as the League Entry fee is paid in advance at the outset. Deducting £20 from £510 produces a cost for each league game and training session of £35 (£490 [£510-£20]/14 [7 home and 7 away games]).

Dispute with HMRC

76. By letter to the Appellant dated 20 March 2010, HMRC intimated that they were *looking at VAT implications for organisers of small sided football leagues in the UK* and sought information from them about their trading activities. In their response, the Appellant made it clear that they owned and operated five-a-side soccer centres. Meetings and further correspondence ensued. In correspondence, the Appellant pointed out that their core business was renting out soccer pitches, and that the organisation of leagues was ostensibly a means to get teams to book pitches.

77. By letter to the Appellant dated 24 January 2011, HMRC stated that they had always been of the opinion that the amounts paid by teams to participate in the leagues were taxable. They took the view that (i) the essential nature of the supply is of participation in a football competition; (ii) the essential nature of the supply is NOT a supply of land, (iii) the supply consists of a bundle of elements which are integrated to each other, but it cannot be said that there is one principal element to which all others are ancillary.

78. A review was requested by letter dated 8 February 2011. By letter dated 17 June 2011, the decision contained in the letter dated 24 January 2011 that amounts paid by teams to participate in the leagues were taxable, was confirmed. HMRC were not satisfied that there was a separate supply of league organisation and a separate supply of pitch hire involved. The letter considers the law and some detail and concludes that the overarching supply was not one of a pitch but of participation in a league. We have already set out part of that letter above.

79. In April 2011, HMRC issued *Revenue & Customs Brief 04/11* which included the following statement:-

> *We consider that the supplies made by sports league providers consist of a bundle of elements, which are integral to each other, but that it cannot be said that there is one principal element to which all others are ancillary. In these circumstances, it is necessary to establish the character of the overarching supply to determine whether it falls within the exemption. In HMRC's view, the overarching supply is of participation in a sports league, not a supply of land.*
>
> *It is therefore HMRC's view that the supplies made by commercial sports league providers are liable to the standard rate of VAT.*

Submissions

80. The Skeleton Arguments are detailed and we give only a brief summary of their contents and the closing submissions for each party.

81. For the *Appellant,* reference was made to in particular *Card Protection Plan,* and *Levob* to identify the correct approach to transactions containing a bundle of features and acts. The principle of neutrality was also noted under reference to recital 7 of the Principal VAT Directive, 112/EC, *AmpliscientificaSrl v Ministero Dell' Economia e delleFinanze* (C-162/07)2011 STC 566 at paragraph 25, *RCC v Rank Group plc*(C-259/10)2012 STC 23 paragraphs 36, 38, and 40-44& 46&50, *Marks & Spencer plc v RCC* (C-309/06) 2008 STC 1408 *("M&S 2")* paragraph 47 and the Opinion of AG La Pergola in *Goldsmiths (Jewellers) Ltd v CEC* (C-330-95) 1997 STC 1073 paragraph 28, and *RCC v Isle of Wight Council* (C-288/07) 2008 STC 2964.

82. It was submitted that the Tribunal should consider the ways in which the Appellant's customers use the facilities and services and how they might view the market in which the Appellant operates. In support of the argument that there were separate supplies of pitch hire and league management services, the Appellant relies on the fact that there are separate contracts for each service with separate prices. Breach or termination of the League Entry Agreement did not lead to breach or termination of the Pitch Hire Agreement and *vice versa*. There was therefore no inextricable link between the use of the pitch under the Pitch Hire Agreement and the participation in the league under the League Hire Agreement. It should not make any difference to the VAT treatment whether both are provided by the same or different suppliers (*Tellmer, Rank paragraph 46*). They are not indivisible. It would be

artificial to combine them and treat them as one supply. This would infringe the principle of fiscal neutrality and distort competition. There was no global price and how teams split up the cost was irrelevant. The evidence did not support the argument that the customer was getting a *package.* Reference was also made to *Baxendale, Purple Parking,* and *College Estate Management v CEC* 2005 STC 1597.

83. The league participation service is in effect a marketing or promotional tool to generate additional income. The Appellant and its customers to whom the additional tax burden may have to be passed should not suffer because of the way the Appellant markets its core business of pitch hire. Miss Whipple submitted that HMRC had wrongly characterised the Appellant's business as being involved in the organisation of small sided football leagues, and had not applied the *Levob* test.

84. If pitch hire and league participation are to be viewed as two elements of an overarching single composite supply, then pitch hire predominates. League participation is not an aim in itself but a means of better enjoying the use of the pitch by making the experience more competitive. This would mean that both elements would be exempt (*Talacre Beach Caravan Sales Ltd v CEC (C-251/05) 2006 STC 1671 paragraph 31*).

85. Alternatively, the approach set forth by AG Kokott in *Talacre Beach Caravan Sales Ltd v CEC* 2006 STC 1671 and in *European Commission v France* (C-94/09) 2012 STC 573 should be followed. This too would enable pitch hire to be treated as exempt and league management services as standard rated. Reference was also made to *Wm Morrison Supermarkets Ltd v HMRC* 2012 UKFTT 366 (TC).

86. On Tuesday 10 July 2012, as already noted briefly above, Miss Whipple applied to recall Mr Payton, lodge an additional witness statement signed by him plus two additional documents. The basis of the application was that Mr Ghosh's submissions related to areas of evidence which had not been fully explored and were factually wrong. The HMRC Statement of Case was not detailed. In the course of the proceedings, the HMRC case has become clearer and it is necessary and just that the Appellant be allowed to lead evidence on points which have come to light which HMRC are founding upon. Thus, she had evidence of customers participating in the Appellant's leagues but not using their pitches. She submitted under reference to Rules 2, 5 and 15 of the Tribunal's Rules that we had power to admit such new evidence even at this stage.

87. For HMRC, Julian Ghosh QC submitted the letting of immovable property involves a passive supply which does not add value and which gives exclusive occupation where the lessee behaves as if he is the owner of the property (*Temco Europe* paragraphs 18-20). In testing whether there are multiple supplies or an overarching single composite supply for VAT purposes, the Tribunal should take an overall view at the level of generality that corresponds with the economic, commercial and social reality without over-zealous dissection (*Bryce* paragraph 23(f)). Fiscal neutrality cannot determine whether there is a single composite supply or multiple supplies.

88. He contrasted the way in which a customer uses a pitch for a non-league game and for a league game. In a league game the customer had no choice as to what game to play on the pitch or how many players he could have participating in the game at any one time. The customer's use of the pitch was tightly regulated by the league rules. The league required active use of the pitch. Failure to make payment under the League Pitch Hire Agreement, Mr Ghosh submitted, entitled the Appellant to terminate the League Entry Agreement. The Appellant added value by packaging the pitches with league management services. It was therefore artificial to split up the supply of the pitch and the supply of the league participation services. The League Entry Agreement and the League Pitch Hire Agreement constituted one agreement, although it was not necessary to his case to establish this. The agreement number on each was the same; the documents were filed together. The reference to *this agreement* in the League Entry Agreement, properly construed, included the League Pitch Hire Agreement.

89. The description of composite single supply which accords with economic and social reality is that the Appellant is making a composite supply of participation in a sports competition, not a supply of the letting of immovable property as that concept is understood in European Union law. When you buy league participation and management services from the Appellant you need a pitch. Customers would not think of going elsewhere for a pitch.

90. Mr Ghosh made much of the evidence of Mr Burrett who agreed in cross examination that what the Appellant supplied was a package. Mr Ballantyne said much the same in cross-examination. This was said to be consistent with the global price set forth in the League Entry Agreement.

91. It is not open to treat this single composite supply as a supply of distinct elements. This only arises where so treating such a supply as a single supply is effectively *ultra vires* because to do so extends the scope of a derogation or reduced rate unlawfully. A central and indispensable element can still be part of a composite supply (*College of Estate Management* at paragraphs 11 and 12). Here, the pitch is central as were the books in *College of Estate Management* and the barn in *Bryce*. The mere fact that it cannot be described as ancillary does not mean that it is to be regarded as a separate supply for tax purposes.

92. Mr Ghosh also referred us to various authorities including *Baxendale* and *Purple Parking, Bryce, Stichting 'GoedWonen' v Staatssecretaris van Financien* 2003 STC 1137.

93. Mr Ghosh also addressed us on the application, made after he had completed his closing submissions, to recall Mr Payton. It was, he accepted, competent for us to admit such further evidence. What matters is that justice is done. No one was at fault here. A decision in a case of this nature which is not based on all the relevant evidence would be undesirable. In those circumstances he did not object to the admission of further evidence from Mr Payton. He produced a written note on this whole question and urged us to make it clear that the circumstances were unusual and should not be regarded as a precedent for late evidence which would be undesirable.

Discussion

Starting Point

94. We start from the basis that every supply should normally be regarded as distinct and independent, and that separate supplies should not be artificially combined to create a single composite supply when to do so would not reflect the economic reality of the situation. Here, we are concerned with the argument that a League Pitch Hire Agreement entered into along with a League Entry Agreement was either one single contract and therefore one single supply, or that the transaction has been artificially split into pitch hire on the one hand and league management services on the other hand, and should therefore be treated as a single supply for the purposes of VAT.

95. The facts as we have found them to be, show that a consumer (here a team organiser on behalf of his team) may enjoy the Appellant's facilities in a number of different ways. In particular, the consumer may (i) use the Appellant's pitches to play league games in the Appellant's leagues (ii) use the Appellant's pitches to play league games in a third party league, (iii) play in the Appellant's leagues but use third party pitches to play those league games and (iv) use the Appellant's pitches to play non-league games. Within these four categories, pitches may be booked and paid for on a block booking basis, or may be paid for on a casual basis. At first blush, it is wholly unsurprising that the Appellant has separate contracts for non-league pitch hire, league pitch hire, and league management services. The various combinations of supplies make it sensible to have different contracts to cater for the different arrangements that can be made with the typical consumer, although the most common will be (i) and (iv).

96. We are concerned with (i) above. So far as the Appellant and HMRC are concerned, there is no dispute about the VAT treatment in relation to the other categories. The supply of the Appellant's pitches in category (ii) is exempt from VAT provided that the statutory criteria are met (and it appears to be common ground that the criteria are usually met). The supply of the Appellant's league management services [category (iii)] is a standard rated supply. Use of the Appellant's pitches to play non-league games [category (iv)] on a block booking basis is exempt from VAT provided that the statutory criteria are met (and it appears to be common ground that the criteria are usually met).

Essential Features of the Transaction

97. The starting point is to consider whether it is appropriate to describe the entering into a League Management Agreement and a League Pitch Hire Agreement as a transaction. In some circumstances, for example where a non-league Pitch Hire agreement on a block-booking basis is converted to a League Pitch Hire Agreement there will clearly be two separate transactions, the first is the non-league Pitch Hire Agreement and the second is the League Entry Agreement entered into at a later date.

98. Assuming that what occurs is a transaction, and without making an over-zealous dissection or analysis, the essential features are the use of a pitch on a regular basis to play football against arranged opposition in a game regulated by a referee, the results being published and counting towards achieving a position and status within the league of teams selected by the Appellant against whom the customer's team plays twice in the course of a season. Achieving standing in the league is an aim in itself but the hire of the pitch is the fundamental and most expensive element. The league management services, being distinct from pitch, hire can be abandoned if, for example, they do not meet expectations. They can be severed from the transaction or the package of services (the phrase used by AG Fennelly in *Card Protection Plan* at paragraph 1 of his Opinion). It can hardly be said that league management services are of no use (like the un-customised software in *Levob*) without a pitch hire agreement with the Appellant.

99. We find it difficult to describe the essential nature of the entering into of a League Pitch Hire Agreement and a League Entry Agreement as the *supply of the participation in a football competition* as HMRC described it in their letters dated 24 January 2011 or as *participation in a sports league* as they described in their letter dated 17 June 2011. In the written summary of his submissions, Mr Ghosh described the supplies as a *composite supply of participation in a sports competition.* None of these seems to us to be appropriate. The fact that it is difficult to identify an apt generic description may suggest that one is not dealing with an overarching supply at all but two separate supplies which are not integral to each other or indissociable (cf *College of Estate Management- education services,* and *Benyon (Dr) and Partners v CC&E* 2005 1 WLR 86 - *medical services, Faaborg-GeltingLinien A/S v Finanzamt Flensburg* 1996 STC 774 - *restaurant services; Byrom – massage parlour services*).

Contract or Contracts?

100. On the face of matters, there is one contract for the hiring of a pitch and another separate contract for the provision of league management services. There are separate documents with separate terms and separate prices. They are each signed by the parties, sometimes at the same time but this is not essential. One is not expressed to be conditional upon the other. If one is breached or terminated, the other is not automatically breached or terminated. *Prima facie* there are two separate distinct supplies. This is not an obvious case of artificially separating out one overarching supply into discrete supplies for fiscal purposes. Rather, these arrangements have developed and are based upon the raison d'etre of the Appellant's core business namely maximising pitch hire.

101. The fact that after the two agreements are signed, there is endorsed on to each for administrative purposes the same reference number, is of no moment. Such an act could be done at any stage half an hour or a week after the documents were signed. Such unilateral post contract conduct cannot affect the question whether at the moment the second document was signed, it and the other document fell to be treated as one contract governed by one overall set of terms and condition. It was either one agreement at that point or it was not. In our view, it was plainly not one contract.

102. The documents show that it is possible to drop out of the League but retain the remaining block bookings under the League Pitch Hire Agreement. It is probably not possible to terminate the League Pitch Hire Agreement but remain in the League and play the remaining games on a third party pitch. Although this does not seem to be expressly prohibited, such a prohibition is probably implied from the terms of the League Rules. These provide that postponement and cancellation are at the discretion of the Appellant. It would be odd if they had discretion to postpone or cancel a game taking place at a third party venue due to adverse weather conditions. Moreover, opposing teams entering into one of the Appellant's League Entry Agreements would expect to play all their games at the Appellant's venue. There was some exception to this but that was in a student league where all teams entered the Appellant's league and all teams agreed to play all their matches at University venues.

103. The facts show that, on occasion, a League Entry Agreement may be entered into without entering into a League Pitch Hire Agreement, and a League Pitch Hire Agreement may be entered into without entering into a League Entry Agreement. Although this is not the typical arrangement, it nevertheless does not support the argument that the two documents are inextricably linked and thus fall to be treated as one contract.

104. Moreover, as already noted, the facts show that from time to time the League Entry Agreement may be brought to an end by the team dropping out of the league but continuing to use the remainder of the block of bookings for non-league games. This does not support the argument that the League Entry Agreement and the League Pitch Hire Agreement are inextricably linked and thus fall to be treated as one contract.

105. Taking an overall view of the terms of the documents and the relevant surrounding circumstances, and avoiding an *over-zealous dissecting and analysis of particular clauses* (*Card Protection Plan Ltd* 2001 STC (HL) 174 at 183 paragraph 22) we conclude that there are two contracts and two distinct services.

106. Cases such as *Bryce* on which HMRC relied are thus distinguishable. There, the Upper Tribunal concluded, reversing the First-tier Tribunal, that there was a supply of a group of facilities for a children's party provided as a single supply (paragraph 34). That conclusion is understandable given the facts, in particular the fact that the charge was a rate per child rather than for hire of the hall, a range of significant services were supplied such as food/refreshments for the children, play equipment was supplied, and a party host prepared and cleared up the play barn and prepared the refreshments. All these services were closely connected and there was one all-inclusive price. The package was the provision of various elements which enabled the holding of a two hour play party. Roth J held that it would be artificial and would involve an *over-zealous dissection* to characterise the supply of the play barn and the provision of refreshments as two separate supplies (paragraph 37). The view was also taken that the supply did not, in any event, fall within the land exemption (paragraph 44).

107. While we take no issue with the statement of the law or its application in *Bryce*, the essential features of the arrangements are materially different from those we have found to exist in the present appeal.

Single Composite Supply?

108. The pricing structure does not lend support for the view that there is a single composite supply. The main cost to the consumer is the pitch hire. The consideration for the league management services is relatively minimal. Each can be paid weekly or in advance at the outset, or one weekly and the other in advance. Such flexibility of arrangements does not suggest one overarching supply which could be characterised as participation in a sports competition. Rather, this suggests two discrete but linked supplies separately entered into and separately charged for. The fact that a global price is identified on the League Entry Agreement is relevant but not conclusive.

Restrictions on Use

109. The argument here was that the League Pitch Hire Agreement, the League Entry Agreement and the League Rules placed restrictions on the customer's use which prevented the use being classified as a letting of immovable property for the purposes of European Union law. We do not consider that it necessarily follows that tightly controlled use of the pitches prevents such a classification. Most commercial leases place tight controls on what a tenant can and cannot do on the subjects of let. Statutory planning and licensing controls are often incorporated into such a lease. Thus, a tenant may be permitted to use premises as a shop but not an office, to sell food but not hot food; or obliged to trade only during certain hours, and so on.

110. These restrictions do not negate the classification of the contract as a letting of heritable or immovable property whether under the law of Scotland or the law of the European Union. While such restrictions in the present appeal do provide a contrast between a Pitch Hire Agreement and a League Pitch Hire Agreement, they are of doubtful relevance to the question whether what is supplied should be treated as a single composite supply, and, if relevant, are not by any means determinative. At the most basic economic, commercial and social level, in non-league pitch use, the customer provides or includes the opposition and play is self-regulated. In league pitch use, the opposition or away team is provided along with a referee. In both, the pitch is used to run about, kick the ball and score goals during a specified period which may be the same or slightly different in each case.

111. We also regard this argument as somewhat artificial. We are unable to make findings in fact about how the typical consumer was actually affected by the various restrictions. Common sense tells us that, in most cases where teams play, it will make little difference as to how they conduct themselves. No doubt in non-refereed games, the football may be less structured and the rules of the game more flexible. The essential difference is the presence or absence of the referee, which imposes conditions on use of the pitch in the same way in which a commercial lease imposes conditions on use of commercial or industrial premises. Imposition of such conditions does not change the juridical nature of a commercial lease into something else.

112. There can, of course, be a range of restrictions even where there is a League Entry Agreement in place. If non-league Pitch Hire Agreement block bookings can be used for league games, then it is quite likely that say 45 minutes of the pitch hire will be subject to league rules and a referee and the opposing team will be present, but for the remaining 15 minutes of an hour's non-league booking there will be no referee, no opposition and no applicable league rules. In addition, three of the pitch hires in the block booking whether converted from non-league block bookings or whether they were originally league block bookings are reserved for training. On those occasions, there will be no referee, no opponents and no applicable league rules, or at least they will not be applicable in any meaningful sense. That situation relates to 30% of the block bookings. That can hardly be described as a complimentary facility. In reality, these training sessions are paid for. This seems to undermine considerably the importance which HMRC attach to the differences in detail where the League Rules apply and where they do not apply. It would make no sense to treat the training days differently from match days for VAT purposes.

113. While we acknowledge that the concept of the letting of immovable property must, as a supply which is exempt from VAT, be given its own independent meaning in Union law (*Belgian State v Temco Europe* 2005 STC 1451 (ECJ) at paragraphs 16-20), we do not consider that this assists HMRC's arguments for the reasons we have endeavoured to explain. The fact that it is common ground that a block booking of non-league pitch hire is exempt seems to us to undermine HMRC's argument that there is simply no exempt letting when the same pitches may be let out for similar periods on similar terms.

The Levob Test

114. This test is different from and additional to the *Card Protection Plan* test or tests. That is plain from the opening words of paragraph 22 of the Court's Judgment, where having noted the principal/ancillary supplies test may lead to there being a single supply, the Court states *The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.* This is also clear from the Court's observations in *Ministero dell' Economia e delleFinanze v Part Service Srl* Case C-425/06 21/2/08 paragraphs 52 and 53, *Tellmer* at paragraphs 18 & 19, and *Purple Parking Ltd v Airparks Ltd* Case C-117/11 19/1/12 at paragraphs 28 & 29). The two elements or acts must not only be linked or even closely linked but so closely linked that they form a single indivisible economic supply which it would be artificial to split.

115. On the facts in the present appeal, this test is simply not met. There is a link between the supply of League Pitch Hire and the supply of league management services. In this area of law, there will always be a link between or among the supplies under scrutiny (*College of Estate Management* at paragraph 12*)*. The diverse arrangements which may be made in relation to league pitch hire and league management services show that these two supplies do not form an indivisible economic supply. They may start together or separately and end together or separately (see *Tellmer* at paragraphs 23 & 24). There are separate contracts and

separate prices for each. There is nothing artificial about such arrangements. They probably make the transaction more transparent from the point of view of the typical consumer. In *Levob* the link was very close. There was only one commercial contract (paragraphs 8-11); the first supply (of software) was useless without the further supply of customisation services (paragraph 24). This, in effect, overrode or diluted the fact that there were separate prices for each supply.

116. In the present appeal, we have found that there were separate contracts and separate supplies with separate prices. It would be artificial to combine them and classify them as a single supply from an economic point of view. It is therefore inappropriate to apply the dominance test set forth in *Levob* to identify the proper classification of a single complex supply (paragraph 27). Moreover, there is no suggestion that the administrative and contractual arrangements have tax avoidance as their principal aim as discussed in *Part Service.*

117. Finally, we should indicate that we have endeavoured to bear in mind that the guidance in *Card Protection Plan* and *Levob* is not and is not intended to be exhaustive. All relevant circumstances must be taken into account. Special features may lead to particular results (as in *Talacre*).

Fiscal Neutrality

118. We were addressed at some length on this issue, particularly by counsel for the Appellant. We are inclined to agree with Mr Ghosh that the principle of fiscal neutrality does not have a significant role to play in the exercise of determining whether several elements of a transaction constitute a single supply or multiple supplies.

119. The principle is set forth in recital (7) of Council Directive 2006 /112/EC to the effect that *within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution process.* More recent exposition of the principle is to be found in *Rank Group plc v RCC 2012 STC* 23 where the CJEU observed, at paragraph 36, that *a difference in treatment for the purposes of value added tax of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of (the principle of fiscal neutrality* (see also *Ampliscientifica* at paragraph 25, and *Isle of Wight Council* at paragraphs 42 and 43). None of these three cases was concerned with the single/multiple supplies issues discussed in *Card Protection Plan Ltd, Levob* (neither of which mentions fiscal neutrality) and other similar cases. Roth J's summary of the relevant principles in *Bryce*, to which neither counsel took exception, does not mention the principle of fiscal neutrality at all.

120. The basis of holding that a supply which comprises a single service from an economic point of view should not be artificially split, is to avoid distortion of the functioning of the VAT system (*Card Protection Plan Ltd* 1999 STC 270 at 293 paragraph 29). The principle of fiscal neutrality may possibly be used as a cross check after applying the guidance in the cases, particularly *Card Protection Plan Ltd*

and *Levob*. The result of an application of these tests might seem illogical to the typical consumer; that might suggest that the test or tests, which are not, in any event, exhaustive) are not being applied correctly. Thus, if we had acceded to HMRC's arguments, the result would be for the typical consumer that there will be no VAT on the consideration for a block booking of pitch hire at one of the Appellant's venues by a consumer who joins a third party league, but there will be standard rated VAT on the consideration for a block booking of pitch hire at one of the Appellant's venues by a consumer who joins one of the Appellant's leagues. It is entirely possible that this could occur on adjacent pitches at the same time and venue. That could be said to be an example of different treatment for the purposes of VAT of two supplies of services which are in substance identical or similar from the point of view of the consumer and meet the same needs of the consumer (see *Drumtochty Castle* at paragraph 63). That would appear to infringe the principle of fiscal neutrality and might suggest that the tests in *Card Protection Plan* and/or *Levob* or any other relevant test were not being correctly applied.

121. The characterisation of a particular transaction as a single supply normally involves giving, to what would otherwise be separate supplies, a tax treatment which is different from that which they would have enjoyed if treated separately. Most cases of this type have this result and that is invariably why the dispute has arisen. This will affect the availability of zero-rating or exemption and alter the incidence of taxation (*David Baxendale Ltd v RCC* 2009 STC 2578 at paragraph 23). However, it may be that a complex supply of services consisting of several elements is not automatically similar to the supply of those elements separately (*Purple Parking Ltd* at paragraphs 38 and 39). Overall, while the principle of fiscal neutrality must be respected, its application in this area of law will not be determinative of the single/multiple supplies issue.

Various Arrangements

122. The numerous different types of arrangements which may be made between the Appellant on the one hand and a team organisation representative on the other hand which involve a combination of one or more of non-league Pitch Hire Agreement, League Pitch Hire Agreement, League Entry Agreement, the conversion of a residual non-league Pitch Hire Agreement to League Pitch Hire Agreement and payment in advance, block booking, payment on a weekly basis, and casual payment, suggest that each supply is not so closely linked to any other that any two, which are the subject of a transaction, must be regarded as indivisible. An overall view of the economic reality without over-zealous dissection of the contractual arrangements under scrutiny must take the various combinations into account (*Bryce* at paragraph 23(f); *Card Protection Plan Ltd* 2001 STC 174 at paragraph 22).

123. Thus, where a team voluntarily drops out of a league but continues to use its remaining pitch hire slots for what would have been the rest of the season, the separate and distinct nature of the supply of league management services on the one hand and pitch hire on the other hand is demonstrated. This could also arise where the team breaks the League Rules in some way and the League Entry Agreement is terminated. The League Pitch Hire Agreement is not or need not be terminated and

the remaining slots in the block booking could be used by the team banned from the league for non-league games.

124. Likewise, a non-league block booking Pitch Hire Agreement may, part way through the block, be converted into a League Pitch Hire Agreement if a league is subsequently joined. The timing of such arrangements might be that the non-league Pitch Hire Agreement is entered into on day 1, and converted to a League Pitch Hire Agreement on say day 17 after two pitch hires have been used. On day 17 a League Management Entry Agreement is entered into. It is difficult to see how the provision of pitch hire and the provision of league management services could possibly be described as one single overarching supply. There are separate agreements and separate prices entered into and paid on different days. The pitch hire could have been paid in full on day 1. The League Entry Agreement fee could be paid in instalments from day 17 until the end of the season.

125. Furthermore, although this was not canvassed in evidence, we can envisage circumstances where a casual booking could be used to fulfil a league game commitment. The League Entry Agreement does not appear to forbid this. Nor do the League Rules referred to in the League Entry Agreement. There is no cross reference in the League Entry Agreement to the League Pitch Hire Agreement. No written agreement is entered into when a single casual booking is made. This emphasises the independence of the League Pitch Hire Agreement and the League Entry Agreement.

126. All this negates the notion that the transaction (whether the League Pitch Hire Agreement is entered into at or about the same time as the League Entry Agreement or not) can be analysed as a single composite supply.

The Evidence of Burrett and Ballantyne

127. These gentlemen were led as typical consumers. They each answered *Yes* to a carefully crafted question in cross-examination by Mr Ghosh along the lines that what was good about a *Goals League* was that they organise everything, the pitch, the referee - the *package* is what you are buying. It was the word *package* which caused consternation in the Appellant's camp. The matter was not explored further in cross-examination (not surprisingly) and was not the subject of re-examination.

128. We do not consider that this chapter of the evidence, skilfully elicited as it was, carries any significant weight. One could readily substitute *transaction* for *package.* The *de quo* of most of the cases on single or multiple supplies is to identify the transaction or package, unwrap the package and determine whether the various elements, which are invariably linked are *so closely* linked as to be indivisible from an economic point of view, or whether one or more elements constitute the principal service while others are merely ancillary. Accordingly, for a witness to agree that he was receiving a *package* does not resolve the issue of single or multiple supplies or even materially contribute to its resolution.

Other Matters

129. Although we have made findings of fact about the Appellant's income and expenditure and the proportion of turnover attributable to the various facets of its business, we doubt whether these findings are relevant beyond the finding that the Appellant's core business is pitch hire. How much it costs to generate that turnover does not seem to us to be relevant to the question whether there is a single supply or multiple supplies in relation to the Appellant's transactions with the typical consumer. It is the supplies and what they comprise which are important. The supplies have to be assessed objectively for their significance to the consumer and their connection one with the other. The price or prices paid by the consumer are plainly relevant but not necessarily conclusive. The cost to the taxable person of supplying the service does not seem to be relevant as it may vary considerably from one taxable person to another making similar supplies and such variation may not affect the provision of the service from the point of view of the customer (*Purple Parking Ltd* at paragraphs 16 and 37).

130. We have also not forgotten that the fact that the same or similar services could be supplied separately from different sources is irrelevant to the question whether, in the particular transaction under consideration, their combination produces a different economic result (*Purple Parking Ltd* at paragraphs 31; *David Baxendale Ltd* paragraph 24). It respectfully seems to us that at various points in the evidence and the submissions this has been overlooked by the parties. It is inherent in the nature of this type of dispute that there will be several identifiable supplies and that each such supply or a similar supply is likely to be available from a third party. Thus, third parties provide similar league management services. The same or different third parties provided pitches for hire.

131. We also note that if HMRC are correct, it might not be too difficult to elide the consequence of treating league pitch hire and league management services as a single supply, by the Appellant entering into some genuine and mutually beneficial arrangement with a competitor who also provides pitch hire and league management services for the Appellant to require its customers using its pitches to sign up e.g. online to the competitor's league management services, and for the competitor's customers using the competitor's pitches to sign up online to the Appellant's league management services. Provided these arrangements had some genuine and beneficial commercial advantage, it would be difficult, in our view, to conclude that the provision of pitch hire and provision of league management services constituted a single composite supply.

Conclusion on the Primary Case for the Appellant

132. From the point of view of the typical consumer, there is a discrete supply of the use of a pitch, on the one hand, and the supply of league management services on the other hand. The former is exempt from VAT provided the statutory criteria are met (and that is, for present purposes, common ground). The latter supply is standard rated.

The Appellant's Alternative Cases

133. If our conclusion on the Appellant's primary case is wrong, and we enter the world of the artificial and assume that there is a single composite supply, then we are of the view that pitch hire is clearly the principal supply and league management services are clearly ancillary thereto. We do not think this would be straining the natural meaning of *ancillary* (*College of Estate Management* at paragraph 30). There is a marked difference in price between the two supplies. The league management services enable the principal service to be better enjoyed. The economic reality is their cost to the typical consumer is minimal compared to the pitch hire costs. The games take on a competitive edge; opponents are provided which reduces the administrative burden on the team representative; a referee is provided, points are awarded, and league tables and results are published, all of which gives the game a realism which makes playing a structured game on the pitch more enjoyable and satisfying. It would be wholly unrealistic to view the league management services as the principal or predominant supply, and the pitch hire as ancillary. The hire of the pitch and playing on it are the essence of the Appellant's business and the essence of the transaction entered into by the typical consumer. It is the pitch hire that is normally central and indispensable (see *College of Estate Management* at paragraph 30). A team organiser transacts with the Appellant for pitch hire with the optional extra of participating in a league.

134. Accordingly, if contrary to our view, we are concerned with a single composite supply, league pitch hire is the principal supply and league management services are ancillary supplies. That single composite supply cannot therefore be treated as a supply of distinct elements for VAT purposes in purported application of *Talacre Beach.*

135. It is therefore unnecessary to consider the Appellant's second alternative case. We have, in any event, reservations as to whether the *Talacre* approach could apply to the circumstances in the present appeal. The supply of a caravan was expressly declared to be zero-rated, but not the contents. That provision had to be interpreted strictly. The treatment of the supply of a caravan and its contents as a single supply could not change that specific legal framework which had to be taken into account in determining the scope of a supply from the VAT point of view, as to which there is no set rule (see paragraphs 20-25 of the Court's Judgment and paragraphs 38-40 of the Opinion of the Advocate General).

Tax Treatment of Other Taxable Persons

136. Mr Ghosh submitted that this was irrelevant and in any event the evidence related to the supply of pitches and not the supply of pitches in combination with the supply of league management services, and was therefore irrelevant. Mr Ghosh had, at the outset of the Hearing, objected to certain passages in the evidence of Mr Gow, Mr Ballantyne and Mr Burrett. At that stage in proceedings, we simply noted the objection and allowed the evidence to proceed unrestricted.

137. Although we were not addressed in detail on this branch of the case in closing submissions, we agree with Mr Ghosh's second point and are inclined to agree with him on the first point too. We agree that the evidence of the supply of pitches by a local authority or university neither of which offers league management services adds nothing to the Appellant's case.

138. The Tribunal is concerned with the Appellant's tax affairs and not those of a rival trader who is not represented, whose tax affairs are confidential, and thus the detail of which is unknown and cannot be examined. Any examination of a third party's tax treatment would therefore be incomplete, bind no-one, unnecessarily extend the duration of the hearing and add to the complexity of the Tribunal's task. *Prima facie,* an appellant does not have a sufficient interest in law to justify such an investigation (*CIR v National Federation of Small Businesses Ltd* 551982 AC 617 at 633C-D, 646G-647B).

139. There does, however, appear to be some tension between the foregoing view, the principle of fiscal neutrality and what is said to be a cardinal principle of public administration that all persons in a similar position should be treated similarly (*Western Ferries (Clyde) Ltd v RCC* 2012 UKFTT 243 (TC) at paragraphs 200 & 213. In the absence of full submissions, we think it would be unwise for us to say anything further on this topic.

140. At the end of the day, such evidence as there was of the VAT treatment by (rather than *of*) third parties was minimal and we have not relied on it. We consider the most expedient way to deal with Mr Ghosh's objection to the admissibility of such evidence in this case is to reject it (rather than attempt to untangle the evidence of, in particular, Messrs Ballantyne and Burrett), and hold the evidence in question, such as it was, and insofar as it truly related to the tax treatment of third parties, to be admissible but irrelevant, as Mr Ghosh contended in his Skeleton Argument.

Procedural Issue- Additional Evidence at late stage in proceedings

141. As discussed above, we allowed Mr Payton to be recalled to give further evidence. This might never have arisen had the timing of the various stages in the proceedings been different.

142. The hearing was allocated two days, Thursday 5 and Friday 6 July 2012. Miss Whipple had concluded her closing submissions by about noon on Friday 6 July. By the end of the day, Mr Ghosh had concluded his closing submissions. Miss Whipple wished and in the circumstances was entitled to a right of reply which could not be dealt with that day owing to the lateness of the hour. The Tribunal, the parties and counsel were able to reconvene the following week on Tuesday 10 July 2012. Accordingly, Tuesday morning was set aside for Miss Whipple's reply.

143. It appears that over the weekend, the Appellant and her advisers, having reflected upon Mr Ghosh's submissions, decided that they wished to lead further evidence to deal with certain submissions made by Mr Ghosh. These submissions related to various aspects of the evidence, which perhaps had not been as clear as they

might have been. Accordingly, a further written witness statement by Mr Payton was prepared and further documents were assembled.

144. There was some communication between counsel and/or the parties' other advisers, over the weekend, and/or Monday 9 July 2012, as we understand that the additional statement and documents were intimated at some point before Tuesday morning.

145. As we have already discussed, we granted the application and heard further evidence, cross examination and submissions. The reason for granting the application was (i) Mr Ghosh did not oppose the application and did not indicate that he was or would be prejudiced by it being granted, (ii) the appeal was an important one, of high value and one which might affect other suppliers of similar services, (iii) it was therefore important to have the fullest and clearest explanation of the relevant facts, (iv) in these circumstances, it was plainly fair and just to allow the additional evidence. In granting the application, we indicated to Mr Ghosh that, should he require an adjournment to reflect upon the ramifications of our procedural decision, the Tribunal would be sympathetic. In the event, he did not request an adjournment, and the proceedings were finally concluded in the course of the morning. Had the hearing proceeded at a faster pace (and we are not suggesting it could or should have) the whole appeal may have been concluded without any such application being made.

146. It should be stressed that such additional evidence at the stage this appeal had reached would not normally be allowed. In most cases, any attempt to introduce additional evidence, after a party (whether represented or not) has closed his case, is likely (i) to be regarded as unfair, (ii) to cause his opponent irretrievable prejudice, and (iii) to be prejudicial to the general efficient administration of justice, by reason of possible delay, disruption and extension or continuation of the proceedings.

147. We consider that our procedural decision is consistent with the *dicta* in *Connect Global Ltd v HMRC* 20011 STC 51 at paragraphs 35-39 and *Nottinghamshire & City of Nottingham Fire Authority v Gladman Commercial Properties* 2011 1 WLR 3235 at paragraphs 32-36, to which we were referred by Mr Ghosh. Whether to admit late or further evidence is a matter for the Tribunal's discretion. These cases and Rules 2(1), 2(2)(c), 2(2)(e), 5(1) & (2), and 15(1) & (2)(a) provide some guidance as to how the exercise of that discretion should be carried out. The key principles appear to be fairness to both parties and the efficient administration of justice.

Summary

148. We summarise our principal conclusions as follows:-

> **1** There were separate contracts and separate supplies. It would be artificial to combine them and classify them as a single supply from an economic point of view.
>
> **2** From the point of view of the typical consumer, there is a discrete supply of the use of a pitch, on the one hand, and the supply of league management services on the other hand. The former is exempt from VAT

provided the statutory criteria are met (and that is, for present purposes, common ground). The latter supply is standard rated.

3 If contrary to our view, we are concerned with a single composite supply, league pitch hire is the principal supply and league management services are ancillary supplies. That single composite supply cannot therefore be treated as a supply of distinct elements for VAT purposes in purported application of *Talacre Beach.*

Result

149. We allow the appeal.

150. 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.

J GORDON REID, QC, FCIArb
TRIBUNAL JUDGE

RELEASE DATE: 10 September 2012