[2016] UKFTT 294 (TC)

TC05067

Appeal number:MAN/1999/1048

VALUE ADDED TAX – company limited by guarantee – whether supplies to members were outside the scope of VAT – single supply or multiple supplies – nature of supplies – exemption under Article 13A(1)(l) Sixth Directive – supplies made by an organisation of a philanthropic nature – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HALLÉ CONCERTS SOCIETY **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR NOEL BARRETT

Sitting in public in Manchester on 7 and 8 October 2015

Mr Frank Mitchell of counsel instructed by PricewaterhouseCoopers Legal LLP for the Appellant

Mr Richard Chapman of counsel instructed by the General Counsel and Solicitor of HM Revenue & Customs for the Respondents

DECISION

Background

1. The Hallé Orchestra was founded in Manchester in 1858 by Sir Charles Hallé. With the support of wealthy individuals it continued until his death in 1895. In 1898 the Hallé Concerts Society ("the Society") was incorporated as a company limited by guarantee. The Society has operated the Hallé Orchestra ever since.

2. The Society is a members' society and members pay annual subscriptions with various rights and benefits being associated with membership. One of the benefits associated with membership is the right to priority booking, in advance of tickets going on open sale to the general public.

3. This appeal commenced in 1999 and challenged a decision that concert admission charges should properly have been treated as exempt from VAT. Challenges against subsequent decisions were consolidated in the present appeal and concerned the VAT treatment of annual subscriptions paid by members of the Society. By the date of hearing the parties had agreed the position in relation to admission charges. We are therefore only concerned with the VAT treatment of members' subscriptions.

4. The issues arise in the context of claims for repayment of VAT by the Society which have been refused by HMRC. These are claims for repayment of output tax which the Society accounted for in relation to members' subscriptions. The claims in dispute are for £154,962 in the period 1 April 1973 to 31 May 1999 and £18,204 in the period 1 March 2001 to 30 November 2003.

5. The grounds of appeal and the issues which arise in the appeal were helpfully summarised in both parties' skeleton arguments and are broadly as follows:

(1) The Appellant contends that members' subscriptions did not amount to consideration for any supply by the Society and were outside the scope of VAT.

(2) If any of the rights and benefits associated with membership were within the scope of VAT, both parties contend that the Society made a single composite supply rather than multiple supplies. The Appellant contends that the single supply should be characterised as a supply of membership which would be outside the scope of VAT. The Respondents contend that it should be characterised as a supply of priority booking rights which is within the scope of VAT.

(3) If all aspects of the rights and benefits of membership are within the scope of VAT, the Appellant contends that there is either a single supply which is exempt by virtue of the "philanthropic exemption" or there are multiple supplies which individually fall with within the philanthropic exemption, the cultural exemption or are zero rated publications.

6. The cultural exemption applies to certain supplies in relation to cultural services and performances of a cultural nature. It is the subject of a reference to the Court of

Justice of the European Union ("CJEU") by the Court of Appeal following *Commissioners of HM Revenue & Customs v British Film Institute [2014] UKUT 370 (TCC)*. Both parties agreed that we should put the cultural exemption to one side for the purposes of the hearing.

7. The evidence before us was primarily set out in two witness statements of Mr John Summers who has been the chief executive of the Society since 1999. Those witness statements exhibited a substantial amount of documentation. We also had witness statements from Mrs Penelope Moore and Mr Terence Moore who have both been members of the Society for many years. The evidence was not challenged by HMRC and therefore we did not hear any oral evidence. We are grateful for the extremely helpful way in which the evidence was presented.

8. We set out below our findings of fact based on the evidence before us. The issues before us are issues of law or depend in large measure on our analysis of the facts. We therefore deal with those issues and the submissions of counsel in the discussion which follows our findings of fact.

Findings of Fact

9. Since 1963 the Society has been a registered charity and has twelve trustees. The Society's charitable objects centre upon the advancement of musical education for the benefit of the public. The Society has a separate board of directors on which the trustees are non-executive members. Three of the trustees are effectively nominated by the Association of Greater Manchester Authorities ("AGMA") and nine are elected by the Society members.

10. The Society's objects were set out in its Memorandum of Association dated 28 June 1899 as follows:

> "*To give and arrange concerts and generally to promote the study, practice, and knowledge of the art of music in the United Kingdom and elsewhere.*"

11. On 9 October 1990 the Society's objects were amended as follows:

> "*The object of the Society is the promotion of the study practice and knowledge of the art of music in the United Kingdom and elsewhere by the giving and arrangement of concerts and such other means as is thought fit…*"

12. It is notable that the objects refer to music in general, and not to classical music or orchestral music.

13. The Society receives public funding from the Arts Council and AGMA. Funding from the Arts Council is conditional on the Society demonstrating a public benefit and the Society is required to make annual applications which include an outline programme of performances for the coming year. Funding received from AGMA is more closely linked to community work carried out by the Society.

14. The Society also receives funding from the Charles Hallé Foundation and the Hallé Endowment Trust. The Charles Hallé Foundation operates a patronage scheme through which patrons donate money for the benefit of the Society. It also receives donations from other educational foundations. The Hallé Endowment Trust is itself a charitable trust established to assist the Society in the performance of its objects. Its funds are held on permanent endowment and the income is used to support the Society. Funding for the Society also comes from sponsors, concert income, programmes, membership subscriptions and investment income.

15. The Society's accounts for year ended 31 March 1974 show concert income including VAT of £295,865 and a total income net of VAT of £283,983. Total expenditure, principally orchestra costs, was £525,108. The Society therefore had a deficit of £241,125 which was covered by grants from the Arts Council and predecessors of AGMA.

16. The Society consistently operated a deficit in each subsequent year with the deficit being covered to a greater or lesser extent by grants.

17. The Society's accounts for year ended 31 March 2014 are not part of the period we are concerned with, but they are indicative of how the Society has always operated. The total income from all sources, other than endowment funds and restricted funds was approximately £7.4m. Approximately half that sum was voluntary funding, as described above. Some £2.7m was income from orchestral concerts and related work of the orchestra. Charitable and associated expenditure was approximately £7.0m, the bulk of which was orchestra costs.

18. It is clear from the evidence that the box office and associated income would be wholly insufficient to cover the operating costs of the orchestra. Membership subscriptions are a relatively minor source of income for the Society. In the year ended 1974 they were £3,809 and in 2014 they were £53,000. In some years the membership income was not separately identified but included in "other income".

19. There are currently 956 members of the Society. We shall refer to the members for the time being as "Members". The current annual subscription is £50 for an adult, £37 for a concessionary subscription and £56 for an overseas Member. Overseas Members pay extra because of additional postage costs. In the early years of the period covered by this appeal there was a distinction between Full Members and Country Members, the latter paying a reduced annual subscription.

20. According to the articles of association of the Society, each Member has liability as guarantor not exceeding £5 to contribute to any deficit on a winding up of the Society. In addition each Member must pay an annual subscription. The articles provide that Members are entitled to attend and vote at general meetings where the annual accounts are received, external auditors appointed and directors appointed. Members have no interest in any income or property of the Society. On a winding up of the Society no property shall be distributed to Members. Such property must be distributed to a charitable or other institution having similar objects to the Society.

21. In practice very few members actually attend the annual general meeting. Proportionately more attended in the late 1990s when the Society was experiencing financial difficulties. The table below shows the total number of Members and those attending the meetings at that time. In 1997 there was a contested election for membership of the board of directors and in 1998 there was a vote on changes to the Society's articles of association:

Year	Total Membership	Members Attending AGM
1995	3,681	43
1996	3,998	54
1997	3,320	74
1998	2,908	72

22. Since 1998 the number of Members has reduced considerably to just 956 Members in 2015.

23. One of the issues which we must consider is what Members obtain for their membership subscriptions. In 2004 the Society recorded interviews with 40 Members as part of an oral history project. Members were asked why they had become Members and what they felt they got out of membership. The responses included "to have a greater involvement and connection with the Society", "to support the orchestra" and "family tradition". It does not appear that any members suggested that obtaining priority tickets was what they got out of membership.

24. There are various rights and benefits associated with membership which have changed over the years both in terms of what is received and the significance of what is received. The evidence included historical literature describing the benefits of membership. In addition to the rights given by the articles of association such as the right to vote and to receive the annual accounts, there are certain other benefits of membership. In all years since 1974-75 Members have received various publications. Depending on the year these are described variously as the Proms Prospectus, the Hallé magazine, the Yearbook, the Annual Prospectus or Hallé News. Generally it seems that there were 2 or 3 such publications provided in each year, and that newsletters were sent quarterly. The present cost of providing such publications to Members is some £1,500 per year, which excludes the costs associated with making the publications available to patrons and donors.

25. Other benefits were variously described, depending on the year as follows – priority booking for single tickets, priority booking for season tickets, season ticket retention rights, membership of the Hallé Club, rights to obtain a rehearsal pass, invitations to special members' concerts, exclusive offers on Hallé merchandise, membership of the Bridgewater Hall mailing list (said to be worth £5.50) and discounts at various outlets in Manchester. In the period we are concerned with, the last 3 mentioned benefits were only referred to in 2001-02 and 2002-03.

26. It is apparent that the nature of the benefits has changed over time. For example, membership of the Hallé Club is referred to from 1980-81 up to 1990-91 but not thereafter. Rehearsal passes are referred to between 1980-81 and 1993-94.

27. The Hallé Club provided lectures, recitals and social activities for its members. It also gave some priority booking rights. In 1974-75 membership of the Hallé Club itself cost non-Members £1.50, or 75p for concessions. In 1990-91 the cost of the Yearbook was £2.50 for non-Members, or £2.00 if ordered with a season ticket. The Yearbook was a source of reference for concert-goers throughout the season. It was free to Society Members. Full membership of the Society in 1990-91 was £15.

28. In order to understand the nature of priority booking rights it is necessary to say a little about the Society's performances.

29. In the period until 1996 the Hallé Orchestra was based at the Free Trade Hall in Manchester. In 1996 it moved to the newly built Bridgewater Hall. The Orchestra itself has 80 full time equivalent playing members. In the period we are concerned with it had up to 96 full time equivalent playing members. In any given year the Society would also engage up to 300 freelance musicians and around 100 freelance soloists and guest conductors.

30. The Society aims to offer as wide a repertoire of orchestral music as possible within the parameters of its charitable objects, funding agreements and financial constraints. Throughout the period we are concerned with it offered 3 principal series of concerts:

Series	**Description**
"Thursday Series"	These are generally the most artistically driven concerts featuring more challenging and less often performed works. Public access to such performances might not otherwise be available. They require more rehearsal time and involve use of experienced soloists and pre-eminent guest conductors. Each concert will be performed on 1 night and will generate a loss or deficit for the Society. A single Thursday Series concert in 2014-15 would give rise to a deficit of approximately £15,000 before taking into account fixed orchestra costs and general overheads. The orchestra costs for a concert would typically be in the region of £45,000.
"Opus Concerts"	These are the Society's middle tier performances. They were originally aimed at businesses buying group tickets for their employees and were also known as "Industrial Concerts". In the 1970s and 1980s they continued to be aimed at groups of concert goers. They feature a range of better known works and are typically performed over

	3 nights. The costs associated with Opus Concerts are typically lower than the Thursday Series, mainly because there is less rehearsal time, lower fees to soloists and conductors because there are repeat performances and a smaller orchestra is used. They typically generate a small profit or surplus although after fixed orchestra costs and general overheads they also result in a deficit.
"Popular and Seasonal Concerts"	These feature a lighter range of shorter pieces. They may be themed to a particular culture such as a "Russian Spectacular" or a genre such as "movie classics". Seasonal concerts are held at Christmas and during the summer. They typically attract larger audiences and are more economical to run.

31. In terms of attendance the Seasonal Concerts are most popular, followed by the Opus Concerts, the Thursday Series and the Popular Concerts. For example in 2012-13 the Christmas Concerts were at 69% capacity and the Popular Concerts were at 51%. The average attendance at the Bridgewater Hall was 1,242.

32. The Orchestra can also be hired for a fee to perform at external engagements throughout the UK.

33. Members of the public can purchase single tickets or subscriptions for the Thursday Series concerts in a given season. Subscribers, as they are known, can then attend each Thursday Series concert.

34. Opus Concerts attract local community groups and group tickets are available. Members of the public can purchase single tickets or subscriptions for the full series of Opus Concerts in a given season. Subscribers can then attend one performance of each Opus Concert.

35. The pricing of Popular and Seasonal Concerts is similar to commercial organisations offering similar concerts, such as Raymond Gubbay. However there are a wide range of concessionary and complimentary tickets to attract audiences who might not otherwise be able to attend. Season subscriptions are available for the Popular Concerts. Seasonal Concerts are not available for subscription.

36. Full price tickets for Popular and Seasonal Concerts fall into 4 price brackets, depending on the position of the seat. These prices are broadly comparable to commercial operators such as Raymond Gubbay, although such operators will have much lower operating costs. There are 2 further lower price categories for Thursday Series and Opus Concerts. There is also an extensive range of concessionary and complimentary tickets for all concerts. For example in 2014-15 tickets for Thursday Series concerts and some Opus Concerts were available at £3 to anyone in full time education. The Society works with AGMA to provide complimentary tickets to community groups and disadvantaged members of society. As indicated above, all

such concerts at the Bridgewater Hall typically have seats available so that complimentary tickets can be distributed in this way.

37. Priority booking rights enable Members to purchase tickets before they go on sale to the general public. As appears above, it is rare for the Bridgewater Hall performances to be sold out. The position was the same at the Free Trade Hall which had the same level of attendances but was actually a slightly larger venue. The advantage of priority booking rights is that Members get priority over the general public before tickets go on general sale.

38. Approximately one third of Members never buy tickets for performances and so they never utilise their priority booking rights.

39. It is also the case that people who buy a subscription either to the Thursday Series or the Opus Concerts obtain priority booking rights, in other words the right to select one particular seat for the whole series. If a subscriber then subscribes for another series of performances in the following season he has the same priority booking rights as a Member. Subscribers and Members can also buy individual tickets before they go on general sale to the public.

40. The nature of priority booking rights has changed over time. From the 1970s until the early 1990s Members did not have priority in relation to the Opus Concerts. Members received small membership cards which until the early 1990s included the priority booking dates and thereafter made reference to priority booking rights.

41. A promotional leaflet from 1976-77 describes the advantages of buying what was described as a "season ticket", in other words subscribing for a whole series of concerts. This included having the same seat throughout the series and avoiding subsequent price rises for single tickets. It also described the advantages of becoming a Member as including receipt of the "Annual Prospectus" immediately it is available. The Annual Prospectus included full details of the next season's concerts. Members of the Society were said to have "the added privilege of being able to retain their season ticket from season to season".

42. The leaflet also referred to "Retention Vouchers" which were for "Society Members Only". A retention voucher could be used by Members to retain their seat for the following season before the series of concerts was announced, but without any obligation to purchase until the programme was announced. Season tickets were said to be on sale to Members from 17 July 1976 and to the general public on 14 August 1976.

43. Mr Summers understanding was that historically both Members and subscribers had some sort of priority booking rights and that in the past priority booking periods and ticket release dates were applied much more rigidly. The system has changed over the years and the general trend was to reduce the distinction between priority booking rights of Members and those of subscribers. By 1996, when the Orchestra moved to the Bridgewater Hall there was no real distinction between the two.

44. In January 1996 an internal memo of the Society considered the priority booking system when the Society moved to the Bridgewater Hall. It is apparent from the memo that the Society was intending to alter the system in some way and was clearly concerned about how this would be perceived by concert goers. The memo did not set out the existing system, but the proposed system involved subscribers to the Opus Concerts having priority over Members for Opus Concerts only. The memo refers to the fact that one of the main advertised advantages of subscribing for a series ticket was being able to sit in the same seat for each performance. It also indicates that Members would have priority over non-Members and those with long membership would have priority over more recent Members.

45. There was evidence from 2013-14 which showed the extent to which Members and subscribers utilised the right to priority booking. It showed the number of occasions on which Members, existing subscribers or people who were both Members and existing subscribers booked series tickets during the priority period or after the priority period when tickets were on general sale to the public:

Description	**Using Priority**	**General Sale**
Member Only	10	276
Member and Subscriber	133	81
Subscriber Only	200	143

46. It can be seen therefore that only 10 Members purchased a series ticket during the priority period, compared to 276 who purchased them after they had gone on general sale. Subscribers were much more likely to use priority booking rights which they had by virtue of an existing subscription. So too were those people who were both subscribers and Members.

47. The Society also participates in educational and community programmes. There is an extensive education programme which involves working with schools, young people and disadvantaged people both at the Bridgwater Hall and at community centres, care homes and prisons. Events at the Bridgewater Hall involve children of all ages from local schools rehearsing with the orchestra and then staging a performance. This is known as the "Hallé for Youth" programme. Playing members of the orchestra participate in an "Adopt a Player" programme in which a school will "adopt" a musician. The musician goes into the school and works closely with the children who have an opportunity to attend an Opus Concert and meet the musician there. There are various other programmes involving schools, care homes and prisons and a wide range of educational and community based projects.

48. The Society operates 4 Youth Ensembles for gifted and talented children and young people up to the age of 19. These are free of charge and provide teaching, coaching and performance experience through a series of weekly rehearsals and regular concert appearances for 260 children. There are also residential tours and courses why typically cost about £500 each, but for which the Society offers bursaries to those in financial need. There is also a similar choral programme for 170 children.

49. The Society operates a "Professional Experience and Young Conductor's Scheme" aimed at recent graduates of the Royal Northern College of Music.

50. The educational and community programmes we have described are those which have operated since at least the 1980's. However, reaching out to the wider community has always been a central part of the ethos of the Society.

51. Mr and Mrs Moore gave evidence as to the background and motivations for their membership of the Society. They each have a love of classical music. We consider the relevance of that evidence below, but for present purposes we make the following findings of fact.

52. Mrs Moore was a history teacher. At the beginning of her career in 1965 she visited one of the Society's concerts at Victoria Hall, Hanley as part of a school trip. Thereafter she regularly took pupils to the Society's concerts. In 1997-98 she became a Member of the Society. In 1999 she became a patron of the Society through the Charles Hallé Foundation. She considers the principal tangible benefit of membership to be the newsletters which the Society sends to Members. She has never felt the need to attend an AGM or exercise her vote.

53. Mrs Moore's motivation for being a Member is intangible. It makes her feel "closer to the action" and that she has "joined the club". She is keen to support the Society's aims, in particular bringing classical music to the wider community. The annual membership subscription is one way in which she can do this. She also contributes in other ways, including being a patron and funding certain specific activities of the Society.

54. Mr Moore became a Member in 1982. He continued his membership in the period 1985 to 1991 when he worked abroad. In 1999 he became a patron, along with Mrs Moore. This was because the Society was in financial difficulties at that time and they both wanted to contribute. Mr Moore's motivation for being a Member is to give a feeling of a greater level of involvement with the Society and its music and to help give everyone the opportunity to experience it, children and young people in particular.

55. Mr Moore has never felt the need to attend an AGM or exercise his vote. He does not associate his membership with any tangible benefits, but simply wants to support the Society financially.

56. Mr and Mrs Moore were not motivated by any priority booking rights attached to membership. Indeed Mr Moore was not aware that membership gave such rights.

Discussion

57. We must consider the following issues:

(1) Is the grant of membership to Members a supply within the scope of VAT?

(2) If there is a supply or supplies within the scope of VAT, is there a single supply or multiple supplies and what is the nature of those supplies?

(3) To what extent do any supplies fall within the philanthropic exemption or fall to be zero rated as supplies of publications?

58. We shall address each issue in turn. In addressing these issues we are conscious that the answers may not be the same throughout the period of the claim. It also appears from the arguments as presented that there is a considerable overlap between issues (1) and (2).

(1) Is the grant of membership to Members a supply within the scope of VAT?

59. Mr Mitchell's submissions as to whether what was supplied was outside the scope of VAT fall to be considered in two stages. Firstly he submits that membership of a company limited by guarantee which simply gives a right to vote and receive copies of annual accounts ("the corporate rights") without any additional benefits would be outside the scope of VAT. Secondly he submits that the additional benefits received by the Members in the present case are incidental and do not cause what is supplied to fall within the scope of VAT.

60. Mr Chapman submitted that it was artificial to ask whether membership of a company limited by guarantee was outside the scope of VAT because the additional benefits received by Members were inseparable from the corporate rights. Having said that, Mr Chapman did not accept Mr Mitchell's submission that a supply of corporate rights alone would be outside the scope of VAT.

61. In *Kretztechnik AG v. Finanzamt Linz Case C-465/03* the taxpayer applied for admission to the Frankfurt Stock Exchange and was subsequently listed. It issued shares and sought to deduct VAT paid on supplies in connection with the listing. The CJEU held that the issue of the shares was outside the scope of VAT. However the increase in share capital was for the benefit of the taxpayer's whole economic activity and so it was entitled to deduct the input tax.

62. We are not concerned with the CJEU's approach to deduction of input tax but with its finding that a new share issue did not constitute a transaction falling within what was article 2(1) of the Sixth Directive. The Court set out its reasoning at [18] to [27], of which the following paragraphs are particularly relevant for present purposes:

> " *18. In that connection, it must be borne in mind that it is clear from Article 2(1) of the Sixth Directive, which defines the scope of VAT, that, within a Member State, only activities of an economic nature are subject to VAT. Economic activities are defined in Article 4(2) of the Sixth Directive as encompassing all activities of producers, traders and persons supplying services, in particular the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis (KapHag, paragraph 36).*

19. It is settled case-law that the mere acquisition and holding of shares is not to be regarded as an economic activity within the meaning of the Sixth Directive. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property and is not the product of any economic activity within the meaning of that directive (see Harnas & Helm, paragraph 15; KapHag, paragraph 38, and Case C-8/03 Banque Bruxelles Lambert (BBL) [2004] ECR I-'0000, paragraph 38). If, therefore, the acquisition of financial holdings in other undertakings does not in itself constitute an economic activity within the meaning of that directive, the same must be true of activities consisting in the sale of such holdings (see Case C-155/94 Wellcome Trust [1996] ECR I-3013, paragraph 33; KapHag, paragraph 40, and BBL, paragraph 38)."

63. The CJEU distinguished businesses which trade in securities which are within the scope of VAT, but exempted under what was article 13B(d)(5). It emphasised that whether or not a company is quoted on a recognised stock exchange makes no difference to the analysis. The issue of shares could not be a supply of goods because there was no disposal of tangible property. The Court went on to hold in relation to whether there was a supply of services:

" *24. In that connection the Court has already held that a partnership which admits a partner in consideration of payment of a contribution in cash does not effect to that partner a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive (KapHag, paragraph 43).*

25. The same conclusion must be drawn regarding the issue of shares for the purpose of raising capital.

26. As the Advocate General rightly observes in points 59 and 60 of his Opinion, a company that issues new shares is increasing its assets by acquiring additional capital, whilst granting the new shareholders a right of ownership of part of the capital thus increased. From the issuing company's point of view, the aim is to raise capital and not to provide services. As far as the shareholder is concerned, payment of the sums necessary for the increase of capital is not a payment of consideration but an investment or an employment of capital.

27. It follows that a share issue does not constitute a supply of goods or of services for consideration within the meaning of Article 2(1) of the Sixth Directive. Therefore, such a transaction, whether or not carried out in connection with admission of the company concerned to a stock exchange, does not fall within the scope of that directive."

64. The Court of Justice had previously held that the admission of a new partner in return for an introduction of capital was outside the scope of VAT. In *KapHag*

Renditefonds 35 Spreecenter Berlin-Hellersdorf 3. Tranch GbR v Finanzamt Charlottenburg Case 442/01 a German partnership admitted a new partner upon payment by him of a sum of money by way of capital contribution. One of the questions referred to the Court of Justice was whether the admission of a new partner who pays a contribution in cash constitutes a supply of services for a consideration for the purposes of VAT. The Court of Justice held that there was no supply of services by the partnership to the incoming partner because there was no reciprocal consideration from the partnership.

65. At [27] to [35] Advocate General Colomer stated as follows:

> " *27. …the mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity. For that reason, the Community case law does not recognise that the mere acquisition and the mere holding of shares constitute an economic activity, since they do [not] correspond to the exploitation of an asset for the purpose of obtaining income therefrom on an ongoing basis, since any dividend yielded by that holding is merely the result of ownership of the property. Exceptionally, where the holding is accompanied by direct or indirect involvement in the management of the company, without prejudice to the rights inherent in the capacity of shareholder or partner, the transaction may be taxable.*
>
> …
>
> *32. … the court will have to examine the legal nature of the relationship which is established between a partnership and the new partner when, in order to acquire that capacity, the new partner makes an economic contribution to the partnership which he is joining.*
>
> *33. I have not the slightest doubt that the future partner performs an act involving the disposal of his assets, of which becoming a member of the partnership is not the counterpart. Or, in other words, the fact of joining a partnership does not constitute a supply of services whereby the partnership confers an economic advantage on the new partner.*
>
> *35. The formation of a partnership (the partnership agreement being the founding act) or the incorporation within a partnership of new partners who subsequently join (variation of the agreement) constitute an agreement whereby various persons (natural or legal) form an organisation which the law recognises as having legal personality, and extend or amend its subjective basis. It is true that in the agreement the partners undertake to make contributions in common, which may consist of goods or services, in order to attain a shared objective, generally that of making a profit. No matter how widely it may be interpreted, however, that objective does not contain the notion of consumption in exchange for consideration, within the framework of a bilateral legal relationship, which is the basis of the Community rules on VAT. At most, as the case law of the court which I have cited makes abundantly clear, there is an expectation of obtaining advantages, which are the consequence of*

the ownership of a share in the partnership acquired by means of the disposal of assets but do not constitute payment for that share."

66. Mr Chapman submitted that the emphasis in these cases was on rights of ownership, distinguishing those rights from the exploitation of property for the purpose of obtaining an income. In each case it was necessary to examine the nature of the legal relationship. He sought to distinguish the position of the Members, who were members of a company limited by guarantee. As such they had no proprietary interest or right in the Appellant. They were not getting ownership of shares, they were getting rights conferred on them by the articles of association. The Members did not own anything out of which the rights could arise. They did not own shares or an interest in a partnership. Hence the reasoning in Kretztechnik and KapHag, that there was an acquisition of capital which could not amount to a supply of services, did not apply. Membership of the Appellant involved the granting of rights by the Appellant which could amount to a supply of services.

67. Mr Mitchell submitted that in Kretztechnik and KapHag it was the existence of the underlying assets owned by the company and the partnership and the rights to dividends and profits which gave rise to the question whether the interests in those rights amounted to an economic activity. In the present case, the mere right to vote and to receive accounts did not amount to an economic activity. There was no exploitation of property for the purpose of obtaining an income.

68. We are concerned with a particular type of entity, namely a company limited by guarantee. Members become members by guaranteeing the liabilities of the company. The articles of association are such that Members receive no interest in the company's assets and no rights to income. What they do receive is the corporate rights.

69. It is important to consider the legal nature of the entity and the relationship it has with its members. If, objectively, the aim of the company was to raise capital reflected in a financial holding of the contributor then the circumstances would fall within the reasoning of Kretztechnik. That is where stage 1 of Mr Mitchell's submissions becomes artificial. The rights and benefits received as a result of individuals becoming members of such a company will be evidence as to the nature of the relationship between the company and its members. It is necessary to consider the company's aims in the context of all the evidence as to what is paid and what is received.

70. There are also domestic authorities and we must consider whether these authorities are binding on us.

71. In domestic legislation the various Value Added Tax Acts ("VATA") have always defined the scope of VAT in terms of whether a supply is made by a taxable person in the course or furtherance of a "business" rather than in terms of carrying out an "economic activity". Section 47 VATA 1983 made provision for the meaning of the term business. There had been a similar provision in section 45 Finance Act 1972. Section 47(2)(a) provided that a business shall be deemed to include the provision by

a club, association or organisation, for a subscription or other consideration, of the "facilities or advantages" available to its members. More particularly, in the context of this appeal, section 47(3) provided as follows:

> "*47(3) Where a body has objects which are in the public domain and are of a political, religious, philanthropic, philosophical or patriotic nature, it is not to be treated as carrying on a business only because its members subscribe to it, if a subscription obtains no facility or advantage for the subscriber other than the right to participate in its management or receive reports on its activities.*"

72. The provisions of Section 47 were repeated in section 94 VATA 1994 but section 94(3), which replaced section 47(3), was repealed with effect from 1 December 1999. Both these provisions were considered by the Court of Appeal in *Customs & Excise Commissioners v British Field Sports Society [1998] STC 316* ("BFSS"). In April 1993 the Commissioners had decided that the campaigning activities of BFSS did not fall within section 47(2)(a) such that in respect of those activities it was not carrying on a business. As such whilst the subscriptions were subject to output tax the Commissioners refused the right to deduct input tax on costs incurred by BFSS in running its campaigning activities. BFSS argued that such activities were deemed to be a business by virtue of section 47(2(a) because they amounted to the provision of facilities or advantages by an association to its members.

73. The VAT Tribunal held that the campaigning activities were the provision of facilities or advantages to members and allowed the BFSS appeal. Subscriptions were paid for a package of benefits including the campaigning activities. Hidden J upheld the tribunal's decision and the Court of Appeal dismissed the Commissioners' appeal.

74. The issue before the Court of Appeal was as to the meaning of the term "facilities or advantages". It held that the term should be given its ordinary and everyday meaning and that it was "*quite obviously an advantage to members for the society to provide the organisation and to carry out the objects of the society … on behalf of the individual members*". Beldam LJ stated as follows at 322e – 323b:

> "*Although sec. 47 does not define "facilities" or "advantages", sec. 47(3) does give two instances of matters which, if not excepted, would amount to "facilities" or "advantages", namely the right to participate in the management of a body and the receipt of reports on the activities of that body. Facilities or advantages should be given their ordinary everyday meaning. It is quite obviously an advantage to members for the Society to provide the organisation and to carry out the objects of the Society and, in instructing professionals to assist in the campaigns, the Society is doing so on behalf of the individual members each of whom benefits directly and in the manner they expect in return for the payment of their subscription.*
>
> *Conclusion*
>
> *Sec. 47(3) is in my view instructive for it proceeds upon the basis that, unless excepted, a body of the nature there described would be carrying on a business*

if its members, in return for a subscription, obtained only the facility or advantage of the right to participate in management or receive a report on its activities. This seems to me to indicate that the scope of the phrase "facilities or advantages" is very wide and if a member receives a facility or an advantage from the provision of a report on the Society's activities I cannot see on what logical basis he would not receive a facility or advantage from professional services engaged on his behalf to further the objects to which the report relates. Similarly, if the mere right to participate in the Society's management is to be regarded as a facility or advantage, how can the benefit of the services provided by management be excluded?"

75. Mr Chapman relied on BFSS, and the reasoning quoted above, in support of his submission that sections 47(3) and 94(3) gave specific exemption to what would otherwise be within the scope of VAT, namely the right to participate in the management or receive reports on the activities of a philanthropic body. We are not at this stage concerned with whether the Appellant is a philanthropic body, but with the principle of whether a right to vote and receive accounts is a supply within the scope of VAT.

76. Mr Mitchell submitted that sections 47(3) and 94(3) were not deeming provisions. They do not deem anything to be within the scope of VAT which would otherwise fall outside the scope. They do not deem a transaction to be within the scope of VAT where a member receives any facility or advantage in return for a subscription, in particular the right to vote and receive accounts. He submitted such a construction would have been inconsistent with the Sixth Directive as interpreted in KapHag and Kretztechnik.

77. Both parties accepted that if a domestic statutory provision or authority was inconsistent with the Sixth Directive then we must disapply that provision and would not be bound by that authority (see *DG grup EOOD v Direktor na Agentsia 'Mitnitsi' (Case C-138/10) [2011] All ER (D) 99* at [47] and *Elchinov v Natsionalna zdravnoosiguritelna kasa* (C-173/09) *[2011] All ER (EC) 767* at [31]). Both parties also considered that BFSS would be binding on us unless we considered it was inconsistent with the Sixth Directive as interpreted in Kretztechnik and KapHag.

78. Neither party sought to criticise the conclusion of the Court of Appeal, but Mr Mitchell criticised the reasoning in so far as it involved a finding that a body which only supplied a right to participate in management or receive a report on its activities was carrying on a business. In the light of Kretztechnik and KapHag he submitted that membership of a company limited by guarantee does not involve an economic activity for the purposes of the Sixth Directive. There is no exploitation of any tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

79. We can see why that is the case in relation to a company limited by shares and a partnership. The issuing of shares or the creation of an interest in a partnership involves merely the granting of rights of ownership rather than the exploitation of

property by the company or the partnership. Such contributions to capital are therefore outside the scope of VAT because the dividends or share of profits simply arise as a result of ownership and not as a result of any economic activity by the company or the partnership.

80. As we have said, Mr Chapman sought to distinguish a company such as the Society on the basis that members had no proprietary interest in the company. We agree that is a relevant distinction. The Society is not granting rights of ownership at all. In legal terms members get the right to vote and the right to receive the accounts. There is no reason why that should not be seen as the supply of an intangible asset by the Society. It is granting those intangible contractual rights to persons who are prepared to guarantee the liabilities of the company and pay an annual subscription.

81. Whenever the nature of a supply is being considered it is necessary to have regard to the economic and commercial reality of the transaction (See *Esporta Ltd v Commissioners for HM Revenue & Customs [2014] EWCA Civ 155*). Mr Chapman also referred to Court of Appeal's decision in *Commissioners for HM Revenue & Customs v Airtours Holidays Transport Ltd [2014] EWCA Civ 1033* but that was in the particular context of tri-partite relationships where one party was said to have received nothing. Mr Mitchell accepted that Members received something for their subscriptions. He did not suggest they were simply a donation.

82. It follows that Members paid their subscriptions in order to receive at least the corporate rights. If that is the case then it also follows that there was a supply of the corporate rights. Members were not receiving any proprietary interest or right to income in the Society so the reasoning in Kretztechnik and KapHag does not apply and the supply is within the scope of VAT.

83. In our view the reasoning of the Court of Appeal in BFSS based on section 47(3) is entirely consistent with Kretztechnik and KapHag where the aim of a company in granting corporate rights is not the raising of capital and members receive no interest in the capital or income of the company.

84. The position becomes even clearer where there are other benefits which are available to members. In the present case the Members do receive other benefits which we have described above. We do not accept Mr Mitchell's submission that those additional benefits should be viewed separately and as being in some way incidental to the right to vote and receive the accounts.

85. Some Members are no doubt motivated to become Members, to a greater or lesser extent, by the charitable nature of the Society's work. Mr Mitchell disavowed any argument that Members subscriptions were gratuitous donations to the Society. As Mrs Moore's evidence illustrates, there are various means of supporting the Society's work, including making one off donations to the Society and becoming a patron of the Society. In the context of the present issue we are concerned with the more tangible benefits of membership, even if they arise in relation to intangible property such as the contractual rights deriving from the articles of association.

86. If we are wrong and the right to vote and receive copies of the accounts would, if supplied alone, fall outside the scope of VAT, then we would have to consider whether the other benefits of membership were merely incidental to those rights. That must be decided by reference to objective evidence and both parties agreed we must have regard to the economic reality. The relevant enquiry is an objective one. The relevance of the subjective views of particular Members or officers of the Society is simply that they may throw some light on the objective enquiry (See in a different context *Commissioners for HM Revenue & Customs v European Tour Operators' Association [2012] UKUT 377 (TCC)*).

87. Mr Mitchell identified 3 aspects to his argument that if the corporate rights were outside the scope of VAT then the additional benefits did not bring the supply within the scope of VAT:

(1) The economic reality was a supply of corporate rights only;

(2) The additional benefits were de minimis;

(3) Even if the additional benefits were not de minimis, they did not predominate over the corporate rights so as to bring the supply within the scope of VAT.

88. It seems to us that these 3 aspects really amount to an argument that the economic reality of what Members receive for their annual subscriptions is the corporate rights. The additional benefits are merely incidental and therefore the supply remains outside the scope of VAT.

89. Mr Mitchell submitted that it would only be a substantial facility or advantage going to the heart of the transaction which would bring the entire transaction within the scope of VAT. For example he submitted that if the only additional benefit was a souvenir calendar then it would be de minimis and would not cause the transaction to fall within the scope of VAT. We agree to the extent that it would always be a matter of degree.

90. Mr Mitchell also submitted in relation to this aspect of the appeal that Members did not pay any part of their subscriptions in return for the additional benefits we have identified above.

91. Both parties agreed that there must be reciprocity. It is well established that a service is taxable only if a legal relationship exists between the provider and the recipient pursuant to which there is reciprocal performance. It is therefore necessary to consider what if anything is received in return for the payment (See *Tolsma v Inspecteur der Omzetbelasting Leeuwarden [1994] STC 509*).

92. Mr Mitchell submitted that what Members got for their subscriptions, apart from supporting the Society's charitable work, was the right to determine the direction of the Society by means of their voting rights. The economic and commercial reality was that subscriptions were not paid in return for the additional benefits.

93. The fact that the Society is a charitable body is a strand which flows through much of the argument on this appeal. At least part of the motivation for individuals to become Members undoubtedly derives from the charitable nature of the Society's objects. Yet we must still consider the economic and commercial reality of what is supplied in return for the membership subscriptions. Is it characterised by the right to vote and determine the direction of the Society, or is it characterised by the additional benefits?

94. It is clear from the objective evidence that very few Members have ever exercised their rights to vote. It may be that they have been content with the direction of the Society, or are content that other Members who do exercise their right to vote will make the right choices. We accept that it is the existence and supply of the right to vote that matters and not simply the extent to which they are used. However it is difficult for the Society to argue that the economic reality is that members pay their subscriptions for the corporate rights rather than the additional benefits when the evidence is that very little use is made of those rights. It seems to us that membership subscriptions are paid for the whole bundle of rights and benefits which attach to membership.

95. We do not consider that the additional benefits are de minimis when compared to the corporate rights. We had some evidence as to the extent to which priority booking rights were used by Members in 2013-14. It is impossible to say to what extent this was reflective of the position in the period of the claim. The evidence we do have as to that period is principally the marketing material which highlights various benefits of membership, including priority booking rights. We also have the memo from 1996 which indicates that the Society was concerned about how changes to priority booking rights would be perceived by concert goers. We infer that concert goers, including Members, did consider priority booking rights to be important benefits, whether obtained through subscriptions to concert series or through membership

96. It is clear also that membership of the Hallé Club and obtaining the Yearbook were not insignificant benefits. They were available to non-Members by way of a separate payment. Likewise, membership of the Bridgewater Hall mailing list. It is not clear to what extent Members might have valued the opportunity to acquire rehearsal passes but we do know that this was advertised as a benefit over an extended period.

97. In relation to printed material supplied to Members, we accept that the costs of providing such material are relatively small. Mr Summers' evidence was that it is presently some £1,500 compared to a membership income of £53,000 in 2014. Comparative cost is one factor which must be taken into account in assessing the significance of that benefit. However it is not a determining factor. The fact remains that membership is one way to secure access to the publications.

98. Mr Mitchell argued that the additional benefits were de minimis not only in relation to the cost to the Society of providing them, but also in terms of their value to Members. We are not satisfied that is the case. It seems to us from the promotional

material that the publications were marketed as very real benefits of Membership. Membership was not promoted as a means to obtain the corporate rights, together with certain other incidental benefits. It was promoted as a means to acquire a whole host of benefits of which the right to vote was just one. The economic reality was not that a membership fee was paid only for the corporate rights, with other benefits being incidental.

99. Mr Mitchell submitted that even if the additional benefits were not de minimis, they did not predominate over the over the corporate rights. He submitted that the corporate rights predominated and the entire supply should therefore be treated as outside the scope of VAT. He summarised this submission in terms that a philanthropic body with members can supply benefits in addition to membership but still remain outside the scope of VAT provided the other benefits are ancillary and incidental.

100. This is a different argument to the de minimis argument. Mr Mitchell relied on the decision of the CJEU in *Město Žamberk v Finanční ředitelství v Hradci Králové Case C-18/12*. In that case the taxpayer municipality charged an entrance fee for access to a municipal aquatic park. The park included areas such as a swimming pool divided into lanes which could be used for sporting activities and other areas such as a paddling pool and water slides which could be used for amusement or rest. One of the questions referred was whether the sporting exemption in article 132(1)(m) of the VAT Directive applied to an aquatic park which offered facilities not only for engaging in sport but also other types of amusement or rest.

101. The approach of the CJEU was to apply well established principles in determining whether there was a single supply or multiple supplies and then in the case of a single supply to identify the nature of that supply to see if it fell within the terms of the sporting exemption.

102. At [28] the Court stated as follows in relation to the question of whether there was a single supply or multiple supplies:

> " *28. There is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (Levob Verzekeringen and OV Bank, paragraph 22; Case C-425/06 Part Service [2008] ECR I-897, paragraph 53; and Bog and Others, paragraph 53). There is also a single supply where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply (see, in particular, CPP, paragraph 30; Levob Verzekeringen and OV Bank, paragraph 21; and Bog and Others, paragraph 54 and case-law cited).*"

103. At [29] and [30] the Court stated as follows in relation to the characterisation of a single supply:

" *29. In order to determine whether a single complex supply must be categorised as a supply closely linked to sport within the meaning of Article 132(1)(m) of the VAT Directive although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified (see, to that effect, in particular, Case C-231/94 Faaborg-Gelting Linien [1996] ECR I-2395, paragraphs 12 and 14; Levob Verzekeringen and OV Bank, paragraph 27; and Bog and Others, paragraph 61).*

30. It follows from the case-law of the Court that the predominant element must be determined from the point of view of the typical consumer (see, to that effect, in particular, Levob Verzekeringen and OV Bank, paragraph 22, and Case C-276/09 Everything Everywhere [2010] ECR I-12359, paragraph 26) and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption provided for under Article 132(1)(m) of the VAT Directive in relation to those not falling within that exemption (see, to that effect, Bog and Others, paragraph 62)."

104. For the same reasons as we have set out above in relation to the de minimis question, we are satisfied that the additional benefits are not ancillary to the corporate rights. Further we do not consider that any element of the package of rights and benefits could properly be regarded as predominating. If anything, if the corporate rights were outside the scope of VAT, it seems to us that it would be the additional benefits viewed as a whole which predominated. In any event the single supply would be within the scope of VAT and taxable, subject to the philanthropic exemption which we consider below.

(2) If there is a supply or supplies within the scope of VAT, is there a single or multiple supply?

105. For the reasons given above we consider that the supply of corporate rights and the supply of additional benefits are both within the scope of VAT. The question which then arises is whether there is a single supply of a package of rights and benefits or multiple supplies. If there is a single supply how should it be characterised and if there are multiple supplies, whether those supplies are of corporate rights, additional benefits and/or publications. The significance of those distinctions is that some separate supplies may be taxable, some may be exempt pursuant to an exemption such as the philanthropic exemption and some may fall to be zero rated as supplies of books.

106. We have already referred to the applicable principles as described in *Město Žamberk*. We have also had regard to the principles summarised in *Honourable Society of the Middle Temple v Revenue & Customs Commissioners [2013] UKUT 0250*. Whilst we have identified issue (2) in part by reference to whether there was a single supply or multiple supplies, in fact both parties proceeded on the basis that there was a single supply.

107. Mr Mitchell sought to characterise the single supply as a supply of membership rights and benefits on the basis that it was a single indivisible economic supply which it would be artificial to split.

108. Mr Chapman on the other hand sought to characterise the single supply as a supply of priority booking rights on the basis that was the principal supply. He submitted that priority booking rights and season ticket retention rights provided the greatest benefits to Members.

109. We consider that there is a single supply of a package of the rights and benefits arising from membership. We agree with Mr Mitchell that it is an indivisible economic supply which it would be artificial to split. It comprises various aspects by reference to which individuals who wish to become Members can engage with the Society. The supply may simply be described as a supply of membership rights and benefits, which include the corporate rights, the priority booking rights, the publications and other benefits. Those rights and benefits have changed over the period of the claim but it seems to us that throughout the period of the claim they can validly be described as supplies of membership rights and benefits. We are not satisfied that the nature of the supply has changed during the period of the claim. The evidence as a whole does not support Mr Chapman's submission that priority booking rights and season ticket retention rights provided the greatest benefit.

110. For the reasons given above the single supply is taxable. The final issue therefore is whether the supply of those membership rights and benefits falls within the philanthropic exemption.

> *(3) To what extent do any supplies fall within the philanthropic exemption or fall to be zero rated as supplies of publications?*

111. In May 1977 the Sixth Directive became effective and introduced what we have described as the philanthropic exemption, although it applies to bodies other than philanthropic bodies. We understand that there was no equivalent provision before 1977 and it is now Article 132(1)(l) of the VAT Directive. Article 13A of the Sixth Directive was headed "*Exemptions for certain activities in the public interest*" and paragraph 1(l) provided as follows:

> "*1. Without prejudice to other Community provisions, Member States shall exempt the following …*
>
> *(l) the supply of services, and goods closely linked thereto for the benefit of their members in return for a subscription fixed in accordance with their rules by non-profit making organisations with aims of a political, trade union, religious, patriotic, philosophical, philanthropic or civic nature, provided that this exemption is not likely to cause distortion of competition.*"

112. The philanthropic exemption was introduced into domestic legislation in 1999 and is to be found in Schedule 9 Group 9 Item 1(e) VATA 1994. Both parties accept that the exemption in the Sixth Directive had direct effect prior to 1999.

113. In passing we also note the cultural exemption which is at article 13A(1)(n) and provides as follows:

> "*certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned*"

114. As stated above, the parties have agreed that we should not be concerned with the cultural exemption at this stage. Thus we did not have submissions on the nature and extent of the cultural exemption and we are not in a position to give detailed consideration to the relationship between the philanthropic exemption and the cultural exemption.

115. Mr Mitchell accepted that to fall within the philanthropic exemption any services and goods supplied must be referable to the aims of the Society. He submitted that all the rights and benefits supplied by the Society to Members were referable to the Society's objects which were "*the promotion of the study practice and knowledge of the art of music*".

116. The philanthropic exemption was considered by the First-tier Tribunal in *United Grand Lodge of England v Commissioners for HM Revenue & Customs [2014] UKFTT 164*. One of the issues in that case was whether the United Grand Lodge's main or principal aim was of a philanthropic nature. The United Grand Lodge case was due to be heard by the Upper Tribunal shortly after the hearing of this appeal. We were content that both parties should retain the possibility of making further submissions in the light of the Upper Tribunal's decision, reference [2015] UKUT 0589 (TCC). In the event both parties agreed that it did not have any bearing on the issues in this appeal where it is accepted that the Society has only one aim. The issue we must decide is whether that aim is philanthropic in nature. The meaning of the word "philanthropic" was common ground in United Grand Lodge, as recorded by the Upper Tribunal at [19].

117. We were referred to a number of VAT Tribunal decisions in which the meaning of the word "philanthropy" has been considered for the purpose of the philanthropic exemption. For present purposes we shall simply set out what was said by Stephen Oliver QC in *The Game Conservancy Trust v Commissioners of Customs & Excise (Decision 17394)* at [63] and [64]:

> " *63. There being no statutory definition of the word "philanthropic", we start with extracts from the Oxford English Dictionary, second edition. "Philanthropic" is defined to mean: "Characterised by philanthropy; actuated by love of one's fellowmen; benevolent; humane." "Philanthropy" is defined to mean: "love to mankind; practical benevolence towards men in general; the disposition or active effort to promote the happiness well-being of one's fellow-men".*
>
> *64. The term "philanthropic" was considered by the VAT Tribunal (David Shirley) in Rotary International v Customs and Excise Commissioners [1991]*

VATTR 177. It was there concluded that the body in question was "philanthropic" because it had administered and organised the philanthropic activities of rotary clubs, even though it was not directly engaged in those activities. The Tribunal concluded that Rotary International's objects were of a philanthropic nature. Their object and purpose were "redolent of a desire to promote the well-being of mankind by serving one's fellow-men"; see paragraph 183E. In reaching this conclusion the Tribunal had taken into account the observations of the judges in Re MacDuff [1896] 2 Ch 451. In that case there had been a bequest of money construed as being for "purposes charitable or philanthropic". The question was whether this was a good charitable gift. It was held by Stirling J at first instance that it was not charitable for the reason that there may be philanthropic purposes which are not charitable. Focussing on the word "philanthropic", Stirling J went on to say –

> *"… an act cannot be said to be philanthropic unless it indicates goodwill to mankind at large."*

Lindley LJ, on appeal, put no definite meaning on the word but observed –

> *"All I can say is that a philanthropic purpose must be a purpose which indicates goodwill towards mankind in general."*

Unlike the position in Re MacDuff we are here concerned with a body which, it is common ground, is a charity. In this connection it is relevant to mention that the Charity Commission – requires charities to have purposes which are for the public benefit. This means "for the benefit of the community (or a significant section of it)": see Charity Commission publication CC21 paragraph 9; and Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297 at 305. The Commissioners of Customs and Excise have adopted that formulation and applied it to the "philanthropic" head of exemption. They require that the aims of the body in question be "for the benefit of the general community or a particular section of the community, or designed to promote the well being of mankind": see a letter from the Commissioners dated 27 March 2000. The view expressed in Volume VI of the Customs and Excise Manual (VAT) is that philanthropic "can be interpreted as for the benefit of the general community or a particular section of the community". It follows, as we see it, that charity law and VAT law are closely allied. But that still leaves us with the question of whether the objects of the Trust satisfy the statutory criterion as being "of a philanthropic nature."

118. The law report of re MacDuff includes reference to an exchange between Lindley LJ and counsel for the respondent where counsel was asked to suggest a purpose which would be philanthropic without being charitable. Counsel gave numerous examples, including a trust established for the purpose of supplying music as a source of recreation. He described philanthropic as "a very wide word and includes many things which are only for the pleasure of the world, and cannot be

called charitable". In his judgment, Lindley LJ went on to suggest purposes which might be philanthropic and not charitable: "purposes indicating goodwill to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptation of the word – that is to say in the wide, loose sense of indicating goodwill towards mankind or a great portion of them; but I do not think they would be charitable". Lopes LJ and Rigby LJ both gave illustrations of philanthropic gifts for the benefit of the rich or "moderately well-to-do" which would not be charitable.

119. It is notable that the current online edition of the Oxford English Dictionary also defines philanthropy as "*love of mankind; the disposition or active effort to promote the happiness and well-being of others; practical benevolence, now esp. as expressed by the generous donation of money to good causes*" (emphasis added). It seems to us that the term has come to have an even wider meaning than perhaps it once did. A charitable donation or act might now be described as philanthropic, although not every philanthropic act will be charitable. In that sense philanthropy has a much wider meaning than the legal term charity, which was clearly recognised in re MacDuff.

120. The fact that a body is involved in an economic activity of making supplies to its members does not disqualify it from being philanthropic. Indeed the exemption itself only applies to supplies of services and goods to members of a philanthropic body which would otherwise be taxable.

121. Mr Mitchell's essential submission was that everything the Society does is referable to its objects, and those objects are philanthropic. Indeed he went so far as to submit that the philanthropic nature of the Society's objects was "beyond question" and that the Society was "the epitome of a philanthropic body". He relied on the fact that the Society was a registered charity and a non-profit making body. It promotes the study, practice and knowledge of the art of music for the public benefit by holding concerts and through its work in education and the community. He accepted that a body which makes supplies to its members and exists principally for the self-interest of its members would not be philanthropic, but that was not the case here. The rights and benefits supplied to Members were all squarely directed at the Appellant's philanthropic aims. They were all designed to encourage and foster engagement with classical music.

122. Mr Chapman submitted that whilst the Society's aims were very laudable, they were not philanthropic. Its objects focus on promoting classical music which whilst pleasurable for those who enjoy classical music do not promote mankind's well-being. The Society's objects were cultural rather than philanthropic. He emphasised that philanthropy involves practical benevolence and that the Society charges people to attend its concerts. He contrasted the "Live Aid" concert in 1985 the purpose of which was to raise money for the relief of famine in Ethiopia. Organising that concert involved philanthropy by those who participated, however the Society's concerts were "culture for culture's sake". He submitted that otherwise the cultural exemption would be denuded of meaning and one would be left with value judgments as to what cultural activities could amount to philanthropy. He questioned whether providing a free concert of heavy metal music would amount to philanthropy, and if not then why should putting on a classical concert?

123. Both counsel cautioned us against attempting any general definition of the word "philanthropic". It is clear from the authorities quoted above that philanthropy includes "goodwill towards mankind in general". Notably the Society is a charity and all charities must have aims which are for the public benefit, now expressly recognised in section 2(1)(b) Charities Act 2011. Sir Stephen Oliver QC touched on the relationship between charitable objects and philanthropy. He clearly did not see the existence of charitable status as being determinative of whether the activities of the Game Conservancy Trust were philanthropic.

124. We do not find this issue as easy as Mr Mitchell suggested. However we can see that it is for the benefit of society as a whole that classical music endures for present and future generations. The same can be said of other genres of music, including many different genres within both classical music and popular music. Different genres will have different followings, and each would no doubt be able to put up subjective arguments as to why a particular genre was worthy of preservation or encouragement of a wider audience. We do not consider the fact that the present case happens to be concerned with classical music, itself a very wide description, should affect the argument as to whether the objects of the Society are philanthropic. As we have noted, those objects do not refer to classical music. The real question as we see it is whether the Society's aims of promoting the study, practice and knowledge of the art of music through concerts, educational programmes and community initiatives is philanthropic in nature.

125. There is no doubt in our minds that the Society's objects and the activities through which it achieves those objects are benevolent. It is a non-profit making body, which is a pre-requisite for exemption before any consideration of whether it has aims of a philanthropic nature. Whilst concert-goers pay for their tickets, those tickets are subsidised, indirectly by Arts Council grants, local authority funding, sponsorship and donations to the Society. The educational and community programmes are clearly subsidised to a much greater extent. All of that happens in the Society's pursuit of its charitable objects. It was not suggest that the fact the Society utilises funding from others including the Arts Council or AGMA to cover its deficit meant that it could not be viewed as being an organisation which was philanthropic in nature.

126. The meaning of the word "philanthropy" in a 19th century will posed real difficulties of definition in re MacDuff. We are concerned with the meaning of the term in the Sixth Directive. It is in that context that we must give it meaning, and determine whether the aims of the Society are philanthropic. In doing so we bear in mind that we are concerned with an exemption, and we must give it a strict interpretation because it has the effect of exempting certain transactions from VAT. However we bear in mind the Court of Appeal's judgment in *HM Revenue and Customs v Insurancewide.Com Services Ltd [2010] EWCA Civ 422* at [83]:

> " *83. Before leaving the case law, it is important to comment on the proper application of the numerous statements in the European cases, some of which are cited above, that the exemption in Article 13B(a), like the other exemptions*

in Article 13, should be interpreted strictly since it constitutes an exception to the general principle that turnover tax is levied on all services supplied for a consideration to a taxable person. As Advocate General Fennelly said, in paragraph 24 of his opinion in Card Protection, this does not mean that a particularly narrow interpretation will be given to the terms of an exemption. As Chadwick LJ said in Expert Witness Institute v Customs and Excise Commissioners [2001] EWCA Civ 1882, [2002] STC 42 at paragraph [17], the Court is not required to give the words in the exemption the most restricted, or most narrow, meaning that can be given to them. I agree with his observation, in paragraph [17] of his judgment, that:

> *"A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question."*"

127. We must give the words a fair interpretation in their context. No organisation can come within the terms of the exemption unless it is a non-profit making organisation. Beyond that it must also fall within the types of organisations identified in article 13A(1)(l). It seems to us that the common theme amongst those organisations is that they are all organisations that exist for the benefit of society or certain sections of society in a broad sense. We do not consider that it is necessary to give the word philanthropic a restrictive meaning such that it only applies to what Mr Chapman described as "practical benevolence" involving the provision of basic necessities such as food or shelter.

128. The great philanthropists of the 19th Century focussed on private initiatives for public good, and in particular improving the quality of life of people in towns and cities. It seems to us that their philanthropy did not stop at building decent housing and sanitation for workers. It extended to schools, universities, parks and gardens, libraries, public art galleries and museums. It is difficult to see why art and literature should be distinguished from music in this context. If a wealthy benefactor wished to build or subsidise a library or a concert hall for the benefit of a town or city we would regard that as philanthropic. Likewise the setting up and funding of an orchestra to put on free or subsidised public concerts would also amount to philanthropy.

129. The Society does charge for admission to its concerts but as we have found the tickets are subsidised to a greater or lesser extent and in some cases are free. In 1974 total expenditure, principally orchestra costs, was approximately £525,000. Concert income was approximately £290,000. There were similar subsidies in subsequent

years. No commercial operator could put on concerts with the same repertoire in the same way as the Society.

130. In the light of all the evidence we are satisfied that the Society did have aims of a philanthropic nature throughout the period of the claim. The supplies it makes to Members therefore do fall within the philanthropic exemption for those periods following the introduction of that exemption.

131. Finally we should record that it was not in dispute that if there was a separate supply of publications then that supply would be zero-rated. Further, in the light of our findings in relation to the philanthropic exemption, issues in relation to the cultural exemption do not arise.

Conclusion

132. For the reasons given above and for the periods following the introduction of the philanthropic exemption we allow the appeal.

133. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 27 APRIL 2016