# TC01288

**Appeal number: EDN/08/195**

***Value Added Tax; economic activities; business; sale of venison; postal services; whether sale of wild venison from large remote highland estate constitutes an economic activity; whether contract with Royal Mail for delivery of mail to remote location constitutes an economic activity. Value Added Tax Act 1994 ss 1, 2, 4 and 94 EC Council Directive Articles 2 and 9.***

**FIRST-TIER TRIBUNAL**

**TAX**

**MARK ZIANI DE FERRANTI** **Appellant**

**- and -**

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

**TRIBUNAL JUDGE:** **J Gordon Reid, QC., F.C.I.Arb.,**
**Member(s):** **S A Rae, LLB., WS,**

**Sitting in public at George House, 126 George Street, Edinburgh on Thursday 12 and Friday 13 May 2011**

**Mr Christopher Yaxley, for the Appellant**

**Mr Ian Artis, Advocate, for the Respondents**

DECISION

## Introduction

1. This appeal raises two principal issues. The first is whether the sale by the Appellant of venison from the carcases of deer shot on his estate (Meoble Estate, Morar, Invernesshire) to a local game dealer is a *VATable* supply within the meaning of s4 of VATA 1994. The second issue is whether a contract to deliver mail is a *VATable* supply requiring the Appellant to charge VAT. This is how the Appellant described the issues and we are content to proceed on that basis.

2. A Hearing took place at Edinburgh on 12 and 13 May 2011. The Appellant was represented by Christopher Yaxley of Dyke Yaxley, Chartered Accountants, Shrewsbury. He led the evidence of the Appellant who amplified his written statement. The Respondents ("HMRC") were represented by Ian Artis, Advocate. He led the evidence of Martin Roberts, a senior HMRC official, who also amplified his written statement. A joint bundle of documents was lodged. There was no dispute as to the authenticity or, where appropriate, the transmission and receipt of those documents. A Minute of Agreement setting out factual common ground was also produced. We have incorporated its contents in our findings.

3. We also received, from the Appellant, witness statements from Claire Illingworth, a director of Lochaber Game Services Ltd, Fort William, and a Report by Finlay Clark of Bidwells, dated 4 May 2011. Neither gave oral evidence. The parties accepted this material *as evidence in the case.* Mr Clark is secretary of the Association of Deer Management Groups and has been involved in deer management for 23 years.

4. We have been asked to provide a decision in principle and not to consider the detail of the quantification of the assessments. Evidence was led on that basis. Much of the correspondence considered in some detail the question of quantification. It is neither necessary or appropriate for us to refer to that detail at this stage.

## The Appeal

5. On 27 February 2008, HMRC assessed the Appellant pursuant to s73 VATA in the sum of £15,800 plus interest. On 30 July 2008 the assessment was amended by a Notice of Amendment of Assessment to £11,717 plus interest. The assessment related to under declared output tax for the VAT periods ending 03/05 to 06/07 inclusive.

6. On 8 September 2008 HMRC assessed the Appellant under s73 in the sum of £44,723 plus interest. That assessment was for under declared output tax and over declared claims for input tax for the VAT periods ending 09/05 to 06/07, and 03/08.

7. By letter dated 8 September 2008, HMRC notified the Appellant of their decision to disallow credit for input tax pursuant to s73 in the sum of £24,585.43 claimed in the periods 09/07, 12/07 and 06/08.

8. The assessments relate to four categories of dispute, namely (a) private use of a helicopter as a result of the input tax claimed and allowed on the purchase of the helicopter – the *Lennartz Charge*, (b) input tax claimed in respect of the running costs of the helicopter, (c) input tax claimed in respect of a hydro-electric turbine [this matter is no longer in dispute], and (d) input tax claimed in respect of other costs of running the Estate – essentially relating to the sale of venison, and postal services provided by the Appellant under contract with the Royal Mail. As we have been asked at this stage to consider issues of principle, we need not set out or consider the detailed calculations making up the assessments.

9. Our understanding of what parties have referred to as the *Lennartz Charge* is that the *Lennartz principle*[1]states that where a person acquires goods partly for business use and partly for non-business use, he is entitled to full input tax recovery at the outset and is required to account for output tax on the supply that is deemed to take place when, and to the extent that, the goods are put to non-business use.

10. A local review was carried out by a Mrs HJ Thomas on or about 29 October 2008, but she supported the assessments.

11. The Appellant has appealed these assessment and decision. The grounds of appeal are, in summary, that he is *in business* at Meoble Estate.

**Statutory Framework**

12. Article 2 of the EC Council Directive 2006/112 (the Principal VAT Directive provides that:-

> 1 The following transactions shall be subject to VAT;
>
> (a) the supply of goods for consideration within the territory of a memberState by a taxable person acting as such ……
>
> (c) the supply of services for consideration within the territory of a memberState by a taxable person acting as such.

13. Article 9 provides

> 1 "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the profession, shall be regarded as an "economic activity". The exploitation of tangible or intangible or property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

14. Sections 1,4 and 94 of the Value Added Tax 1994 (VATA) provide *inter alia* as follows:-

[1]*Lennartz v Finanzamt Munchen III 1995 STC 514 paragraph 26 page 545*

1(1) Value added tax shall be charged, in accordance with the provisions of this Act-

(a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply).

3(1) A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act.

4(1) VAT shall be charged on any supply of goods or services made in the United Kingdom where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him;

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

94(1) In this Act "business" includes any trade, profession or vocation ….

15. Although, following our decision, questions relating to input tax may arise, we have not quoted the various statutory provisions on that topic.

## The Facts

*The Appellant*

16. The Appellant is chairman and managing director of and majority shareholder in Denis Ferranti Meters Ltd, and other companies with the Denis Ferranti Group. He has been chairman and managing director for about 40 years. The business, which is based in Bangor, North Wales, specialises in the manufacture of mechanical, electromechanical, and electronic products. It is a family run business. The founder of the original business was the inventor and electrical engineer, Dr Sebastian Zianni de Ferranti. The Appellant is a successful and wealthy businessman.

*Meoble Estate*

17. The Appellant owns Meoble Estate, by Loch Morar. It lies on the mainland below the southern tip of the Isle of Skye. Loch Morar is about twelve miles long and is Scotland's deepest freshwater loch. Meoble Estate is very large, about 32,000 acres. Its northern boundary extends about ten miles along the southern shore of the Loch Morar.

18. The Estate is inaccessible by road. It has no metalled roads. It can only be reached by boat along Loch Morar, by foot over the hills from Arisaig which takes at least one and a half hours, or by helicopter. The Appellant's boat is a substantial flat decked fishing boat. He also has a modern ex-military landing craft which can handle 6-7 tonnes of goods and equipment. Practical access is by boat on Loch Morar from the village of Morar, where there are local shops, to the main Estate pier. This takes about 45 minutes in the fishing boat, and about 15 minutes in the landing craft when the weather is suitable. The one road on the Estate is of stone and gravel composition and can only be used by 4x4 vehicles. The road connects Loch Morar with Loch Berroid and is used for travel between Meoble Lodge and the pier. Loch Berroid is about four miles long.

19. Onward travel from Moraris by vehicle to Mallaig and elsewhere. All food and supplies are brought on to the Estate by boat, as is the mail.

20. The Estate has no stock-proof boundary fences. It is mountainous and consists of mainly un-forested open hillside. Red deer on the Estate are not confined in any way. They flourish in the natural environment which provides a plentiful food supply. The Appellant does not *stock* the Estate with deer. There were about 1390 red deer on the Estate in 2010

21. In spite of its size the Estate has relatively few dwellings and buildings. There is a Lodge used by the Appellant and his family and friends when they visit the Estate. It is a six or seven bedroom dwelling. The Lodge, which is approximately in or about the middle of the Estate, was rebuilt by the Appellant's father in the 1960's. The Lodge is about two miles by road from the pier. There are five further dwellings, namely *Inverosie Meoble*, occupied by the estate caretaker/handyman and his wife; *Inverslaite*– a dwelling that has no permanent resident; the *Bungalow* – again no permanent resident; *Kinlochberaid* – this dwelling is uninhabitable; a bothy known as the *Woodhouse*.

22. There are additional buildings, namely The *School*, the *Store* – containing general estate equipment, the *Garage* – used for estate vehicles and machinery; the *Pier and shed* – at the waterside where the boats are stored. There are numerous other buildings such as workshops, generator shed, a traditional Scottish deer larder, and a new cold store built to meet food hygiene regulations applicable to the storage of venison. There is also a concrete helipad near the Lodge.

23. The source of electricity on the Estate was until about 2010 an old diesel generator. Its output was consumed domestically by the Lodge and Estate accommodation and a chilling plant and various lights serving other buildings.

*Estate History*

24. The Estate was purchased by the Appellant's father in the 1950's. He ran the Estate with other farming activities he had at the time. Activities carried on at the Estate included deer stalking. The Appellant has visited Meoble Estate on a regular basis since he was a child. The Appellant's father emigrated in the 1960s and gave the Estate to a family friend (Miss Mirian Ford). She ran the Estate as a business. The main business activities were sheep and the sale of venison. She had three flocks of sheep which were hefted to the ground. She employed a shepherd, a stalker and a boatman/handyman. She was registered for VAT. Historically, the Estate has never been run as a sporting shoot.

25. Latterly, if not throughout her tenure of the Estate, Miss Ford had insufficient funds to maintain the Estate which generally deteriorated over the years. When Miss Ford became elderly, she removed to London and handed the Estate over to the Appellant. Her business was transferred to the Appellant in about June 1993. This was achieved by a Donation Agreement dated 7 July 1993. The precise details of the transfer do not matter, but it is clear that the Appellant was taking over a going

concern including three employees. The Donation Agreement also recorded that Miss Ford *carries on a sporting business enterprise.* The Appellant took on the three existing staff, as recorded in the Donation Agreement. He acquired Miss Ford's VAT registration number. The gift was treated for the purposes of VAT as the transfer of a going concern. The Estate itself was bought for value by the Appellant in 1993 under exception of the Lodge, which he subsequently acquired as a gift from Miss Ford.

26. The Appellant then set about renovating, refurbishing, repairing and/or replacing the buildings and dwellings, the pier, the plant, machinery, vehicles and boats. All this took time and money. The Appellant, being successful in business for many years and coming from a successful family, was and is plainly a man of considerable substance, means and determination. His long term plan was and is to make the business which he took over from Miss Ford, profitable. He has spent substantial sums (over £1m) improving the estate and its management.

*Helicopter*

27. In about December 2002, the Appellant purchased a helicopter from a company within the Ferranti Group, of which he was a director. It was about five years old when he purchased it. He did so in order to inject (then) much needed capital into the Denis Ferranti Group. In respect of that supply VAT was incurred in the sum of £73,500 which the Appellant claimed in whole as input tax within his VAT return for the period ending 12/02.

28. The Appellant has, since its acquisition, claimed deduction of all input tax arising on the helicopter's running costs with no restriction for non-business use. The helicopter is based at Bangor but serviced at Oxford. The Appellant deals personally with all the administration relating to the helicopter. He is, *inter alia,* an experienced helicopter pilot.

29. He has used and uses the helicopter by way of hire, mainly to Denis Ferranti Meters Ltd. The hire of the helicopter is a taxable supply of services. Either the Appellant or another pilot ferry Denis Ferranti staff to meetings with customers from time to time.

30. 30. The helicopter is also used by the Appellant to travel between his home at Gorddinog, Llanfairfechan, Gwynedd, Wales and Meoble Estate. Flying time is about 2.5-3hrs. To drive by car would take about eight hours. In addition, the helicopter is used in connection with activities on the Estate. Sometimes the Appellant pilots the helicopter. On other occasions a self-employed professional pilot is brought in and paid to do so. None of these professional pilots is registered for VAT so no question of input tax arises in relation to the pilot's charges.

31. The helicopter is also used to convey the stalking party to and from the appropriate location on the Estate and to transport carcases from the mountainside to the Estate larder as described below. The use of the helicopter improves the efficiency of the whole operation. The average flying time for each beast is only about eight minutes. This enables the carcases to be delivered to the Estate's cold

store in a shorter period than traditional methods would permit. This has advantages for both meat quality and hygene. Fuel for the helicopter costs about £85/hr. Some other estates make similar use of helicopters. The Deer Commission for Scotland have recognised the advantages of the use of helicopters. While the Appellant's use of a helicopter is by no means unique as some other estates use a helicopter for such activities, the Appellant's father pioneered such use in the Highlands.

32. The parties are agreed that flying hours are a reasonable method of attribution of the use of the helicopter between business and non-business activities.

*Activities on the Estate*

33. The principal activity with which this appeal is concerned is the production and sale of venison. This activity has been carried out on a regular basis since before Miss Ford's ownership of the Estate. Since he acquired the Estate, the Appellant has carried out this activity every year. Approximately the same number of deer is shot each year, namely about 50-60 stags and some hinds and calves, about 75-80 beasts in total. There is no legal obligation on the Appellant to shoot deer on his Estate. There is no evidence to suggest that the deer population on Meoble Estate is at a level at which Scottish Natural Heritage might contemplate intervention using statutory powers under the Deer (Scotland) Act 1996 (to be amended by the Wildlife and Natural Environment (Scotland) Act 2011).

34. Each year, usually in August the Appellant spends at least three weeks on the Estate. The purpose is to produce venison for sale to the local game dealer. The arrangements are organised in advance by the Appellant with the assistance of his secretarial staff at Bangor. Certain friends and family are invited to join him on the Estate. He provides accommodation and hospitality all free of charge. Some of his guests form part of the stalking team if they are sufficiently skilled and fit.

35. The Appellant organises the stalking party. He normally engages the services of two stalkers and two gillies. The head stalker sees to it that the shoot takes place in the appropriate areas. He is accompanied by a team of up to four assistants but he is responsible for achieving a clean kill, i.e. a humane kill and one which does not damage the carcase. Those friends and family who do go out on to the hill must be fit, responsible and be a competent shot as the whole exercise is arduous and is not merely a pleasant walk on the hills. The exercise takes place each year whether or not friends or family join the Appellant. The purpose behind the deer stalking is not the provision of a sporting shoot or unpaid hospitality or free entertainment, but the sale of venison to a game dealer.

36. About 75-80 beasts are shot each year. Royals (stags with antlers of 12 points or more) are not shot. This is to maintain the quality of the herd and is consistent with good land management practice.

37. Once a beast has been tracked, selected and shot, it is gutted (gralloched) on the hillside. The animal is then dragged to a point as close to a location where the helicopter can land. This is an arduous operation as a stag may weigh between 85 to

125kg. The gutted animal is attached to the helicopter by hook and rope and swings underneath the helicopter as it flies back to the vicinity of the Lodge. Sometimes, several gutted animals are air lifted down the mountain at the same time. In days gone by ponies were used to carry the animals down the hillside. This is no longer a practical or economic method of operating. Ponies require all year round care; the old pony paths on the Estate would have to be maintained; many have fallen into disrepair.

38. When the helicopter lands in the vicinity of the Lodge, the gutted animals are taken to one of the buildings which serves as a form of abattoir. There, they are dismembered and placed in the cold store building, tagged and made ready for transport first by vehicle and then by boat along Loch Morar. The game dealer's chiller lorry collects them at the pier.

39. The whole exercise is arduous and time consuming. The objective is to sell venison at commercial prices. All those participating must be fit, reliable and know what they are doing if they are to make a contribution towards what appears to be very much a team effort. This is all in stark contrast to the traditional sporting shoot on estates which are less remote and generally more accessible by vehicles.

40. The game dealer to whom the Appellant sells his deer carcases is Lochaber Game Services Ltd, Fort William. Its main business is the licensed retail and wholesale supply of venison, beef, poultry and fish. The game dealer collects carcases on three or four occasions during the season. The sale of carcases generates income of about £5,000 per annum and has varied between 2004 (£9,034) and 2010 (£5,948). What is being sold is wild venison and not farmed venison.

41. Hinds are also shot, usually in November. The process is a little more straightforward. They roam in lower areas of ground closer to the enclave of buildings. They are also much lighter in weight. Calves may also be shot when orphaned.

42. Other activities on the Estate will, in due course, include letting grazings. The Appellant is about to let about 11,000 acres. This activity is outwith the periods of assessment under consideration. There is no arable farming carried out on the Estate. Nor is there grouse shooting. There are no water sports. There are no fishing or cottage lets.

43. Heather burning takes place from time to time to re-generate the grasses. Salt licks are sometimes provided for the deer in winter.

44. The other activity carried on at the Estate is the generation of electricity. A water-powered electric turbine has been installed by the Appellant on the Estate. This project has taken several years to complete beginning in 2006, and finally being commissioned in 2009. The installation of the turbine and related equipment cost about £265,883. It supplies power to the buildings on the Estate. The scheme takes advantage of the government's general carbon reduction initiatives. The turbine is used to generate a revenue stream through Renewable Obligation Certificates (ROCs).

These certificates are issued to accredited generators for eligible renewable electricity generated with the United Kingdom and supplied to customers within the United Kingdom by a licensed electricity supplier. This is what made it a commercially attractive proposition to the Appellant. These certificates may be issued to those who can demonstrate that they are producing electricity in an environmentally friendly manner. They can be traded and are distinct from the supply of electricity itself.

45. The scheme also produces or at least is capable of producing surplus electricity. A power line needs to be installed to connect it up to the National Grid so that it can be sold and delivered. The Appellant chose not to install a power line pending the outcome of the dispute on this issue with HMRC.

46. It is, however, now agreed by the parties in this appeal that the installation and operation of the water turbine scheme is a business activity for the purposes of VAT. The Tribunal understands that HMRC will allow input tax claims relating to the water-turbine subject to any question of private user. We are not asked to determine the extent of any such private user. No evidence was led to that end.

*Administration*

47. Most of the paperwork in relation to Meoble Estate was carried out by the Appellant's personal assistant, Sue Williams. She paid the bills, and kept the financial records. She acted as book-keeper and organised the shoots, arranging and confirming dates and who would attend. She was not familiar with the detail of the activities carried on at the Estate. The Appellant kept a separate bank account for the Estate's activities. His VAT returns were completed by others on his behalf under the guidance of Dennis Cooper, a retired company secretary. Some, but not all, invoices rendered on behalf of the Appellant for his supplies quoted his VAT number.

*Estate Employees*

48. The Appellant has two employees who live on the Estate. They are Mr and Mrs Fraser. Mr Fraser acts as boatman, handyman and caretaker. Mr Fraser oversees the Estate's general condition and security, deals with postal deliveries, and assists the Appellant with the stalking team. He attends to the turbine on a daily basis. Mrs Fraser acts as housekeeper. Their wages are paid through the Denis Ferranti Group and re-charged to the Appellant. This administrative arrangement is said to make the PAYE system applicable to them easier to operate and apparently has the approval of HMRC.

49. Outwith the shooting season, the Frasers maintain the houses, buildings, boats and machinery, and the road. The red deer stag stalking season runs from 1 July to 20 October and the hind season from 21 October to 15 February.

*VAT Treatment*

50. The Appellant is and has been since 1 June 1993 registered for the purposes of VAT and has lodged VAT returns regularly ever since he took over Miss Ford's number.

51. Input tax on the expenditure relating to the Appellant's private residence on the Estate is not, we understand, claimed. However, all other VAT incurred both on the running of the Estate and in acquiring and running the helicopter has been treated as deductible input tax.

52. The Appellant keeps books and records relating to the running of the Estate at Bangor. They are kept by company staff on his behalf. These records appear to be basic but sufficient.

*Postal Delivery Service*

53. For practical reasons the Royal Mail does not deliver post addressed to the Appellant or his employees (the boatman/handyman and his wife) at the estate. Instead, there is an arrangement in place between the Royal Mail and the Appellant, whereby the Appellant fulfils the delivery service on behalf of the Royal Mail. This used to involve collecting mail from Morar post office and taking it by boat (owned by the Appellant and usually operated by Mr Fraser) to the Estate. The post office at Morar has been closed for some time and so the post is collected from the Post Office at Mallaig. The post is collected either by the Appellant himself (when he is on the Estate) or by Mr or Mrs Fraser, on behalf of the Appellant. The regularity of the collections is weather dependent but is normally about twice per week. Most of the mail is for his two employees who live on the Estate. Occasionally, mail will be sent to the Estate for him and/or his guests.

54. The evidence discloses and we find as fact that there is an individually negotiated contract between the Appellant and the Royal Mail. The essential terms are that in exchange for a sum of money the Appellant provides the service of delivering mail to Meoble Estate which the Royal Mail is unable or unwilling to provide. The Appellant is, in essence, an independent contractor supplying a service for which he charges a fee. The fee is varied from time to time over the years by express or implied agreement (e.g. by the Appellant increasing the sum previously agreed and the Royal Mail paying the increased sum).

55. As an illustration of the arrangement, a letter dated 22 November 2005 from the Royal Mail to Meoble Estate providing for the continuation of the postal services between October 2005 and October 2006 at the rate of £2,264.88 per year (£188.74 per month) has been produced. In an accompanying Purchase Order, to which is attached a set of Standard Terms and Conditions, the service is described as

> Conveyance of Mail – Meoble Estate
>
> The crossing of Loch Morar and collection of mail from Mallaig Post Office, and subsequent delivery of that mail to the Meoble Estate twice a week
>
> Total value excl. VAT £2,264.84 [the difference of £0.04 is unexplained and is *de minimis*]

56. Invoices dated 1 June 2008 and September 2010 from the Appellant to the Royal Mail in the sum of £188.74 plus VAT have also been produced. A similar monthly invoice for September 2010 in the same principal sum has also been produced. The

arrangements established by the evidence cannot be described as compensation for the inability or unwillingness of the Royal Mail to deliver the mail to Meoble Estate.

*HMRC Enquiries*

57. A VAT control visit took place in 1994. Some information about the visit is recorded in HMRC's letter dated 21 January 2009 to the Appellant's accountants, Dyke Yaxley. There has never been any suggestion by HMRC until the dispute to which these proceedings relate, that the Appellant was not carrying on business at Meoble Estate.

58. When the Appellant purchased the helicopter, he reclaimed the VAT paid thereon. HMRC allowed the full amount under the *Lennartz charge* on the basis that any non-business or private use would be brought into account as output tax through the Appellant's VAT returns.

59. Following receipt of a repayment return for the VAT period ending 06/07, HMRC made enquiries and ascertained that the claim related to the delivery and installation of a water turbine on the Estate and the supply and installation of a replacement engine for the helicopter. A VAT Audit Report was created by Mr Jones an HMRC official and a visit to the Group's premises took place on 23 August 2007. The Appellant was not present at the meeting. This Report is a document available online to HMRC officials; it can be added to as the investigation proceeds by any HMRC official who has access to it. The format of the Report [B2/5] is difficult to follow. It does not proceed or at least does not always proceed in chronological order.

60. Subsequent correspondence showed that HMRC took the view that there was no business activity on the Estate because the Appellant was under a legal obligation to cull deer on the Estate, and because the stalking was a sporting activity for which the Appellant made no charge. Accordingly, as HMRC saw it, there was no business activity.

61. Mr Jones attended a meeting at Bangor on 30 October 2007. This initial visit was to verify a repayment claim. The Appellant's personal assistant, Sue Williams and Mr Cooper [see paragraph 47] from the Denis Ferranti Group attended the meeting. The Appellant did not attend the meeting. Mr Jones retired shortly after that meeting and Mr Roberts took over.

62. Another meeting took place on 1 April 2008. Mr Yaxley, the Appellant, Mr Cooper, and Mr Roberts were all present. The outcome of that meeting was agreement to attempt to prepare an approved statement of facts which would be sent to HMRC policy unit for consideration. A draft letter was prepared by HMRC and revised on behalf of the Appellant. We heard evidence about the various changes made and proposed. This evidence, led by HMRC was confused and confusing but nothing turns on the terms of the letter and we say no more about it.

63. HMRC Policy unit advised Mr Roberts on or about 25 June 2008 that the activities conducted by the Appellant at Meoble Estate were not conducted by way of business. The precise terms and detail of that advice was not disclosed to the Tribunal.

64. The amended assessment dated 30 July 2008 (in the sum of £11,717) relates to the HMRC apportionment of the input tax claimed on the purchase of the helicopter between business and non-business use. This is assessed as an under-declaration of output tax (a *Lennartz charge*).

65. A local review was carried out by Mrs HJ Thomas, a Higher Officer of the Chester Appeals and Review Team, on or about 29 October 2008. She upheld the assessments. HMRC's view as reflected in their Statement of Cases appears to have been that (a) a *Lennartz charge* was due in respect of the input tax claimed when the helicopter was purchased (b) input tax for all the helicopter running costs has been wrongly claimed; there should be an apportionment; (c) input tax claimed in relation to the running costs of the Estate has been wrongly claimed; that should be recovered; and (d) input tax in respect of the costs of the supply and installation of the water turbine has been wrongly claimed; that should also be recovered. There is no longer any dispute about (d).

66. A further meeting took place at Bangor on 7 May 2009. Among others, Messrs Yaxley and Roberts were in attendance along with the Appellant and Mr Cooper. Mrs Thomas was also present. The purpose of the visit was to find out more about the nature of the activities at Meoble Estate. By letter dated 7 May 2009, David Waterhouse, a review officer with the Local Compliance Appeals and Review Unit, Chester, maintained the stance on behalf of HMRC, that the sale of venison was consequent to other activities, namely the obligation to ensure the Deer Commission's conservation requirements were met; and the opportunity to provide guests to shoot free of charge; these were said to be activities themselves rather than cost components of venison production. The input tax on the turbine installation was not recoverable. ROCs were a standard rated supply and input tax on costs incurred since the Appellant began trading in ROCs was, however, recoverable. The use of the helicopter at Meoble Estate was said to be for a wholly non-business purpose.

67. Further correspondence ensued which it is unnecessary to narrate.

68. Ultimately, Mr Roberts thought that it was a finely balanced question whether business activities were being carried on at Meoble Estate. He stated that the Policy Unit had concluded that business activities were not being carried out.

**Submissions**

69. Both parties produced written Notes of Argument which referred to many of the numerous authorities on whether a supply is in the course or in furtherance of a business or an economic activity.

70. Essentially, Mr Yaxley's argument, which he deployed in great detail in his Skeleton Argument, was that the Appellant was exploiting Meoble Estate. The deer

were wild but that did not matter. There was a transfer of ownership of the carcases for a price. The activities were similar to those of a traditional abattoir. They are not exempt activities. This was an economic activity within Article 9 of the Principal VAT Directive; it had been carried on since the seventies if not before then. Motive and the scale of activity are not relevant.

71. As for the postal service, Mr Yaxley submitted that there was a contract between the Appellant and the Royal Mail. The Appellant was supplying a service for a consideration. Although the supply by the Royal Mail was exempt that exemption did not apply to the Appellant. He referred to *R(Ex p. TNT) v HMRC 2009 STC 1438* and to *Ayuntamiento de Sevilla v Recaudadoras de las Zonas Primera v Segunda 1993 STC 659.*

72. Mr Artis's principal submission was that shooting at the Estate was not for the purpose of a business in terms of s24 VATA. The degree of seriousness and earnestness was insufficient; the activities were not materially different from a sporting shoot undertaken for private leisure. The activity is distinguishable from venison farming; it is not organised on business principles; the other usual factors or questions (which we discuss below) did not favour a conclusion that there was an economic activity. The sale of the dead carcases of venison, whilst a taxable supply in itself, was not the result of a business activity but as the outcome of a requirement to maintain the land on the Estate.

73. He referred to various passages in *Wellcome Trust Ltd v CEC 1996 STC 945 Tolsma v Inspecteur der Omzetbelasting Leewarden 1994 STC 509, European Commission v Finland C-246/08 29/10/09* and *CEC v Lord Fisher 1981 STC 238* and *CEC v Morrison's Boarding Houses Association 1978 STC 1.*

74. In relation to the delivery of mail, Mr Artis accepted that the services covered by the contract between the Appellant and the Royal Mail were covered by the Royal Mail's Universal Obligation and were therefore exempt services (*R ex p TNT v HMRC 2009 STC 1438*). However, he submitted that the arrangements did not have the necessary characteristics of a business. The activity had no substance in spite of its regularity which was in the control of the Appellant. It was essentially a casual arrangement not predominantly concerned with making supplies to consumers. It was not an economic activity, but rather the Appellant turning to account his right to receive a mail delivery at the Estate.

**Decision**

*General*

75. The Appellant is a wealthy and successful businessman. He runs a large commercial enterprise in North Wales. He has expended large sums on Meoble Estate since 1993. He obviously cares passionately about it and its future. It is his aim to run the Estate at a profit. We found the Appellant to be an impressive witness and accept his evidence as reliable and credible. He was careful and precise in his evidence as would be expected of a man of his experience.

76. Mr Roberts, we also found to be reliable and credible. However, he had little to add in his evidence to the correspondence. His evidence largely reflected the opinion of HMRC on the facts as he understood them to be. That was not really the proper subject of evidence. He ultimately expressed the view that whether the sale of venison by the Appellant was an economic activity was finely balanced.

77. Although we heard evidence of what transpired at some of the meetings referred to above, neither Mr Yaxley nor Mr Artis founded on the discussion or advanced arguments on credibility or reliability based on what occurred at the meetings. There does seem to have been some misunderstanding on the part of HMRC as to the true facts. It might have been better if they had spoken to the Appellant instead of his employees. It might have been better if the Appellant had attended the initial meetings.

78. As for the other witness statement and the report by Bidwells, neither party made much reference to these at the Hearing. We do not consider that anything significant turns on that evidence.

79. Finally, we should record that the nature of the evidence was such that it was at times quite difficult to identify to what period the evidence related bearing in mind the periods of the assessments which are in dispute. However, we consider that the thrust of the Appellant's evidence was that much the same arrangements have been in place for many years. Accordingly it is not necessary to try to identify precisely to which period any particular chapter of evidence related.

*Sale of Venison*

80. The parties appeared to accept the accuracy of the treatment of the question whether an activity is a *business* for the purposes of VAT as construed in the light of and having regard to the purposes of the Principal VAT Directive (2006/112/EC) set forth in the current version of De Voil's (looseleaf) *Indirect Tax Service* at sections V2.201 and 202.

81. Although not conclusive, the following questions are frequently considered with a view to determining whether a particular activity is a business for the purposes of VATA. The answer to any one of the questions is not, in itself, conclusive. Each is an indicator, sometimes pointing in the opposite direction of another indicator, to be weighed up and considered in the context of the overall picture presented by the facts.

*Is the activity a serious undertaking earnestly pursued?*

82. Parties were agreed that the activity of shooting and butchering deer and subsequently selling venison at commercial rates was a serious undertaking earnestly pursued by the Appellant. We agree. Given the arduous nature of the operations described in our findings of fact, it would be hard to describe the process of harvesting the deer to the point of sale of the venison to the game dealer as an activity normally pursued for pleasure, social enjoyment or as a pastime. This can be contrasted with the facts in *C&CE v Lord Fisher 1981 STC 238.* The use of the word *butchering* is, in this context, indicative of economic activity.

*Is the activity an occupation or function, which is actively pursued with reasonable or recognisable continuity?*

83. The answer to this question must be *Yes*, as the activity of shooting, butchering deer and subsequently selling venison at commercial rates has been pursued by the Appellant annually (during the open season) since about 1993. This cannot therefore be regarded as sporadic (see *C&CE v Morrison's Academy 1978 STC 1 at 8*). A sufficient measure of continuity is present to indicate that the activity is or at least might be an *economic activity*. The fact that sales to the game dealer take place only two or three times a year is more a consequence of the statutory open and close seasons for shooting dear rather than indication of sporadic or intermittent supply, and is comparable to traditional farming activities where stock and/or crops can only be marketed at certain times during the year. The supply is regular but infrequent and has continued over many years.

*Does the activity have a certain measure of substance in terms of the quarterly or annual value of taxable supplies made?*

84. The annual value is low. The measure of substance is small but it cannot be described as *de minimis.*

*Is the activity conducted in a regular manner and on sound and recognised business principles?*

85. The operation of shooting deer, butchering them and selling the resulting venison is conducted in an organised and efficient manner given the nature of the terrain at and the remote location of Meoble Estate. Deer must be killed by shooting them and by no other method.

86. Helicopters are used for transport purposes on other Estates. The organisation of the whole exercise at Meoble Estate appears to be well thought out and efficient, given the circumstances. The Appellant is very experienced and so arranges matters that the shooting is conducted safely and humanely, and that the carcases are dismembered and stored in accordance with the relevant hygiene regulations, as any other producer or trader would be expected to do. The invoicing and book-keeping arrangements are basic but sufficient. While the activity runs at a loss, the profit motive is largely irrelevant. It is clear that the Appellant is endeavouring to make the Estate operate at a profit. The sale of ROCs, surplus electricity and the letting of grazings may enable him, one day, to operate the various activities on the Estate at an overall profit.

87. While the answer to this question must be *Yes*, it seems to us that this is not a particularly valuable indicator, as a hobby or pastime may be conducted in an efficient and business-like manner while a trader or professional man may conduct his commercial activities in a most inefficient and un-business-like manner, yet he is still carrying on a trade or profession in the course or furtherance of a business.

*Is the activity predominantly concerned with the making of taxable supplies for a consideration?*

88. We accept and have found that the object and real nature of the exercise was the sale of venison. The Appellant clearly intended to make taxable supplies, has done so in much the same manner since 1993 and continues to do so. It is not to provide entertainment for friends or family or to provide a free shoot. Shooting is the necessary means to achieving the sale and delivery of venison to the game dealer. The answer to this question must be *Yes.*

*Are the taxable supplies that are being made of a kind which, subject to differences of detail, are commonly made by those who seek to profit from them?*

89. The sale of venison is commonplace. The sale of wild venison is perhaps less common but by no means unique. Those who sell venison usually seek to make a profit from the sale. The sale price achieved by the Appellant is dictated by the supply of and demand for wild venison in the market. Accordingly, the answer to this question must be *Yes.*

90. It is plain that the various activities carried on at Loch Morar take place in a remote location. Each activity is time consuming and expensive to pursue. Making a profit is obviously difficult. The turnover from shooting deer is relatively modest. Perhaps only a few people would attempt to carry on a business activity in such circumstances and under such conditions as we have described them in our findings of fact.

91. The authorities show that motive and profit are largely irrelevant in determining whether the supply of goods for a price is an economic activity for the purposes of Article 9 and therefore being carried on in the course of or in furtherance of a business for the purposes of s24 VATA. Many hill farmers would be carrying on business at a loss but for the provision of agricultural subsidies such as Single Farm Payments.

92. At the point of sale of the deer carcases by the Appellant to the game dealer, the Appellant is carrying out the same transaction which occurs between an abattoir owner and game dealer or a butcher. Goods are supplied for a consideration. These sales transactions have taken place regularly during each shooting season for many years. The game dealer no doubt has other customers from whom he buys other produce on a regular basis. We can see no reason why the Appellant should be treated any differently from those other customers for the purposes of VAT. The sale of venison to the game dealer is not a by-product of the management of the estate but an activity in its own right as there is no obligation on the Appellant to cull wild deer on his land as HMRC seemed to think at one stage. Essentially, the Appellant is carrying on something akin to a small organic farming enterprise; the deer live in a natural environment where they eat what nature intended, supplemented only by the occasional saltlick.

*Further considerations*

93. The facts in *Tolsma* were remote from the circumstances of this appeal. There, a musician played the barrel organ on the public highway in the Netherlands. He received donations from passers-by. He was assessed to VAT on his receipts. The

European Court of Justice held that those receipts could not be regarded as the consideration for a service supplied to them. There had to be a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance (paragraphs 14 and 16). There is plainly a legal relationship between the Appellant and the game dealer to whom he sells his venison.

94. The facts in *Wellcome Trust Ltd* were also remote from the circumstances of this appeal. The questions for the European Court of Justice were whether the term *economic activities* in Article 4(2) of EC Council Directive 77/388 (the Sixth Directive) was capable of covering sales of shares and securities by a person who was not a dealer in shares and securities, and whether a multiplicity of shale sales by a person who was not a dealer in shares to a large number of purchasers on the same day involving sophisticated preparation over a considerable period of time of itself constituted *economic activities.* The Court essentially answered these questions in the negative having regard to the facts. The Court, at paragraph 31, emphasised the breadth of article 4 [quoted at paragraph 29 and 30 of the Judgment]. However, the mere exercise of rights of ownership could not, in itself, be regarded as an economic activity (paragraph 32). However, this statement has no application to the facts in the present appeal as we have found them to be. In *Wellcome Trust Ltd* the facts and circumstances could not be distinguished from the activities of a private investor which fell outwith the scope of the Sixth Directive (paragraph 37).

95. *Finland* concerned the question whether VAT should be charged on legal advice services provided by public legal aid advisers, where the recipient of the advice makes a part contribution for the advice. The Court again confirmed that the scope of the term *economic activities* was very wide (paragraph 37). Generally the activity will be characterised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out that activity; although receipt of a payment does not per se mean that an activity is economic in nature; the term is objective in character (paragraphs 38 and 40). The real issue was whether the services could be regarded as provided by the public offices in return for remuneration (paragraph 42). The Court relied on the principle that there had to be a direct link between the service provided and the consideration received (paragraph 45). The amount of the part contribution depended only in part on the value of the services provided and was not sufficiently direct for the payment to be regarded as consideration for the services. It was more of a fee than consideration. Accordingly the services provided by the public offices were not economic activities (paragraphs 50 and 51).

96. In the present appeal, the link between the venison supplied to the game dealer and the consideration or price received therefor is clear and direct.

97. The only legitimate means open to the Appellant of selling venison is by shooting wild deer on his land (Deer (Scotland) Act 1996 s17(3)). The actual shooting is a small part of the whole exercise. The Appellant does not offer shooting parties as such. His land does not provide a sporting shoot. The activity of shooting, butchering and sale is considerably more than *an activity for pleasure and social enjoyment* (*Lord Fisher at page 247*).

98. Overall, on the facts as we have found them to be, we conclude that the Appellant is exploiting tangible property, namely the wild deer on Meoble Estate, for the purpose of obtaining income therefrom on a continuing basis. He is engaging in the activity of producer and trader. The facts therefore fall foursquare within the meaning of economic activity in Article 4(2) of the Principal Directive and therefore constitute a business within the meaning of s94(1)VATA construed in the light of and having regard to the purposes of the underlying Principal Directive.

99. In these circumstances, the first issue of principle which we are asked to determine must be answered as follows:-

> **The sale of venison by the Appellant to a local game dealer in the factual circumstances described above is an economic activity and constitutes the supply of goods for a consideration in the course or furtherance of a business carried on by the Appellant at Meoble Estate. The supply is a "VATable" supply for the purposes of s4 VATA.**

*Postal Service*

100. In the written material submitted, we were referred to *inter alia R (TNT Post UK Ltd) v HMRC & Royal Mail Group C-357/07,* and *Ayuntamiento de Sevilla v Recaudadores de las Zonas Primera y Segunda (Case C-202/90).*

101. *In TNT* the Court of Justice noted that the Royal Mail, as universal service provider, supplied postal services under a legal regime which was substantially different to that under which an operator such as TNT provided such services (paragraph 39). Services supplied by the public postal services for which the terms have been individually negotiated could not be regarded as exempted under Article 13A(1)(a) of the Sixth Directive (which is in identical terms to Article 132(1)(a) of the Principal VAT Directive). These were services dissociable from the service of public interest; those services met the special needs of the users concerned (paragraphs 46-48).

102. *Ayuntamiento* concerned Spanish tax collectors. They are appointed by the local authorities, but do not receive a salary; nor are they bound by a contract of employment. They received a collection premium, which was portion of the tax recovered. They added VAT to the premium. The European Court of Justice held that the tax collectors were carrying out their activities independently (paragraph 16) and that even although, as private individuals, their activities constituted the performance of acts falling within the prerogative of the public authority that did not mean that the activity was excluded from the scope of VAT (paragraphs 19 and 20).

103. In March 2001, HMRC published a Technical Note which provides *inter alia* as follows:-

> Following a legal challenge, the European Court of Justice (ECJ) confirmed that Royal Mail, as operator providing the public postal service, is the only body in the UK eligible to exempt postal

> services from VAT. However, the Court further ruled that the exemption applies only to the public postal service acting as such and does not apply to services which are provided on individually negotiated terms. The Court's ruling means that the UK has applied the exemption for postal services more widely than is permitted by EU law…….

104.We agree with this summary. The exemption arises by reason of Article 132(1)(a) of the Principal VAT Directive (2006/112). The Technical Note also states (at paragraph 2.7) that *If a service is individually negotiated, then regardless of its regulatory status, the service will become liable to VAT at the standard rate.*

105.As we have found that the service provided by the Appellant has been individually negotiated between the Appellant and the Royal Mail, this issue falls to be determined in favour of the Appellant. He was and is entitled to charge VAT on the service provided. It is a long standing, continuous, commercial arrangement. The activity of the public postal services is not engaged directly but is entrusted to an independent third party (*Ayuntamiento paragraph 20*).

106.We should say that we do not accept Mr Artis's analysis set out above. The contract requires the appellant to provide the service twice a week weather permitting. He has agreed to deliver the mail addressed to the Estate. It is not a casual arrangement. It is not simply his rights which are being met but the Frasers' rights as well. They are consumers to whom he is providing a service, paid for by the Royal Mail. The fact that one of those consumers performs the service on behalf of the Appellant is neither here nor there. The contractual arrangements are serious arm's length commercial transactions carried out on a defined, regular and continuous basis in a business-like manner. If any other enterprise such as TNT performed the service, they would undoubtedly charge VAT. The amounts paid for the service, though small cannot be regarded as *de minimis.* Nor can they be regarded as compensation for the Royal Mail's unwillingness or inability to deliver the mail. Construing broadly the notion of *economic activity* in accordance with the jurisprudence of the European Union, we are driven to the conclusion that the service provided by the Appellant is an economic activity.

107.In these circumstances, the second issue of principle, which we are asked to determine, must be answered as follows:-

> **The contractual arrangements between the Appellant and the Royal Mail to deliver mail in the factual circumstances described above were individually negotiated between these parties. The delivery of mail by or on behalf of the Appellant in accordance with those arrangements constitutes a supply of services for a consideration in the course or furtherance of a business carried on by the Appellant. The supply is a "VATable" supply for the purposes of s4 VATA.**

**Disposal**

108.The Appellant has been successful on the foregoing issues of principle. We invite parties to submit proposals in writing for any further procedure necessary in this appeal within 28 days of the release of our Decision.

109. 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., F.C.I.Arb.,**
**TRIBUNAL JUDGE**

**RELEASE DATE: 30 JUNE 2011**