[2012] UKFTT 80 (TC)

TC01776

Appeal number: TC/11/01142

SUPPLY: Whether payment was a consideration for a supply of services or donation; amount of consideration; link between payer and payee; appeal against decision that services were supplied; Appeal refused.

FIRST-TIER TRIBUNAL

TAX

ABERDEEN SPORTS VILLAGE LTD **Appellant**

- and -

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

TRIBUNAL JUDGE: Mrs G Pritchard, BL., MBA., WS
Member(s):Dr Heidi Poon, CA., CTA,
Scott A Rae, LLB., WS,

Sitting in public at George House, 126 George Street, Edinburgh on Monday 21 – Wednesday 23 November 2011

Mr Charles Rumbles for the Appellant

Mr Ian Artis, Advocate for the Respondents

DECISION

Background

1. Aberdeen Sports Village Ltd (ASV) was incorporated in 2007 with the purpose of providing and operating a regional facility envisaged by the Government as part of a national regional strand of sports facilities to encourage young people to participate in sport. The Government offered financial incentives for building new facilities. Funding is awarded by Sportscotland which makes awards from the National Lottery. Sportscotland encouraged local authorities to enter partnerships with other bodies to carry out the development of these proposed new regional sports facilities. Aberdeen City Council (ACC) entered into a Joint Venture with Aberdeen University (AU) to carry out a new development in Aberdeen now known as Aberdeen Sports Village Ltd. It took several years for all the necessary arrangements and buildings to be completed. In particular it took time to formulate a method for ensuring that the funding of the running costs of the development were met on an ongoing annual basis. What was arranged was that both ACC and AU agreed to a particular commitment to what was referred to as "Annual Grant Funding" to ASV.

2. An assessment to Value Added Tax (VAT) dated 22/03/11 was made by HMRC in the sum of £352,472 for the quarters 08/09, 11/09, 01/10, 04/10, 07/10, 10/10 and 01/11 in respect of the funding arrangements. The assessment followed a long period of correspondence between HMRC and ASV culminating in a decision by HMRC on 14/10/2010. That decision is the subject of this appeal. The assessment was not in dispute. No evidence was led on best judgment or on the amount of the assessment.

3. Although sports bodies may be eligible bodies for exemption from VAT this was confirmed as not an issue for this Tribunal.

4. The issue for this Tribunal was whether the Annual Grant Funding each year is consideration for supplies by ASV to ACC and AU.

5. As will be seen from the Findings-in-Fact and the reasons given for the decision the Tribunal is of the opinion that ASV ought to have accounted for VAT in respect of the Annual Grant Funding which the Tribunal finds is payment for services provided by ASV to ACC and AU.

The Hearing

6. Mr David Beattie a member of the Chartered Institute of Public Finance and Accountancy, the Chief Executive Officer of ASV gave evidence. ASV was represented by Mr Charles Rumbles, VAT Consultant. HMRC had no witnesses giving oral evidence. They were represented by Mr Ian Artis, Advocate. The written material was contained in two joint bundles, one of evidence consisting of correspondence and documentation in tabbed sections, and the other being the authorities. For reference purposes the tab relating to each section of the joint bundle of written evidence will be quoted along with the section page number. The full bundles are not paginated. Where the authorities are referred to the case title will be used with the tab reference given. Where any section or page is referred to it will be

treated as repeated here. Also included separately in the written evidence was the early brochure produced by the architects of the project Reiach and Hall. It contains a full description of the premises to be developed by ASV. The premises so far completed are phases one and two. The premises are referred to throughout this decision as "the Village". The brochure does appear as at Tab 49 of the bundle of evidence but was poorly photocopied.

Procedural Matters

(1) At the outset of the Hearing the Tribunal indicated that from the written evidence they had perused prior to the hearing the structure of ASV with regard to its tax status was not clear. The Tribunal was advised by Mr Rumbles that that would become clear during evidence. The Tribunal was concerned that this was not an adequate response and adjourned to consider the matter further. On returning and before recommencing the hearing the Tribunal was advised by Mr Artis that HMRC were reserving their position on ASV's tax status. The Tribunal decided in open forum to proceed.

(2) In that regard, in the course of the Tribunal it became clear that ASV from Mr Beattie's evidence considered itself "exempt". However although ASV have charitable status from the Office of the Scottish Charities Regulator HMRC had advised ASV that no application for exemption under the Income and Corporation Taxes Act 1988 Section 505 has been applied for, nor any ruling under the Value Added Tax Act 1994 (VATA 1994) Schedule 9 Group 10.

(3) Mr Rumbles objected to two questions put by Mr Artis in cross-examination with regard to the use of the Village by AU. Both objections were upheld.

Law relating to this Decision

Community Law contained within Council Directive 2006/112/EC

Article 2

1. The following transactions shall be subject to VAT:

……

(c) the supply of services for consideration within the territory of a member state by a taxable person acting as such.

Article 24

1. 'Supply of Services' shall mean any transaction which does not constitute a supply of goods.

Article 73

In respect of the supply of goods or services …. the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in

return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.

United Kingdom Law

Value Added Tax Act 1994

Section 4 – Scope of VAT on taxable supplies

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is 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.

Section 5 – Meaning of supply: alteration by Treasury order

(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below-

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services…….

Section 19 – Value of supply of goods or services

(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.

(2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration.

Advisory Documentation issued by HMRC

This was documentation which contained matters agreed with the Chartered Institute of Public Finance and Accountancy.

(1) Revenue and Customs Brief. Issue 28, 22 March 2007 RCB/28/07 (Tab 47) "VAT treatment of Contracted out Local Authority Leisure Services", which is referred to for its terms but includes in its descriptions of various bodies to whom services may be contracted out as being:-

"- through a Non-Profit Distributing Organisation (NPDO), eg charitable trust, or industrial and provident society, in which the authority may have a degree of representation".

It further states:-

> "To decide whether funding is a grant or consideration for a supply the following questions must be asked:
>
> - Does the donor receive anything in return for the funding?
>
> - If the donor does not benefit, does a third party benefit instead? And if so, is there a direct link between the money paid by the funder and the supply received by the third party?
>
> - Are there any conditions attached to the funding, which go beyond setting out the terms under which the funds are allocated and the requirement to account for how the funds are used (commonly referred to as "good housekeeping")?
>
> In the case of leisure centres, it is important to consider issues such as the historical provision of the facilities and the relationship between the parties. The answer to these questions will often indicate the nature of the payment".

It also states at 4.2:

> "Distinguishing between grants and payments can be difficult, especially when interchangeable terms are used, such as "deficit funding". Where funding is freely given, with nothing supplied in return, then the payment is not consideration for any supply. This is normally the case with grants paid by public bodies. Conversely, where funding is given in return for specific goods or services, then that payment is consideration for a supply".

There was also reference to Revenue & Customs Business Brief 80/09:

> "VAT Treatment of Local Authority Leisure Services" a revised version of (1) above but which does not affect the outcome. It is referred to for its terms.

Case Law –

Cases referred to in this Decision:

NOTE: (1) The Tribunal was referred to a number of authorities of which those discussed below were considered the most relevant. (2) ASV is a novel arrangement and therefore there is no directly comparable case. However the issue here has been determined in a number of different cases with authority on the subject of a supply of services, the consideration for that supply and the requirements for a direct link between the consideration and the services. (3) Most of the case law relates to bodies wishing to reclaim input tax but the issue of supply and consideration/link are the same.

(1) Supply of Services:-

British Railways Board (BRB) v C & E Commissioners 1977 STC 221 (Tab 14). Lord Denning in his judgment requires the Tribunal not to look at the state of mind of

a party to the transaction but to apply the law, to the transaction. In *British Railways Board* there was a dispute on the facts as *BRB* held they were supplying train services through a student discount card whereas the Commissioners suggested they were supplying a right to buy a discounted rail ticket.

In *BRB* Lord Browne referred to *British Airports Authority v C & E Commissioners 1977 1WLR 302* and opined that the Court of Appeal had decided in that case that the question was one of law and of contract between the Authority and the person to whom the supply was made. He also quoted *C & E Commissioners v The Automobile Association (AA) 1974 STC 192* on which he had participated in judging and provided that the substance and reality of the arrangements should be considered. However he requested some caution if that meant one looked behind the contract. Sir John Pennycuick in the (*BRB*) decision reflects that the Tribunal Judge in the earlier decision relied on the *AA* case but had not accurately stated the principle set down. He also reflected that the Commissioners' view in *BRB* commended itself. However he opined that it was not "legitimate so as to treat the issue of the card and the sale of the ticket as two distinct and isolated transactions". He went on to say " I agree, indeed it is obvious, that the question must be determined upon the facts of the transaction and that nothing turns on the motives…"

The Tribunal in this case is therefore not to take account of opinion or motive but to look at the transaction itself.

(2) Consideration/Donation/Link between the parties

BRB above also provides some guidance on the requirement to establish what is the supply for the consideration, given that one must look at the facts of the transaction.

Tolsma v Inspecteur der Omzetbelasting Leewarden (Case C – 16/93) 1994 STC (Tab 12). Mr Tolsma's playing his barrel organ and making solicitations of donations from passers-by, householders and shopkeepers when playing was not "providing a service for a consideration" since there was no agreement between the parties ….."

The Arts Council of Great Britain v C & E Commissioners 1994 VATTR 313 (Tab 29). The Tribunal there reflected *Tolsma* and *BRB* in its first decision which stated at p52 *inter alia* "However, even the receipt of a payment does not give rise to a tax consequence if it is unrelated to any supply made by the supplier to the recipient. There are a number of authorities which have decided that money receipts do not give rise to tax consequences where there has been no supply by the supplier to the recipient. In order to determine if any supply has been made it is necessary to see what, if anything, was agreed between the parties. This is done by looking at the matter objectively, rather than by having regard to the expectations of the parties".

CEC v Redrow Group plc (Redrow) 1999 STC 161 (Tab 18) where it was "**Held** – Where all the supplies which the taxable person made in the course or furtherance of its business were taxable supplies, it was not necessary to examine each of the transactions on which a taxable person claimed to be entitled to deduct input tax, in order to determine whether there was a direct and immediate link with a supply which

was taxable. The only question which had to be addressed was whether the supplies on which the taxable person sought to deduct input tax had been used or were to be used for the purposes of the business. The relevant test was whether the supply was received in connection with the business activities of the taxable person for the purpose of being incorporated within its economic activities. The fact that someone else had also received a service as part of the same transaction, did not deprive the taxable person who had instructed the service and who had had to pay for it, of the benefit of the deduction. In the instant case the estate agents were clearly supplying services to the prospective purchasers, as they were engaged in the marketing and sale of the existing homes which belonged to the prospective purchasers and not to R. However, the transactions between R and the estate agents could only be described as the supply of services for a consideration to R. The agents were doing what R had instructed them to do, for which they charged a fee which was paid by R. R was therefore entitled to deduct input tax in respect of estate agents' fees paid by R on behalf of prospective purchasers of R's houses. *BLP Group plc v Customs and Excise Commissioners* (Case C- 4/94) [1995] STC 424 distinguished. *Belgium v Ghent Coal Terminal NV* (Case C-37/95) [1998] STC 260 applied".

In that decision Redrow were successful in being allowed to deduct input tax on a tax invoice from an estate agent they employed to sell a prospective purchasers' house. Lord Hope at p4 when discussing the Court of Appeal's previous decision to disallow it commented, "the Court of Appeal were persuaded by that judgment, against their initial impression on reading the facts in this case, that the services which the estate agents were supplying were the services which an estate agent ordinarily supplies when a house is to be sold and that they were being supplied to the prospective purchasers and not to Redrow. As Peter Gibson LJ ([1997] STC 1053 at 1060) put it, objectively these services could be seen to be directly attributable to the sale by the prospective purchaser of his own house and not the sale of a new house by Redrow, even though the estate agent's supply benefitted Redrow by facilitating Redrow's sale". He also quoted at p5 the original Tribunal decision which had recorded "Clearly the estate agents were supplying services to the prospective purchasers, as they were engaged in the marketing and sale of the existing homes which belonged to the prospective purchasers and not to Redrow. But Redrow was prepared to undertake to pay for these services in order to facilitate the sale of its homes to the prospective purchasers. The estate agents received their instructions from Redrow and, so long as the prospective purchasers completed with Redrow, it was Redrow who paid for the services which were supplied. I do not see how the transactions between Redrow and the estate agents can be described other than as the supply of services for a consideration to Redrow. The agents were doing what Redrow instructed them to do, for which they charged a fee which was paid by Redrow". He also opined, at p5 in relation to consideration as follows "The word 'services' is given such a wide meaning for the purposes of VAT that it is capable of embracing everything which a taxable person does in the course or furtherance of a business carried on by him which is done for a consideration. The name or description which one might apply to the service is immaterial, because the concept does not call for that kind of analysis. The service is that which is done in return for the consideration. As one moves down the chain of supply, each taxable person receives a service when another taxable person does something for him in the course or furtherance of a

business carried on by that other person for which he takes a consideration in return. Questions such as who benefits from the service or who is the consumer of it are not helpful. The answers are likely to differ according to the interest which various people may have in the transaction. The matter has to be looked at from the standpoint of the person who is claiming the deduction by way of input tax. Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which has attracted VAT? The fact that someone else, in this case, the prospective purchaser, also received a service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction".

Apple & Pear Development Council v C & E Commissioners (Case C-102/86) (Tab 11). This was a case where a trade body was created by the Government under the *Apple & Pear Development Council* orders 1966 and 1980. Particular growers of apples and pears were obliged to register with the Council and pay a levy used to promote the production and marketing of apples and pears, and research into the growing and marketing of apples and pears. The issue was whether the mandatory charges of the kind imposed on the growers constituted a consideration for a supply. It was held that it did not because there was no direct link from the Council to any individual grower.

Edinburgh Leisure & Others v C & E Commissioners VTD 18784 2004 (Tab 21). The circumstances were those more resembling but not on all fours with this case. It involved 3 separate cases all brought by companies namely Edinburgh Leisure Ltd (ELL), South Lanarkshire Leisure Ltd (SLL) and Renfrewshire Leisure Ltd (RLL) formed to fulfil the statutory obligations on the Local Authorities to provide sport and recreational facilities under the Local Government and Planning Scotland Act 1982. The 3 companies were all Not For Profit Leisure Trusts. The common features are set out by the Tribunal Chairman as follows:- "Each Appellant is a Leisure Trust and a registered charity. In each case various sport centres owned by the respective Local Authorities which were operated by them are now leased to the Appellants for a nominal rent. The former employees of the Authorities who work at the leased sports facilities were also transferred to the Leisure Trust. Each Appellant receives negotiated payments in advance in recognition that the Appellants cannot meet their service agreement with the Local Authorities out of income they can generate themselves from participants. Some of the activities carried out by the Appellants are profitable in that they produce a surplus, others are not. Accordingly in the course of the business of each Appellant payment would have to be made in order to maintain the operation. Each LA has directors on the management board of the respective trusts, but no control over the board. By setting up Not For Profit Leisure Trusts the LA was able to benefit by a saving which can arise in relation to non-domestic rates. The sums were substantial and in themselves would have justified setting up the arrangement irrespective of VAT considerations. Nonetheless the Appellants and Local Authorities seek, if they can, to achieve VAT savings".

The Tribunal Chairman went on to outline the Memorandum and Articles of Association of ELL a company limited by guarantee whose purpose was to provide or assist in the provision of facilities for recreation in particular in the local authority

area with the object of improving the condition of life for the community and to provide special facilities for persons who by various disadvantages may need special facilities and to promote good health. He outlined at p6 the other two Appellants' structures, one a Company limited by guarantee and the other an Industrial & Provident Society. The issue was whether payments made by the Local Authorities to these bodies were considerations for a supply of services. The Appellants were arguing that these payments were considered as a supply in order to be able to reclaim input tax. By contrast the Commissioners had determined input tax recovery was not to be allowed.

It was held, after consideration of the facts, the case law and the legislation that the benefits clearly accrued to the local authorities through the Leisure Trust arrangements. The Tribunal considered it "obvious that such benefits for the Councils if secured from an independent legal entity require to be paid for and it is inescapable that the reality of the situation with each Appellant is that they are providing services to the Council for a consideration. That consideration is calculated on the basis that the companies shall not suffer loss. It is calculated in advance. It is unrelated to any specific calculation of shortfall or subsidy and it is not to be amended in the event that the payment proves inadequate. The companies have made a conspicuous success of their operations and have achieved surpluses. If there is consideration the method of calculating the amount of consideration does not have any significance.

Whether in the course of the voluminous documentation provided to the Tribunal the payments which the Councils made were described as grants or subsidies is in the view of the Tribunal irrelevant. They are in fact payments and they are payments in consideration for which the local authority receive a supply of services".

The Tribunal Chairman also dealt with HMRC's contentions in that case which dealt with input tax recovery as follows:- "The Commissioners argument that the supply is to the athletic participant and that the companies are operating their own facilities which they lease or own for their own purposes while superficially legalistically maintainable takes no account of the reality which is that but for the Councils payment the facilities could not be operated in the way the Council desire. However the objects of the Leisure Trusts were described, economic fact means that what would be provided without the Councils payment would be totally inadequate to fulfil the Councils statutory duty. They are making a payment to the companies so that they may operate in accordance with the wishes of the Councils properly to fulfil their statutory duty. In that context the Council is the customer".

He concluded: "On the whole matter the Tribunal have no hesitation in unanimously concluding that the companies provide services to the Councils for a consideration and they accordingly find and determine that the rulings made by the Respondent in connection with the 3 Appellants are erroneous. They allow the appeals".

Findings-in-Fact from the evidence

The Tribunal finds as follows:-

1. ASV was created as a private limited company with ACC and AU as its shareholders. It was originally named Aberdeen RSF Limited (ARSF). Its Memorandum and Articles of Association are dated 16/07/2007. The Memorandum and Articles are at Tab 33 and are referred to for their terms. It was registered for VAT with effect from 17/07/2007.

2. ASV was created in pursuance of an award of funding from Sportscotland, which was making funding available for regional sports facilities. An award would reduce the capital cost of some new sporting facilities. To make arrangements for the capital protection of the ACC and AU investment also required for the new sporting facilities (the Village) it was necessary to create a new Special Purpose Vehicle (SPV). It was provided by incorporating ASV. The board comprises 4 nominees each from ACC and AU. There is one paid director who is chosen for his business experience and who it is intended will always contribute his business experience to ASV.

3. Mr David Beattie prior to all of this was AU's Head of Financial Planning and Budgeting. He became aware of the availability of the funding from Sportscotland. Many of AU's premises for sport were becoming outdated. AU used sports facilities, training and prowess to attract students as shown in their website (Tab 59) and reported in their Annual Accounts (Tab 62). However Sportscotland funding was only available to applicants who were local authorities, though these authorities were encouraged to find other funders as well. An application was submitted by ACC with AU identified as a joint participant at the development stage, and funding was granted. AU, ACC and ASV entered into a joint venture to move matters forward.

4. It was clear from his evidence and the Tribunal finds Mr Beattie had very definite ideas about making a commercial success of ASV as well as achieving sporting use and excellence. He convinced those involved in the project at AU and also at ACC that it was essential to take a commercial approach and to that end persuaded them not to have 'representative' directors of ASU but nominees with experience and in particular a businessman for the paid director. He was not concerned about VAT consequences following from registration as he was satisfied that maximisation of benefits for ASV would be produced if ASV was to become registered for VAT so as to reclaim input tax on building costs for the development.

5. The new arrangement to drive forward the project was governed by the Joint Venture Agreement (JVA) (Tab 34) which was executed on 5 October 2007. In addition ground was leased by ACC to ASV as shown in the plan TAB 34 Part 4. The rent is charges at £1,000 p.a. The lease is for 50 years.

6. Mr David Beattie was seconded by AU to ASV, a status which has remained his position even now, firstly as Project Director for the construction phase, and later when it first became operational on 24 August 2009 as General Manager of the Village. This was at that stage Phase 1. Phase 2 has since been completed. Phase 3 has now been awarded funding by Sportscotland. The whole project is fully described

in the brochure, which is referred to for its terms but for information here includes indoor and outdoor pitches for football and hockey, various courts for squash, netball etc, suites for fitness, judo and martial arts and so forth. Phase 3 will be the swimming complex. Mr Beattie is now called the Chief Executive Officer.

7. The funding for the first phase of the construction was provided by ACC eventually to the extent of £10.367m along with £10.367m from AU and £7m from Sportscotland. ASV's Memorandum and Articles of Association dated 16/07/2007 (Tab 33) shows at VII capital of £20m. £10m shares were subscribed for by ACC and £10m were subscribed for by AU. Those sums were used for the construction of the premises.

8. The objects for which ASV is established are:-

(1) The provision of sports and recreational facilities including elite sports facilities, and the organisation of sports and recreational activities, with the object of improving the conditions of life for the students and staff of the AU and the local community and which sports and recreational facilities or activities will be available to members of the public at large, and

(2) The advancement of public participation in sport.

with all necessary powers granted to implement those objects. At the end of the objects clause there is a declaration in the following terms:-

(i) in this clause, "property" means any property, heritable or moveable, wherever situated; and

(ii) in this clause, and throughout this memorandum of association, the word "charitable" shall have the meaning ascribed to it for the purposes of section 505 of the Income and Corporation Taxes Act 1988 and section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005, including any statutory amendment or re-enactment for the time being in force.

9. Given these findings, the Tribunal when looking at the audited annual accounts of ASV for the year ended 31/07/09 (Tab 53) and for year ending 31/07/10 (Tab 54), noted and find that these have been prepared on the assumption that ASV has tax status as a charity. This assumption is also contained in terms of notes to these accounts for 2009 at Tab 53 page 14 and for 2010 at Tab 53 page 15. The terms of the notes to the accounts for ASV for the year ending 31/07/09 state at Tab 53 p14:-

"Taxation and VAT

ASV has been granted charitable status by the Office of the Scottish Charity Regulator and as a consequence is, under Income and Corporation Tax legislation, exempt from tax on income and gains so long as they are applied to charitable purposes.

ASV is VAT registered and it has been ASV's established strategy to supply wholly taxable sports services and thus this allowed ASV to recover the VAT on the capital construction costs of the village. It has recently come to light that a minor element of ASV's activities may not be taxable and thus under the capital

goods scheme, this would necessitate a small VAT repayment. As trading has just commenced this amount cannot be accurately ascertained, but it is considered that the impact of this will have a minimal impact upon ASV's trading position".

For the year ending 31/07/10 the notes state at Tab 54 p15:-

"Taxation and VAT

ASV has been granted charitable status by the Office of the Scottish Charity Regulator and as a consequence is, under Income and Corporation Tax legislation, exempt from tax on income and gains so long as they are applied to charitable purposes.

ASV is VAT registered and it has been ASV's established strategy to supply wholly taxable sports services and thus this allowed ASV to recover the VAT on the capital construction costs of the village".

10. The operation of the Village by ASV is governed by the JVA (Tab 34). This is the contract between ASV (then Aberdeen RSF Limited) and AU and ACC. Its terms provide the main bulk of the provisions governing the relationships but since then Mr Beattie has gained personal autonomy over his capacity to manage the Village, to allocate time for the bookable areas (subject to the terms of the JVA) and to control the offer of memberships of the Village and in particular some discounted membership agreements.

11. Mr Beattie in explaining how the objectives of ASV were to be met advised and the Tribunal finds that where recreational facilities and associated services are provided otherwise than on a fully "private members" basis the charges are directed not to profit but to affordability so as to encourage participation. As a result funding is required through support from public bodies mainly local authorities and as in ASV through additional funding from AU through the JVA.

12. The JVA therefore has provisions which are intended to ensure the objectives of ASV can be met. It supplemented the terms of the Memorandum & Articles of Association with detailed provisions on the rights and obligations of all parties.

13. Paragraph 7 of the JVA is as yet unimplemented. It provided that an Operating Agreement would be entered into between the parties, though at the date of the hearing only a draft has been prepared. The terms of the document were not before this Tribunal. However it was to be designed to meet the "access protocol" based on principles set out in Part 3 of the Schedule to the JVA (Part 3). This governed access principles when the management team were requested for bookings or use of the Village. There was a fail-safe paragraph 15 of the JVA which provided that, failing agreement ASV would fulfil the obligations set out in Part 3.

14. Paragraph 11.2 of the JVA provides for the Annual Grant Funding to be 50% of the net operating cost each for ACC and AU. It is to be calculated according to the Business Plan at the start of the year, payable quarterly in advance, commencing two weeks before the Village became operational, with a cap of £748,000 each.

15. Paragraph 11.3.1 of the JVA states "If the payment by a Shareholder of Project Funding to the Company results in VAT being payable on that Project Funding by that Shareholder (the "Taxed Shareholder"), the other Shareholder shall, to the extent permitted by law, pay to the Taxed Shareholder an amount equal to one half of the VAT payable by the Taxed Shareholder in respect of the Project Funding, to the extent that such VAT is not recoverable as input tax by the Taxed Shareholder from HM Revenue and Customs".

16. Paragraph 17 of the JVA reserved matters in Part 2 of the Schedule to the JVA (Part 2) to ACC and AU.

17. With regard to Part 2 the Tribunal finds this contains 37 restrictions on ASV's activities as matters reserved in terms of Para 17 of the JVA, all relating to shareholder activities, such as decisions with regard to Variation of the Memorandum and Articles of Association all of which curtail the autonomy of ASV's Board.

18. Paragraph 18 of the JVA makes provision for ASV to prepare and submit monthly management accounts to ACC and AU. ASV is also required to submit annual audited accounts to ACC and AU.

Paragraph 18.4 of the JVA in particular provides for the structure of the Business Plan in a particular form which is at Part 9 of the Schedule to the JVA (Part 9).

18.5.1 provides as follows:

> "The Business Plan shall be updated prior to 16 November 2007 to reflect the agreement of the Shareholders that the cost of the following concessions is to be met by the Shareholders through the Annual Grant Funding (regardless of the total number of users or the number of users in any class or the tariffs charged):
>
> (a) Students: 50% discount on the normal adult rate;
>
> (b) Children: 50% discount on the normal adult rate;
>
> (c) University and Council staff: 25% discount on the normal adult rate;
>
> (d) The Council's "access to leisure" users: the generally prevailing discount rate from time to time; and
>
> (e) Any other classes of person (including corporate or alumni): discounts as agreed by the Company".

18.08 provides that in the final year of the existence of the JVA (25 years from the date of commencement) the Business Plan "shall seek to reduce any credits to any general reserve, lifecycle and other account of the Company to zero".

18.10 provides ACC and AU shall be given access to all information they may reasonably require.

18.11 provides for ASV to advise ACC and AU immediately of any material adverse matters affecting it.

19. Part 3 of the Schedule to the JVA sets out ASV's obligations which it states "comprise the operation of the Facility on the basis of minimising the Annual Grant Funding required, and if applicable maximising any surplus subject to (1) the operational objectives, (2) the lifecycle requirements and (3) the access principles".

The operational objectives are stated as:

> (a) provide recreational sporting facilities for the people of Aberdeen, including students and staff of the University;
>
> (b) promote an increase in physical activity by the people of Aberdeen, including the staff, students and clubs of the University (the "University Community"), "hard to reach" user groups and the local community in general; and
>
> (c) promote sports development and sporting excellence.

20. The Tribunal finds the Aberdeen Community and AU are prioritised in this objective. Although there is reference to "the local community" there is no reference to the 'general public' as a category or people in a wider remit in the region. The life cycle requirements oblige ASV to operate and maintain the Village in accordance with Good Industry Practice. The access principles provided are that in scheduling bookable areas within the Village for the indoor football pitch, outdoor football pitch, indoor athletics, outdoor athletics, squash courts, outdoor hockey pitch, sports hall and studios, ASV would ensure in Part 3, 3.1.1 that equal opportunity for access would be given where demand exceeded supply to:-

> "(a) elite sports organisations and user groups for 10% of available time in that week; as required by the Sportscotland conditions; including previous elite users of the Chris Anderson Stadium ("CAS") at the Site (referred to as "Elite Time");
>
> (b) the University Community for 45% of available time in that week (referred to as "University Community Time"); and
>
> (c) the people of Aberdeen other than the University Community and elite sports organisations and user groups for 45% of available time in that week (referred to as "General Public Time")."

At 3.1.2 of Part 3 special provision must be made for availability for AU student Clubs in University term time on Wednesday afternoons 12-6 pm, which 'will' if there is excess demand count against University Community Time. Various other priorities are given to previous users of facilities replaced by ASV such as the new Chris Anderson Stadium which replaced the old but retained the name.

ACC and AU can direct ASV to depart from the access principles, to allow alteration of their opportunity for access by exchanging one priority for another. ASV is obliged to ensure it takes into account all the needs of the community with regard to access for those restricted by age, gender, ethnic origin, religious beliefs, sexual orientation, disability or financial circumstances.

21. Part 6 of the Schedule to the JVA (Part 6) (Tab 34 p48) relates to the Operating Agreement referred to in the JVA although this has not been implemented. However

Part 6 specifies the contents of the Operating Agreement other than the obligations set out in Part 3 with regard to the Objectives and Access Principles. In particular it places on ASV an obligation to provide publicity for the funding support of ACC and AU within the Village and on all marketing materials associated with it.

Part 6 also provides that ASV will notify ACC and AU of any publicity as soon as reasonably practicable relating to ASV or the Village (both negative and positive).

22. Part 9 of the Schedule to the JVA (Part 9) sets out the Business Plan conceived before the Village was operational by professional consultants familiar with the process of setting the contribution required for funding leisure facilities. It is at p52(b) of Tab 34. It shows for a five year period, anticipated income from the various separate areas of the Village, set against likely expenditure thereby giving the net operating costs not met from income. For the first year the anticipated net operating cost was £1,121,070. To that required to be added an allowance for the discounts allowed on entry as found above. That sum was anticipated as £372,552 giving an overall total of £1,493,622. 50% to be borne by ACC and AU each was £746,811 reflected in the cap on Annual Grant Funding also as found above.

Part 10 also contained at pp 53-5 an Inventory of items transferred to ASV which were all sport related items such as goal posts, high jump stands etc.

23. The Tribunal also finds that certain holders of discount cards such as ACC's "Access to Leisure" cardholders being disabled or those on low incomes have access on a basis not available to holders of similar discount cards from other local authorities. This gives preference to their own community through ASV.

24. Before the Village was up and running Mr Beattie agreed a membership system for use of certain areas of the Village.

25. The Membership Provisions are at Tab 40. The memberships include a swim package which was not available at the Village but will be provided once Phase 3 is complete. In the meantime it is provided at King's Pavilion of Aberdeen University with restricted access.

The memberships are in 6 categories for persons as follows:-

> Community, University of Aberdeen Student, Full-time education, Corporate, Over 60s and Access to Leisure.

The memberships are in 5 classes of type as follows:-

> Health & Fitness (divided into Peak and Off-Peak), Swim, Athletics, Squash and Classes.

A discount of 10% is available for an annual 'up-front' payment of membership fees. Discounts are available for packages of memberships. The rest of the payment provisions relate to 'pay and play' charges for peak and off-peak times.

26. As found above from the JVA discounts apply for AU staff and students, for ACC staff and for those in full-time education, over 60s and Access to Leisure. Mr Beattie also negotiated with his Board that corporate membership could be granted with authority to him to negotiate discounts.

27. Mr Beattie in evidence consistently claimed there was open access for all in Community time. Although evidence was given by Mr Beattie that student discounts were given to all students of any University presenting a matriculation card on a pay and play basis access to membership as a student under the full-time education provision by Robert Gordon University (RGU) students had had to be restricted. This happened because RGI's first term commenced a week or so before AU. RGU had a hall of residence next door to the Village. RGU students requested memberships (as opposed to pay and play time) for use of the facilities. There were general restrictions on memberships available to individuals so RGU student membership was limited so as to keep some memberships available for AU students. This is certainly a breach of an "open access" policy.

28. Mr Beattie claimed that discounts for students, children, seniors etc were available for any citizen from any community. However no numbers were made available which would show that that was in any way widely used, or significant, or that when those from other areas used a facility they could not at that time be treated as members of ACC's "community time" users.

29. Although Mr Beattie gave evidence of use of the Village for the Scottish National Women's Football Academy, the academy itself is located at the University of Stirling in association with the Scottish Football Association. In any event they pay for the use of the premises without a discount which was only offered at the start of the arrangement. There was provision for elite time in any event under the JVA which was a condition of ACC's acceptance of the Sportscotland funding. That was therefore provided in terms of the JVA for ACC under the delegated conditions. It did not show 'open access'. On the contrary it appeared to the Tribunal to be a direct provision for ACC.

30. Again although First Group the commercial bus company have now been offered a discount for the whole of their staff their headquarters are in Aberdeen within the ACC area.

31. Although the Tribunal was given a great deal of information about the different types of discounts which were on offer what was very clear was that many of these were directed specifically at university staff and students and Council staff as well as the general public in Aberdeen. These were all based on internal decisions in respect of which professional advice had been sought as to pricing and accountability before the premises opened and later in respect of which Mr Beattie was given an autonomy by the Board to make decisions. He does not have to refer back to the Board for authority to grant discounts such as those to First Group. The basics of these discounts are not relevant to the Tribunal decision since they are in fact all challengeable. They could become a topic for discussion amongst Board members and will generally be affected by the economic climate, availability of premises and

so forth. What is of significance is that there is the Annual Grant Funding proposed at the outset of the five year rolling programme which was prepared by the professional consultants. As was found above it shows the first year a cap per partner at £746,811 carried into the JVA rounded down. Mr Beattie gave evidence and the Tribunal finds that the Village was busier than expected and exceeded its target income from users as a result of which he had a surplus in the accounts. He has maintained this.

32. Since the arrangement was that the Annual Grant Funding would be paid quarterly in instalments in advance no adjustment was made to the commitment during the year. The adjustment could be made on an annual basis but has proved unnecessary as there have been surpluses so far.

33. Partially because of its name of Annual Grant Funding it did not appear to Mr Beattie in considering the financial position of ASV that VAT would be due on these payments when they commenced on the opening of the Village on 24/08/09.

34. However when the first repayment claim was made in respect of the building costs during the construction phase for the quarter 01/08 a visit was carried out by HMRC to examine the records relating to the 01/08 VAT return. The first investigation began with a letter from HMRC to Mr Beattie dated 03/04/08 at Tab 1. It simply raised an enquiry which Mr Beattie was advised had been discussed with the tax avoidance and the partial exemption team. It requested further information on the JVA and AU involvement. Mr Beattie replied on 16/04/08. HMRC had asked about priority booking for AU and he did explain the access opportunities for bookable areas in some detail. Some of the contents of his letter were a little surprising since he says "it is also worthy of note that whilst the university has first call on some access, no concessions on pricing will be given". This is not an accurate statement since the university clearly had special provisions for its staff. He does go on to say that students will pay the student rate for a booking and this rate will apply equally whether the student is from AU or any other UK higher or further education institution. This statement was prior to the premises opening but in relation to memberships was not of course maintained since AU students got a priority on the membership system given the RGU student access to membership was restricted. No evidence was led of other students regularly using the facilities from outside Aberdeen on an individual basis, or bookable area basis.

35. The Annex attached to Mr Beattie's 16/04/08 letter (Tab 2 page 3/4) gives some indication of the tax planning which had been undertaken. It states:

> "Whilst the structure and governance of the SPV changed, the VAT strategy remained constant. The business plan does not forecast an operating profit from the business activities. However, there is a need to widen participation in sport in the Aberdeen area and it was considered best practice to appoint a Director whose employment package should include financial incentives to maximise participation in sport.
>
> With VAT on expenditure likely to exceed the anticipated VAT on income, a VAT strategy had to accommodate best tax practice to minimise any irrecoverable VAT.

> Once the basis of the JV was agreed between the University Court of the University of Aberdeen ("AU") and with Aberdeen City Council ("ACC"), specialist VAT advice was sought from both Johnston Carmichael for ACC and from the RCB Partnership for AU.
>
> It was anticipated that if supplies of "Sport" were made by an "eligible" body, as defined, then that income would be VAT exempt as defined in the notes to VATA 1994. Sch 9, Group 10. ARSF would not be an eligible body on the basis that it is a body "Subject to commercial influence". The determinate feature of Note 4b qualifies "subject to commercial influence" where an emolument is paid by ARSF to an officer or shadow officer and that emolument is, at least in part, calculated by reference to either the turnover or profit of ARSF.
>
> VAT advice suggested a number of options. The preferred option was to ensure that all income to the ARSF was taxable, thus ensuring full recovery of VAT incurred on expenditure. If the income from sport turned out to be greater than anticipated then any excess would further assist ARSF in financing the costs of operating the facility. Increased use and income would also result in additional VAT payable to HMRC.
>
> The new sports complex is designed to facilitate and promote participation in sport in the Aberdeen area. The appointment of a Director, whose remuneration package is based in part on widening and maximising participation, embraced the Joint Venture agreement/plan and confirmed that all income was taxable thus affording full and immediate deduction of VAT incurred on expenditure. VAT compliance issues were also less complex.
>
> You will note that in the JVA (para 4.4) that ARSF will have a paid Director who meets this criteria as the JVA states that "The shareholders shall agree terms of reference and remuneration structure for a paid Director (which will in part be linked to the profit or turnover of the company).
>
> Lets for 24 hours or more, or 10 or more consecutive lets with intervals of greater than 1 day and less than 14 days are exempt from VAT. ARSF had always the intention to opt to tax the buildings etc prior to the first taxable supply by ARSF. That intention has now been fulfilled by ARSF electing to waive VAT exemption in respect of the new facility. Notification of that election has been submitted to and acknowledged by HMRC.
>
> Opting to tax the building ensures that all ARSF income will be taxable at the standard rate and this in turn allows the input tax on purchases, including the input VAT on the construction of the building, to be recovered in full".

36. In HMRC's reply on 02/05/08 continuing their enquiry they raise the issue of a statement in the said annex at page 4 which was "the preferred option was to ensure that all income to the ARSF was taxable". The question was raised if that included the Annual Grant Funding referred to in the JVA. Mr Beattie was asked if that was not taxable to explain why not. Mr Beattie's reply in a letter (Tab 4) incorrectly dated 16/04/08 but deemed to be dated subsequent to HMRC's 02/05/08 letter and received

by HMRC on 13/05/08. He considered that ASV was not providing a supply of taxable business services by the company to either party. He provided what he considered reasonable grounds for believing that to be the position. The correspondence continued and in the meantime the repayment claims were withheld. As the arguments became more complex Mr Beattie became concerned and eventually wrote to the complaints manager of HMRC on 02/10/08 and as a result on 23/10/08 received a letter from Mr Frank Leonard the Tax Avoidance Visiting Officer which stated "I refer to my recent review of your business for VAT purposes. I have authorised the repayment claim submitted by the business and will issue my decision letter in connection with the Annual Grant Funding in due course". He therefore had reserved his opinion.

37. The correspondence on this matter continued and HMRC did accept that it was a finely balanced and difficult issue given that as at 09/04/09 the arrangements had not been implemented as the premises were not yet open. Mr Leonard goes on in that letter to give a very clear picture of some of the issues which were of concern to HMRC with regard to the Annual Grant Funding. He also gave some grounds for believing that it might be subject to a liability for VAT and quoted the case of *Edinburgh Leisure and Others v HMRC (2004) (VDT 18784)*. He also noted from correspondence that ASV was a registered charity but had not asked for a ruling from HMRC regarding charitable status of the company and so no investigations had been carried out on that matter by HMRC. ASV was at that point invited to ask for a ruling on that. Mr Beattie replied with a variety of arguments as to why ASV should not pay VAT but making no comment on the matter of the charitable status for tax purposes of ASV.

38. On 14/10/10 (Tab 22) Mr Leonard issued his decision that the Annual Grant Funding was consideration for a taxable supply. He again very clearly indicated to ASV that they had not asked for a ruling from HMRC regarding either their charitable status for tax purposes, or potential exemption. The letter is very long dealing with ASV's registration, the terms of its articles of association, the membership fee for the facilities with additional charges for bookable areas and with the discounts for students, council and university staff, senior citizens, children and those on benefit. It refers to Part 3 of the JVA stating ASV's obligations and the basis on which the Annual Grant Funding is provided and calculated. It describes the advance payment, the annual calculation and the allocation of 50% each of the net operating cost to both ACC and AU. He then covers the legislation and reviews the case law. He then in an otherwise very carefully worded letter states that he considered the Annual Grant Funding constitutes a consideration for "the discounted admission prices" (p6 para 29).

39. He was using this to establish the direct link which is required by elements of case law to be in existence between two parties in relation to a provision of a service for a consideration.

40. At paragraph 32 of that letter on page 7 of Tab 22 he then expands further HMRC's analysis and in particular widens the argument by stating the Annual Grant Funding is not a donation made with nothing expected in return and that it is clear as a

matter of fact that the Annual Grant Funding is not a gift made with no expectations of a *quid pro quo* and that reduced admission prices benefitting the AU and ACC are not merely coincidental.

41. The Tribunal finds that the reduced admission prices comment equates with Mr Beattie's understanding that the prices in general should be "affordable". It also equates with Article 73 of Council Directive 2006/112 EC since the subsidies provided by ASV is directly referred to in the Business Plan at Part 9 of the JVA at P52(b).

42. Mr Leonard goes on then to say that the payments from the ACC and AU to ASV are made in consideration of this supply of reduced admission prices to persons connected with the ACC and AU. He then called on ASV to account for output tax in respect of the Annual Grant Funding and in order to calculate the amount asked to be advised of the amounts and the dates of the payments. He reserved the issue of penalties and advised of the right of appeal.

43. Before the matter came to the Tribunal Mr Beattie asked for a review of the decision and gave reasons why the decision should be reviewed. He also made a request for clarification asking for a description of the taxable business services in contention. He maintained what was supplied by ASV was to participants from all over the UK and beyond and that discounts were offered to all eligible individuals regardless of where they belong or from what university, college or school they matriculated.

44. The Tribunal finds it had been shown that even RGU students have not found open access to discounted admission to membership. There was undoubtedly discrimination against RGU and in favour of AU. The "Access to Leisure" provision is also for an exclusive group of ACC users.

45. Following the review which upheld his decision Mr Leonard again wrote to Mr Beattie asking for the details of the accounts in order that he could deal with the assessment. Mr Beattie in reply on 07/02/11 did not supply these but protested his position with regard to the Annual Grant Funding and also requested that the matter of penalties be dealt with and a ruling given. He also advised he was to appeal. On 09/03/11 however Mr Beattie did as requested and provided the necessary figures. On 22/03/11 the assessment was issued.

46. The Annual Grant Funding is paid under enforceable contractual obligations created in the JVA. The services comprise the operation of the Village and all the provisions of Part 3. In addition ACC and AU benefit from publicity which they both use to promote their communities. Any publicity for ASV is reportable to ACC and AU in terms of Part 6 of the JVA which also contains specifications for the Operating Agreement. Although technically not agreed or in operation it was clear from the evidence that many of the provisions contained in Part 6 had already been implemented. The description of the funding is not relevant to the determination of whether it is a taxable sum.

Submissions

7. Both parties provided written submissions as well as oral submissions.

Submissions for the Appellants

8. Before dealing with the substance of the submissions the Tribunal required to correct the misapprehension of ASV with regard to the tax status of ASV. HMRC had advised in their letter of 14/10/2010 that ASV had not applied for rulings on exemption from tax under the Income and Corporation Taxes Act 1988 S505 exemption or under Group 10 Schedule 9 VATA 1994. Mr Artis had confirmed at the outset of the Tribunal that HMRC had reserved their position on ASV's tax status and continue to do so to date. The statement that ASV had charitable status and was therefore exempt was not referred to again.

9. Mr Rumbles contentions on behalf of ASV to support allowing the appeal were mainly directed at showing the payments were not a consideration for a supply of services and had no direct link with discounts offered on admission charges. They contended that HMRC used the discounts offered to users as the direct link to the Annual Grant Funding. They contended the discounts were non discriminatory and applied to a wide range of sporting participants. They contended the Annual Grant Payments were solely deficit funding. They also suggested ACC and AU were not consumers.

10. The legislation was considered by ASV including Group 10 Schedule 9 though HMRC had made no ruling on that. They relied on the cases of *British Railways Board* and *Automobile Association* to establish that the whole transaction must be looked at in terms of the contract. So far as ASV was concerned that covered the provision of sporting facilities, and encouragement of use of the facility and these were generally open and available to all through affordability.

11. On the matter of consideration they relied on *inter alia Apple & Pear Development Council* and suggested that the direct link had to be between the supply and the consideration. They contended the consideration in this case was related to the participation in sport. They also relied on *Church Schools Foundation Ltd,* and *Tolsma*. The contention that VAT is a tax on consumption was proponed, and so far as ASV was concerned ACC and AU were not consumers. The Tribunal did not consider *Church Schools Foundation Ltd* as relevant in view of the separation which had occurred by the creation of a charity in that case.

12. *Redrow* was distinguished with the contention that ACC and AU communities were not being supplied with connected services. They distinguished *Edinburgh Leisure* on the ground there was no Service Level Agreement in place in this case, and contended the purposes were different. In reliance on *Sheffield University VTD 20174* he submitted there was no unique benefit to ACC or AU.

13. They submitted the fact there was no adjustment of the discount because the expenditure exceeded income, was significant, in establishing no direct links between the discounts given by ASV and the Annual Grant Funding paid by ACC and AU.

Submissions for the Respondents

14. The Respondents contended the Annual Grant Funding was payment for a supply of services by ASV to ACC and AU. In determining what that meant they referred to AU's description of ASV in their annual accounts to the year end 31/07/2009 which showed the advantages and benefit they expected to gain from ASV as a powerful recruiting tool, attracting and developing elite athletes and so forth. There had been an update of the previous resources available to ACC and AU for leisure purposes. ASV's own annual accounts contain a note which indicates the income received including the grant funding is recognised as earned as related services are provided. ASV must carry out obligations imposed in the JVA including special provisions for access by ACC and AU for their leisure provision for elite athletes and their communities. ACC and AU can step in and direct operations if the services they have demanded are not carried out as they believe they should. AU had assurances that their student community's access was of primary importance. HMRC contended the Board of ASV was not wholly independent and autonomous. The Board was restricted in some matters. The payment of Annual Grant Funding by ACC and AU was projected by the Business Plan which had been drawn up by professional advisers and is obligatory in terms of the JVA. There is a revenue cap. If expenditure was greater no relief is given and so payment was not deficit funding. Mr Artis on behalf of HMRC covered all the legislation and relied on *British Railways Board* and *AA* and *Redrow*. HMRC also contended that a benefit had to be perceived and consumption had to occur. They were satisfied that had been shown and asked that the Tribunal should consider *Redrow* in support given that the users of the facilities enjoyed the benefit and at the same time ACC and AU also enjoyed the benefit. There was no requirement for the services to go in only one direction.

Decision

15. The appeal is refused.

Reasons for the Decision

16. The questions which the Tribunal were required to address were (1) was there a supply of services by ASV to ACC and AU? (2) if there was a supply of services what was the consideration? (3) if there was a consideration what was its nature? Was it a donation or was there a direct link between the payer and recipient sufficient to incur a liability to VAT?

17. It was clear that Mr Beattie was unaware of ASV's full tax position. He perceives what any other business would consider profit generated by more use of the premises than anticipated in the business plan as a surplus for charitable purpose. The Business Plan shows the programme for the first 5 years of operation of ASV. Mr Beattie confirmed that Annual Grant Funding would remain in place whilst there was a shortfall. It could be required for 25 years. Even if that turned out to be the case the JVA provides that in the last year the Business Plan will be designed to seek to reduce any credits to any general reserve, lifecycle and other accounts of the company to zero by the expiry date of the JVA. The contributions to the company by the shareholders

in that contract year should be adjusted and reduced accordingly (Tab 34 page 24 paragraph 18.8).

18. It is appreciated that Mr Beattie is an enthusiastic busy man dealing with many varied tasks but he is a qualified public finance accountant. He was moving into a different funding arrangement with ASV but had help and resources to call on for guidance but somehow did not take account of all of the guidance. The JVA contains cautious advice at paragraph 11.3.1 with regard to the project funding. HMRC's own correspondence relates its concerns with regard to the non-application for charitable tax status and on exemption under Schedule 9. Obviously this shows there are contentious matters in issue which are open to different interpretations. Mr Beattie and his advisers were not helped by the very narrow terms of HMRC's correspondence relating in particular to the discounts. It became clear during the arguments and certainly in the preparation of the outline written submissions which were intimated and in other general correspondence between Mr Beattie and HMRC that the funding itself, however it was calculated was funding to maintain the services provided by ASV under Part 3. The Tribunal has in issue only the VAT but was satisfied that the findings meet the requirements of the legislation and the case law.

19. In answer to question 1 the Tribunal was satisfied from the findings and following in particular the case of *Edinburgh Leisure* that there was a supply of services provided in terms of Part 3 as found above. In addition in the JVA at part D paragraph 7 there was a provision for the parties to negotiate the operating agreement. This included setting out in detail the obligations in Part 3 already referred to and in addition requiring publicity to be provided for ACC and AU. In addition in Part 6 it required that ASV notify the shareholders as soon as reasonably practical as to any other publicity or potential publicity in relation to it or the Village both negative and positive. There is availability of use on the premises for AU students on Wednesday afternoons which is a relic of their previous function at their own grounds, and various other retained uses for previous users of the Chris Anderson Stadium.

20. In the terms of Part 3, ACC and the AU have effective financial control and ease of access to records. The JVA provides that ASV must produce monthly management accounts and produce audited accounts for the shareholders. In addition the access principles in the event of excess demand show preference for AU and ACC. Following in particular *Edinburgh Leisure* the Tribunal could not ignore the very specific requirements and demands which ASV had to meet and was contractually bound to meet and deliver in terms of Para 3.3 of the JVA. There is substance and reality in the services provided. The Tribunal found the submission that the funding was solely in respect of a deficit for the benefit of the sporting participants was not correct, as that sum would have been calculable on actual figures which was not the methodology used. The purpose of the Annual Grant Funding was the operation and maintenance of leisure services for ACC and AU, despite protestations that the Village was available to a much wider community. When the Tribunal was considering this matter it took account of the fact that for instance 'elite' users were not necessarily ACC residents. They were provided for by reason of the conditions of the grant from Sportscotland so the provision is for ACC.

21. In answer to question 2, with regard to the consideration it was clear that from the findings and the reasons above the Annual Grant Funding was a payment for these services and the consideration is simply the sums paid, and in terms of the legislation that includes the VAT due as provided in the assessment.

22. In answer to question 3 from the findings in fact the Tribunal is satisfied the Annual Grant Funding is not a donation and is a consideration for services rendered, as there is a clear and direct link between ASV and AU, and ASV and ACC particularly for the performance in terms of the obligations in Part 3. It is a contractual link for the provision of the services. Although it was contended on behalf of the Appellants that that link did not exist and that the recipient of ASV's services were only the users of the Village who could in some circumstances not be members of the ACC or AU communities, that argument was not in the Tribunal's view sustainable when set against the contractual obligations of the JVA.

23. For all of these reasons therefore the appeal was refused.

24. 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.

MRS G PRITCHARD, BL., MBA., WS
TRIBUNAL JUDGE

RELEASE DATE: 25 JANUARY 2012