Neutral Citation: **[2025] UKUT 4 (TCC)**

Case Number: UT/2023/000115

**UPPER TRIBUNAL**
**(Tax and Chancery Chamber)**

The Royal Courts of Justice,
Rolls Building,
7 Rolls Buildings,
Fetter Lane,
London EC4A 1NL

*VALUE ADDED TAX – exemption for certain fund-raising events by charities – whether applicable to the Great Yorkshire Show – meaning and application of Value Added Tax Act 1994 Schedule 9 Group 12 Item 1 – interpretation in conformity with Principal VAT Directive*

**Heard on:** 9 October 2024
**With further written submissions on:**
4, 6 and 11 November 2024
**Judgment date:** 09 January 2025

**Before**

**MR JUSTICE EDWIN JOHNSON**
**JUDGE THOMAS SCOTT**

**Between**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**
**Appellants**

**and**

**YORKSHIRE AGRICULTURAL SOCIETY**
**Respondent**

**Representation:**

For the Appellants: Amy Mannion, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Michael Firth KC, instructed by Vatangles Consultancy Ltd

## DECISION

### INTRODUCTION

1. The Yorkshire Agricultural Society ( the "Society") is a charity which organises and runs the annual Great Yorkshire Show. The Society considered that its supplies of admission to the show in 2016 and 2017 were exempt supplies for value added tax ("VAT") purposes. HMRC disagreed, and refused the Society's claim for repayment of overpaid VAT for 2016, and issued an assessment to VAT for 2017 in respect of the supplies claimed to be exempt.

2. The Society appealed to the First-tier Tribunal (Tax Chamber) (the "FTT"). In a decision released on 25 April 2023 (the "Decision"), the FTT allowed the Society's appeal against both the 2016 repayment claim and the 2017 assessment. The Appellants ("HMRC") do not appeal against the decision regarding the 2017 assessment, but now appeal the decision regarding the 2016 repayment claim.

### FACTUAL BACKGROUND

3. There is no dispute as to the facts in this case, and the following summary is taken from the Decision. References in the form FTT[x] are to paragraphs of the Decision.

4. Since it is only the 2016 repayment which is the subject of this appeal, we are concerned only with the facts relating to the Show in that year, even though the FTT made findings in relation to the 2017 Show. The parties agreed that that should not have any material impact on our decision. References below to the Show are to the 2016 Show.

5. The Society was founded in 1837. It is a membership organisation with more than 12,000 members, a charitable company limited by guarantee and a registered charity. Its charitable objects are as follows:

> (1) To support and promote agriculture, rural and allied industries throughout the North of England, including championing the role of farmers as providers of high quality produce and encouraging consumers to choose healthy and local produce.
>
> (2) To advance and encourage agricultural research and greater understanding and empathy with farming and the countryside amongst the general public and particularly children.
>
> (3) To advance and encourage the protection and sustainability of the environment.
>
> (4) To hold in pursuance of its main objectives an annual agricultural show.

6. On the basis of written evidence, management accounts of the Society and evidence from the Society's Financial Controller, Mr Stoddart, the FTT set out certain findings of fact at FTT[42]:

> 42. On the basis of the above, and Mr Stoddart's evidence, which we accept, we find:
>
> (1) The Society's activities, done pursuant to its charitable purposes, include promotion of the existence and work of the Society generally. This is increasingly important to the Society because, historically, the Society and the Show were two completely different 'brands': the Show was very well-known and high-profile, but the Society much less so. The Society

was and is trying to increase its prominence and profile as a society per se, and as an organisation which does more than just run the Show;

(2) The Society's activities, done pursuant to its charitable purposes, also include the promotion of public awareness in farming, and supporting farmers;

(3) It holds the Show as one way in which to fulfil its charitable purposes;

(4) The Society undertakes fundraising. The task of fundraising is one for the Society's board of trustees. There is no fundraising committee, but Mr Stoddart attends the board of trustees;

(5) The overall budget for the Show is set by Mr Stoddart and the Society's Chief Executive;

(6) There is a planning team for the Show, led by a "Show Director", whose work is overseen by the board of trustees;

(7) One of the main tasks of the Show's planning team is to consider how to raise as much money as possible from the Show, which is part of raising as much money as possible for the Society to give away through its charitable activities;

(8) The Show is budgeted to make a surplus, and has always been managed with that in mind;

(9) For 2016, the income generated by the Show was approximately £3.463m (being principally composed of £1.483m admissions, £1.114m trade stand fees and £220,000 stock and sundry entry fees) with expenditure incurred directly or proportionally in respect of the show (being principally composed of site costs, personnel costs, displays, prizes, printing and publicity, staff costs) being approximately £2.025m, thereby generating a surplus of approximately £1.437m;

…

(11) The Society pays to put the Show on, as well as paying for some of the permanent infrastructure at the Showground, which is used all-year round and not just during the Show;

(12) The Show usually runs for 3 days in mid-July, from 7.30 in the morning to 7.30 in the evening (with a 6.30 close on the last day). In 2016 it ran from Tuesday 12 - Thursday 14 July…

(13) The Show is well-attended. Attendance at the Show is capped at 35,000 a day; this being about 20,000 ticket sales, and 15,000 other people on the site such as exhibitors, stewards, and other staff (such as gate staff/security, car-parking marshals, catering and sanitary staff);

(14) The whole Show is stewarded by about 300-350 unpaid volunteers who, amongst other tasks (such as helping get animals into the show-ring in the right sequence) go around helping people, and giving more information on a one-to-one basis.

(15) During the Show, the Site is split up into several 'zones';

(16) The 'Discovery Zone' is aimed at children. Its main aim is to educate people about what goes on in the countryside, and to encourage them to find out more. It holds a number of workshops, for example showing how rapeseed oil is produced from seeds, a butcher showing how meat is butchered; bread-making and other 'hands-on' activities;

> (17) The showing of livestock (cattle, sheep, pigs and goats) is one of the main attractions of the Show, bringing animals from across the whole UK. It is not just a competitive exercise, but itself is something done to promote best practice in rearing animals, including animal wellbeing;
>
> (18) Many of the activities at the Show - showing livestock, equine activities such as show-jumping, sheep-shearing, and gun-dog demonstrations - are accompanied by live commentary, which is descriptive and educative - for example, the commentary will say what is happening, why it is done, and what the judges are looking for;
>
> (19) There are some 'trade' and rare-breed stalls. The latter are 'hands-on' and allow people to stroke the sheep (for example);
>
> (20) The food zone includes not only things such as a cheese show, but also demonstrations of cookery in a cookery theatre;
>
> (21) The motor zone is principally a demonstration of modern agricultural machinery such as tractors and trailers, but also has auto-dealer trade stands where it is possible to buy a vehicle.

7. The FTT also set out the following findings of fact which are important in this appeal, at FTT[43]-[46]:

> 43. The Appellant accepts - in its Grounds of Appeal - that it did not "promote" the 2016 Show as being "primarily" for the raising of money.
>
> 44. Mr Stoddart's evidence was that (i) the Society putting the Show on, and (ii) the Society spending money on its charitable aims, were 'entwined'. He said that "you cannot do one without the other", by which he meant (as we understand it, and to paraphrase), without the money from the Show itself, there would be no Show at all. He also said that there were two purposes to the Show: fundraising, and education.
>
> 45. We accept that evidence.
>
> 46. It is also consistent with contemporary documentary evidence.

**RELEVANT LEGISLATION**

8. The only issue in this appeal is the applicability of a particular exemption from VAT to certain supplies by the Society in connection with the Show.

9. The relevant domestic provisions derive from EU legislation, namely Article 132 of the Principal VAT Directive 2006/112/EC (the "PVD"). Title IX of the PVD sets out various exemptions. Article 131 of the PVD states as follows:

> The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

10. Chapter 2 is headed "Exemptions for certain activities in the public interest". The relevant parts of Article 132 state as follows:

> 1 Member States shall exempt the following transactions:
>
> …

> (o) the supply of services and goods, by organisations whose activities are exempt pursuant to points (b), (g), (h), (i), (l), (m) and (n), in connection with fund-raising events organised exclusively for their own benefit, provided that exemption is not likely to cause distortion of competition;
>
> …
>
> 2 For the purposes of point (o) of paragraph 1, Member States may introduce any restrictions necessary, in particular as regards the number of events or the amount of receipts which give entitlement to exemption.

11. Article 131 provides as follows:

> The exemptions provided for…shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

12. In domestic legislation, VAT exemptions are dealt with by section 31 Value Added Tax Act 1994 ("VATA"), which states, in section 31(1), that "a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9".

13. Group 12 of Schedule 9 VATA is headed "Fund-raising events by charities and other qualifying bodies". Item 1 of Group 12 provides exemption for:

> The supply of goods and services by a charity in connection with an event—
>
> (a) that is organised for charitable purposes by a charity or jointly by more than one charity,
>
> (b) whose primary purpose is the raising of money, and
>
> (c) that is promoted as being primarily for the raising of money.

14. Note 11 to Group 12 states as follows:

> Items 1 to 3 do not include any supply the exemption of which would be likely to create distortions of competition such as to place a commercial enterprise carried on by a taxable person at a disadvantage.

15. The exemption for fund-raising events by charities contained in Item 1 of Group 12 was enacted in its present form, with effect for supplies made after 1 April 2000, by the Value Added Tax (Fund-Raising Events by Charities and Other Qualifying Bodies) Order 2000, SI 2000/802. Particularly since certain of the relevant authorities deal with the earlier wording, which we refer to below as the "pre-2000 provision", it is necessary to set out that earlier wording.

> Group 12—Fund-Raising Events by Charities and Other Qualifying Bodies
>
> Item No
>
> 1 The supply of goods and services by a charity in connection with a fund-raising event organised for charitable purposes by a charity or jointly by more than one charity.
>
> 2 The supply of goods and services by a qualifying body in connection with a fundraising event organised exclusively for its own benefit.
>
> Notes

> (1) For the purposes of items 1 and 2 "fund-raising event" means a fête, ball, bazaar, gala show, performance or similar event, which is separate from and not forming any part of a series or regular run of like or similar events.

**THE DECISION AND THE GROUNDS OF APPEAL**

16. The FTT decided that the 2016 Show was exempt from VAT under Item 1 of group 12 ("Item 1").

17. In relation to the three sub-paragraphs of Item 1, it was common ground that sub-paragraph (a) was satisfied as the Show was organised for charitable purposes by a charity. The FTT decided that sub-paragraph (b) was satisfied, because the primary purpose of the Show was the raising of money. The FTT considered that "the primary purpose" should be read as referring to "a" primary purpose, and that a primary purpose meant one which was important. Alternatively, the FTT considered, the purpose of fund-raising was interdependent with the purpose of charitable education. The FTT decided that sub-paragraph (c) was also satisfied, when that requirement was interpreted in conformity with the PVD.

18. We discuss the FTT's reasoning and conclusions in detail below. At FTT [139]-[141] the FTT summarised its conclusions as follows:

> CONCLUSIONS ON ITEM 1
>
> 139. Item 1(a) is met. The Show in 2016…was organised for charitable purposes by a charity.
>
> 140. Item 1(b) is met on the footing:
>
> (1) Fund-raising is one of two inter-dependent purposes, but was the main purpose of the Show; or
>
> (2) Even if not, then it was a main purpose of the Show, in the proper sense of the exemption.
>
> 141. Item 1(c) is met, on the footing that the Show was promoted for fund-raising purposes:
>
> (1) Item 1(c) in its entirety is an incorrect transposition of the Directive into UK law (*Loughborough*); or
>
> (2) The use of the word 'primarily' in Item 1(c) is an incorrect transposition, and falls to be deleted (*Marleasing*)[1].

19. The FTT refused HMRC's application for permission to appeal. The Upper Tribunal (Judge Jones) granted HMRC permission to appeal on two grounds.

20. **Ground 1** is that the FTT erred in law in its interpretation of **Item 1(b)**.

21. **Ground 2** is that the FTT erred in law in its interpretation of **Item 1(c)** and wrongly excised either the whole of (c) or the word "primarily" from the statutory wording.

22. The Society did not provide any Respondents' Notice.

[1] This is a reference to the decision of the CJEU in *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 ("*Marleasing*").

23. We informed the parties at the hearing that we wished to receive further submissions from them on a number of issues, and issued directions to that effect. Those further submissions were very helpful, and we have taken them into account in reaching our decision.

#### THE EU LAW POSITION IN SUMMARY

24. We directed the parties to attempt to agree a joint note setting out the current position regarding the applicability of EU law to the appeal. The note produced by the parties records that since the appeal concerns a dispute over the taxability of supplies made in 2016, prior to the UK's withdrawal from the EU, and a claim of VAT in respect of the Show which was made in 2020, during the Implementation Period, the parties agreed that the applicable law is that which was in place pursuant to European Union (Withdrawal) Act 2018 ("EUWA") at the end of the Implementation Period (that is, in accordance with the retention of EU law as it existed immediately prior to the end of the Implementation Period).

#### GROUND 1: ITEM 1(B): AN EVENT "WHOSE PRIMARY PURPOSE IS THE RAISING OF MONEY"

### The FTT's decision

25. The FTT began its consideration of this issue by referring to the FTT decision of Judge Kempster in *Loughborough Students Union v HMRC* [2018] UKFTT 357 (TC) ("*Loughborough FTT*"). The FTT stated that it agreed with Judge Kempster that "Item 1(b) refers to "a" primary purpose, and not "the" primary purpose, and that a primary purpose means a purpose which is important": FTT[84].

26. The FTT considered that this accorded with a purposive reading of the exemption. It then stated that it also chimed with the approach taken by earlier tribunals in relation to the pre-2000 provision, in *Blaydon Rugby Football Club v Commissioners of Customs and Excise* [1996] V & DR 1 ("*Blaydon*") and *Newsvendors Benevolent Institution v Commissioners of Customs and Excise* (1996) VAT Decision 14343 ("*Newsvendors*").

27. The FTT referred to HMRC's internal guidance on the exemption to support its conclusion that the promotional and advertising material for the Show sufficed to show that the "main and overriding purpose" of holding the event was fund-raising.

28. The FTT determined that Item 1(b) was satisfied for the following reasons, at FTT[92]-[96]:

> 92. Therefore, taken overall, in our view:
>
> (1) Fund-raising was not the exclusive purpose of the Show;
>
> (2) The Show had two main purposes: (i) fund-raising, and (ii) education.
>
> 93. We cannot sensibly rank these in order of importance, and neither party sought to advance any analysis which would enable a ranking of purposes to be empirically, reliably and/or sustainably undertaken on the facts of this case.
>
> 94. Overall, our impression is that it could not be said that either of these purposes was more important than the other. In that sense, looked at in the round, the two purposes are of equal importance. Beyond that, it seems to us that the two purposes not only co-exist, but are interdependent, and not independent.

> 95. If fund-raising were not taken as a discrete purpose, but were taken as being one of two inter-dependent purposes, then, in our view, it was the main purpose of the Show, and it qualified for the exemption.
>
> 96. In fund-raising were taken as a discrete purpose, then it was a main purpose of the Show, and it qualified for the exemption.

29. It is first necessary to unpack the FTT's decision. We consider that this passage records a decision that the event satisfied Item 1(b) on one or both of two alternative bases.

30. The first basis is that fund-raising was not a discrete purpose; rather, the two main purposes of the Show were fund-raising and education, which were of equal importance and were inter-dependent, forming a single purpose which satisfied Item 1(b), even on HMRC's construction.

31. The second basis is that if fund-raising was taken as a discrete purpose, it was one important purpose of the Show, even though it was not the only or primary purpose, and that was sufficient to satisfy the exemption, properly construed.

32. This reading is consistent with the FTT's summary of its conclusion on Item 1(b), at FTT[140]:

> Item 1(b) is met on the footing:
>
> (1) Fund-raising is one of two inter-dependent purposes, but was the main purpose of the Show; or
>
> (2) Even if not, then it was a main purpose of the Show, in the proper sense of the exemption.

33. Therefore, in order for HMRC to succeed on Ground 1, they must establish that the FTT erred in law in relation to both of these alternative conclusions.

**HMRC's arguments**

34. For HMRC, Ms Mannion said that the nub of the issue is whether Item 1(b) requires an event which has a single primary purpose of fundraising, or whether it can be satisfied, as the FTT decided, by an event for which one of the important purposes is fundraising. In HMRC's submission, the FTT was wrong in law, because Item 1(b) plainly requires a single identifiable primary purpose.

35. Ms Mannion made the following points:

(1) The language of Item 1(b), particularly given the established need for VAT exemptions to be construed strictly, supports HMRC's position.

(2) *Blaydon* supports HMRC's interpretation. While *Newsvendors* and *Cheltenham and Gloucester College of Higher Education Students' Union v Commissioners of Customs and Excise* [1998] (1998) VAT Decision 16727 ("*Cheltenham*") arguably support the FTT's interpretation, those decisions relate to the pre-2000 provision, which is differently worded.

(3) Properly read, *Loughborough FTT* in fact supports HMRC's interpretation.

(4) As regards the FTT's conclusion that the main purposes of fundraising and education were "entwined", that conclusion was founded on and undermined by the FTT's flawed legal analysis.

(5) As a matter of law, Item 1(b) requires a determination of any separate purposes for the event, followed by a determination of the single primary purpose. There cannot be an "intertwined" primary purpose.

(6) Applying Item 1(b) correctly, the FTT's findings of fact, and the Society's own case, meant that the requirement was failed.

**Item 1(b):Approach to construction**

36. Both before the FTT and in this appeal the parties were agreed that the construction of Item 1(b) is to be determined by reference to the words used, because it is not ultra vires the PVD, and does not require a conforming interpretation.

37. Item 1 is an exemption. The correct approach to the construction of VAT exemptions was recently considered by the Supreme Court in *Target Group Ltd v HMRC* [2023] UKSC 35 ("*Target*"). While case law establishes that VAT exemptions are to be construed "strictly", it is necessary to understand what that means. In particular, it does not mean that an exemption must be construed in a narrow or restricted way. In *Target*, Lord Hamblen, delivering the judgment of the court, said this, at [17]-[18]:

> 17. The following points are of relevance…
>
> (1) The exemptions contained in the PVD (and formerly the Sixth Directive) are independent concepts of EU law.
>
> (2) The terms used in the PVD to specify exemptions must be interpreted strictly because they constitute exceptions to the general rule that VAT is to be levied on all services supplied for consideration by a taxable person.
>
> …
>
> 18. What is meant by a strict interpretation was explained by Chadwick LJ in *Expert Witness Institute v Customs and Excise Comrs* [2001] EWCA Civ 1882, [2002] 1 WLR 1674, [2002] STC 42 as follows:
>
> "17. … A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption; so that, if the court is left in doubt whether a fair interpretation of the words of the exemption cover the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question."

38. A "strict" construction also requires account to be taken of the underlying purpose of the exemption in question. In *Canterbury Hockey Club* C-253/07, the CJEU stated, at paragraph 17 of its decision:

> The terms used to specify the exemptions under Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all supplies of services for consideration. However, that requirement of strict interpretation does not

> mean that the terms used to specify those exemptions should be construed in such a way as to deprive them of their intended effect (*Temco Europe*, paragraph 17, and *Horizon College*, paragraph 16). They must be interpreted in the light of the context in which they are used and the scheme of the Sixth Directive, having particular regard to the underlying purpose of the exemption in question (see, to that effect, *Temco Europe*, paragraph 18, and Case C428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I1527, paragraph 28).

**Discussion**

39. The statutory requirement is that the Show is "an event…whose primary purpose is the raising of money".

40. The FTT dealt first (as shall we) with the second basis on which it concluded that this requirement was satisfied, namely that on a proper construction this wording requires only that fund-raising was one important purpose of the event.

41. Looking first at the language used, we agree with HMRC that it does not support the FTT's construction. That construction effectively relies on three conclusions. The first is that "primary" mean "main", the second is that "main" means important, and the third is that there can be more than one primary purpose to an event.

42. Mr Firth's skeleton argument asserted that it was common ground that "primary" and "main" are synonymous[2]. Ms Mannion filed a supplementary note which stated that this was not correct. HMRC's position is that main can have a wider meaning than primary and, most importantly, that primary may be synonymous with "the main", but it is not the same as "a main". HMRC further dispute that "main" means merely "important".

43. We broadly agree with HMRC's position. While "the primary purpose" may in general have the same or a similar meaning as "the main purpose", both main and primary are words which describe something more than importance. A secondary or incidental purpose, which is neither the main nor the primary purpose, may nevertheless be an important purpose.

44. In concluding that a primary or main purpose simply means a purpose which is important (at FTT[84]), the FTT stated that it was agreeing with the conclusion to this effect by Judge Kempster at [86] of *Loughborough FTT*. In fact, there is no such conclusion at [86] of *Loughborough FTT* or elsewhere in that decision. Mr Firth argued that authority for the proposition is found in *Travel Document Services v HMRC* [2018] EWCA Civ 549 ("*Travel Document Services*"). We do not agree. The only reference to that issue in that decision is to record a bare assertion by counsel to that effect[3].

45. We also consider that the FTT erred in concluding that Item 1(b) contemplates multiple primary purposes, and is satisfied if one of those purposes is fund-raising. In reaching that conclusion, the FTT's reasoning was as follows:

(1) That construction was adopted in *Loughborough FTT*.

(2) On a purposive reading, "confining the exemption to something where fund-raising is the foremost (ie first-in-rank) purpose is both unnecessarily restrictive, and

[2] Respondent's skeleton argument footnote 1.
[3] *Travel Document Services* at [42].

inconsistent with the Court of Appeal's guidance on the scope of exemptions…": FTT[85].

(3) That approach corresponded to the approach taken in *Blaydon* and *Newsvendors*.

46. In relation to *Loughborough FTT*, the FTT referred to the statement at [85] of that decision that "a primary purpose of fundraising is a fair interpretation of the legislative wording in Article 132(1)(o)". However, in our opinion that puts too much weight on the use of the word "a", and more importantly, fails to take into account the remainder of the decision. In fact, Judge Kempster preferred the approach in *Blaydon*, which broadly endorses HMRC's interpretation, and said at [58] that "a "fundraising event" is an event the main purpose of which is to raise funds". At [62], Judge Kempster also said this:

> I am aware that the VAT Tribunal in *Cheltenham & Gloucester* (Dr Brice) came to a different conclusion; there it was found (at [19]) that fundraising was not the primary purpose of any of the five student balls in dispute but nevertheless all the 15 balls were fundraising events within Group 12 (to reiterate, this was on the pre-2000 statutory wording). I have read carefully but respectfully disagree with the VAT Tribunal's reasoning and conclusion on that point. I agree that fundraising need not be the sole purpose of an organised event but if fundraising is not the main purpose of the event then I consider it is not a *fundraising event*, it is instead merely an event which has the incidental purpose of being expected to yield a surplus.

47. Judge Kempster described the statement on which the FTT relied as following from his conclusions at [56]-[64], which include the passages we have set out, and it would be inconsistent with those conclusions for the statement to bear the meaning ascribed to it by the FTT. The FTT's reliance on *Loughborough FTT* was, therefore, misplaced.

48. The FTT stated that its approach was consistent with *Blaydon* and *Newsvendors*, which "drew a qualitative dividing line between 'the main purpose' and a 'merely incidental purpose'": FTT[86]. However, neither of those decisions addressed the point which the FTT determined, namely whether Item 1(b) encompassed multiple primary purposes. In fact, the tribunal in *Blaydon* stated (at page 3) that "…a "fundraising event is an event the main purpose of which is to raise funds". While *Newsvendors* and *Cheltenham* did not take the same approach, all of *Blaydon*, *Newsvendors* and *Cheltenham* concerned the pre-2000 provision, which differs from Item 1(b). In *Loughborough Students Union v HMRC* [2013] UKUT 517 (TCC) ("*Loughborough UT*"), the Upper Tribunal specifically referred to the difference in wording, signalling that the pre-2000 authorities cannot simply be read across to Item 1(b). It said this, at [55]-[56]:

> 55. Mr Tallon [counsel for the taxpayer] referred us to *Newsvendors Benevolent Institution v Customs and Excise Commissioners* (1996) VTD 14343 in which the VAT and Duties Tribunal said, at [25], that:
>
> > "… the exemption in Article 13A(1)(o) and in Item 1 of Group 12 is not limited to events the main purpose of which is to raise funds. Both provisions refer to 'a fund-raising event" and do not specify that fundraising must be the main purpose of the event."
>
> As will be obvious to the attentive reader, the version of Item 1 of Group 12 quoted above and with which this appeal is concerned does specify that fund-raising must be the primary purpose of the event. The Tribunal in *Newsvendors Benevolent Institution* was discussing an earlier version of Item 1 of Group 12. In April 2000, Item 1 of Group 12 was amended to include the

> primary purpose conditions. Mr Tallon relies on *Newsvendors Benevolent Institution* for the statement that the exemption in Article 13A(1)(o) is not limited to events the main purpose of which is to raise funds.
>
> 56. Mr Tallon also referred us to *Cheltenham & Gloucester College of Higher Education Students Union v Customs and Excise Commissioners* (1998) VTD 15727 in which a differently constituted VAT and Duties Tribunal followed the line taken by the Tribunal in *Newsvendors Benevolent Institution*.

49. We consider that *Blaydon* and *Newsvendors* did not support the FTT's analysis.

50. The FTT further stated that it considered HMRC's interpretation of Item 1(b) to be unnecessarily restrictive and inconsistent with case law guidance as to the interpretation of VAT exemptions. We do not consider that the case law guidance which we have set out above in relation to the construction of VAT exemptions supports the interpretation adopted by the FTT of the clear statutory language. Taking into account the context and underlying purpose of the exemption, an event "whose primary purpose is the raising of money" cannot permissibly be construed as describing an event of which one important purpose is the raising of money.

51. In conclusion, we consider that the FTT erred in law in construing Item 1(b) as describing an event of which one important purpose was fund-raising.

52. We turn to the FTT's alternative basis for deciding that the Show satisfied Item 1(b). This was that fund-raising should not be viewed as a discrete purpose but as one of two equally important and inter-dependent purposes, which were the main purpose of the Show.

53. The FTT's main findings of fact on this issue are set out at FTT[44]-[46]:

> 44. Mr Stoddart's evidence was that (i) the Society putting the Show on, and (ii) the Society spending money on its charitable aims, were 'entwined'. He said that "you cannot do one without the other", by which he meant (as we understand it, and to paraphrase), without the money from the Show itself, there would be no Show at all. He also said that there were two purposes to the Show: fundraising, and education.
>
> 45. We accept that evidence.
>
> 46. It is also consistent with contemporary documentary evidence.

54. Ms Mannion' skeleton argument submitted that this approach was impermissible because it was "founded on and undermined by" the FTT's error of law in relation to the first alternative, namely its conclusion that Item 1(b) permitted multiple main purposes.

55. We do not agree. We consider that the FTT was here reaching a conclusion that if it was necessary to determine *the single primary purpose* of the Show, as a matter of fact it was wrong to separate the purposes of fund-raising and education. Moreover, the FTT concluded, it was not possible to "sensibly rank" those purposes to determine which was most important. This alternative analysis was a different approach to the construction of Item 1(b), which was not dependent on or infected by the error of law which we have found in relation to the FTT's first approach.

56. In her oral submissions, Ms Mannion argued that this alternative analysis was not permissible, because as a matter of law it is necessary in applying Item 1(b) first to find all the separate purposes of an event and then to find which of those purposes was the single primary purpose. That process, she said, did not permit a finding that purposes were intertwined or

inseparable. In response to a question, Ms Mannion stated that if as matter of fact it was found that two purposes were equally important, then there would be no primary purpose.

57. We do not consider that Ms Mannion's restrictive approach to ascertaining the primary purpose of an event is justified. The requirement that the primary purpose is "the raising of money" should be interpreted in context and taking into account the purpose of the exemption in Item 1. As Mr Firth correctly pointed out, in raising money at an event a charity is very likely to be doing so in the context of an intention to advance its charitable purposes, and, as Mr Firth put in in his skeleton argument, "it makes no sense to exempt events intended to raise funds to pursue the charity's objectives but to exclude exemption if the same event actually pursues those charitable objectives".

58. Looking at Item 1(b) in context, by virtue of Item 1(a) the exemption is applicable only if the event is one "that is organised for charitable purposes by a charity…". In our opinion, the FTT was entitled to conclude that the requirement in Item 1(b) was not failed in a situation where, as a matter of fact, the primary purpose of the event consisted of fund-raising which was inextricably intertwined with the furthering of the charity's charitable purposes. Put another way, Ms Mannion's interpretation produces the curious result that an event can only fall within both (a) and (b) if it is organised for charitable purposes but not primarily for charitable purposes.

59. The alternative basis on which the FTT found that the Show satisfied Item 1(b) was dependent on its findings of fact in this particular case, which we have set out above, which were clearly open to it on the evidence.

60. We should mention that Ms Mannion sought to challenge the FTT's decision, at FTT[87], to reject HMRC's argument that because an annual show is regular and not "exceptional", it cannot be a fund-raising event within the exemption. The FTT was, in our opinion, entitled to regard the annual nature of the event as a relevant factor into account in its assessment, but without affording it significant weight.

61. We consider that the alternative basis on which the FTT reached its conclusion that the Show satisfied Item 1(b) was one which was available to it as matter of statutory construction and on the particular facts found in this case.

62. HMRC's appeal in relation to Ground 1 is dismissed.

**GROUND 2: ITEM 1(C): AN EVENT "THAT IS PROMOTED AS BEING PRIMARILY FOR THE RAISING OF MONEY"**

## The FTT's decision

63. The FTT began by stating as follows, at FTT[107]:

> In its Grounds of Appeal, the Appellant accepts that it did not promote the Show in 2016 as being "primarily" for the raising of money.

64. Having set out Article 132(1)(o) of the PVD, the FTT then observed, at FTT[109]:

> The Directive does not contain - either expressly, or by way of necessary implication - any requirement than an event be promoted *primarily* for the raising of money. The only qualification is that the exemption "is not likely to cause distortion of competition".

65. The FTT noted that in *Loughborough FTT*, Judge Kempster concluded that Item 1(c) was incompatible with the Directive , but that the incompatibility could be "cured" by interpreting it in a conforming manner in accordance with the *Marleasing* principle. The FTT agreed with this conclusion. The FTT stated that the parties agreed that (1) the FTT should continue to interpret and apply VATA as it would have been interpreted and applied prior to the UK leaving the EU, and (2) domestic law is to be interpreted so as to conform with EU law: FTT[118]-[119].

66. In *Loughborough FTT* the FTT concluded that that Item 1 could be read in a conforming manner so as to be compliant with the PVD by omitting Item 1(c) in its entirety. The FTT agreed with the analysis and decision of Judge Kempster and adopted it. However, the FTT noted that it would have reached the same result by deleting the word "primarily" in Item 1(c), rather than the entire sub-clause: FTT[128].

67. The FTT stated at FTT[131]:

> In this appeal, Judge Kempster's reading, or our alternative reading, would each have led to an identical outcome, because the Show - as HMRC in the course of its submissions accepted - was promoted for the raising of money, even if not primarily…

68. The FTT expressed concern at the lack of clarity in HMRC's case as to what compliant promotion would actually have looked like. It considered that HMRC's approach was "self-evidently unworkable, either by taxpayers or HMRC, and gives no certainty to either": FTT[133].

69. The FTT summarised its conclusion at FTT[141]. This was that the Show satisfied Item 1(c) either because Item 1(c) in its entirety was an incorrect transposition of the Directive into UK law, and should be deleted, or because the word "primarily" was an incorrect transposition and should be deleted.

**HMRC's arguments**

70. As it was before the FTT, HMRC's primary position in this appeal is that Item 1(c) is not ultra vires the PVD, so that the question of a conforming interpretation does not arise.

71. Ms Mannion submitted that the FTT erred in law in reaching the contrary conclusion, both in adopting the approach in *Loughborough FTT* and in its own alternative approach of disapplying the word "primarily". HMRC were unable to challenge the conclusion regarding Item 1(c) in *Loughborough FTT* itself , because they were the successful party overall in the appeal, but, said Ms Mannion, HMRC consider that it was wrong.

72. HMRC's position is that Item 1(c) is permissible under the Directive because it is an "evidential tool" to ensure that the relevant event complies with Item 1(n), as being an event whose primary purpose is the raising of funds.

73. Ms Mannion argued that such a condition is permissible under Article 132(2) of the PVD, which permits Member States to introduce "any restrictions necessary" for the purposes of the exemption. Alternatively and in addition, it is permissible under Article 131 for the purpose of ensuring the correct and straightforward application of Article 132(1)(o), and avoiding abuse of the exemption.

74. If we do not accept HMRC's primary position, Ms Mannion argued that in any event the FTT's alternative conforming interpretations of Item 1(c) each overstepped the permissible limits of *Marleasing*. They amounted to giving direct effect to Article132(1)(o), and there had been no argument in this case that it had direct effect.

**Relevant EU law principles**

75. The joint note produced by the parties stated that the parties agreed on the following principles:

> a. VATA 1994 has effect in relation to this appeal in the same way that it had effect immediately prior to IP completion day (EUWA 2018, s.2), including effects as a result of interpretation or disapplication.
>
> b. The REULA [Retained EU Law (Revocation and Reform) Act 2023] amendments and [Finance Act] 2024 savings in respect of VAT have no application to this appeal, because the relevant events occurred before the end of 2023 (REULA 2023, s.22(5)) and, in any event, the claim accrued prior to that time (see, by analogy, *Lipton*, as regards causes of action accruing under EU regulations before UK Withdrawal[4]).
>
> c. The parties suggest that this claim accrued in 2016 when the VAT return containing the relevant output tax, which the Appellant says was overpaid, was submitted (or, in the alternative at the date of the claim for overpayment in 2020). For the purposes of this appeal the outcome is the same, because the cause of action would have been carried through by the EUWA, and REULA/s.28 FA2024 do not apply in relation to anything occurring before the end of 2023.
>
> d. CJEU authorities decided before 31 December 2020 remain binding on this Tribunal (i.e. including *Marleasing*). CJEU authorities decided after that date are not binding, but regard may be had to them (s.6 (1), (2) (7) EUWA).
>
> e. Further, s.6(3) EUWA provides that any question as to the validity, meaning or effect of retained EU law (i.e. VATA), is to be decided, insofar as the law is unmodified after IP Day (as is the case with Item 1 of Group 12), in accordance with any retained case law and retained general principles of EU law.
>
> f. The principle of the supremacy of EU law continues to apply in this appeal, so far as relevant to the interpretation, disapplication or quashing of law made before IP Completion Day (i.e. VATA) (s.5(2) EUWA, pre-REULA amendment/s.28 FA 2024 savings).
>
> g. Directly effective rights, if any, arising from the Principal VAT Directive continue to apply in relation to this appeal, only insofar as permitted by EUWA s.4(2)(b) (pre REULA amendment).

76. We accept and adopt this summary of the principles relevant to this case.

[4][Footnote to the parties' joint note] *Lipton* is obiter on this point (§82) and in any event concerns a cause of action arising under a directly effective EU Regulation. However, in the absence of direct authority on the point the parties proceed on the basis that the underlying principle of finality in litigation, as identified by the Supreme Court in *Lipton*, supports a like outcome in the VAT sphere. However, and for the avoidance of doubt, this indication is without prejudice to the rights of the parties to argue differently in any future case where the point is in issue.

**Issues raised**

77. The following issues arise in relation to Ground 2:

(1) Is Item 1(c) ultra vires Article 132(1)(o)?

(2) If it is ultra vires, is it possible to adopt a *Marleasing* interpretation of Item 1(c) which would result in it conforming with the PVD? In particular, were the conforming interpretations adopted by the FTT permissible under *Marleasing* principles?

(3) If Item 1(c) is ultra vires the PVD but a conforming interpretation is not possible, does Article 132(1)(o) have direct effect?

**Is Item 1(c) ultra vires the PVD?**

78. Article 132(1)(o) provides that Member States shall exempt certain supplies by charities "in connection with fund-raising events organised exclusively for their own benefit, provided that exemption is not likely to cause distortion of competition".

79. It is common ground that Item 1 of Group 12 is compliant with Article 132(1)(o) in restricting exemption to an event that is organised for charitable purposes by a charity and whose primary purpose is the raising of money (sub-paragraphs (a) and (b) of Item 1). However, as the FTT correctly pointed out, there is no indication in the language of Article 132(1)(o) that it is necessary in addition for the event to be "promoted as being primarily for the raising of money" (the "promotion condition").

80. In establishing whether or not Item 1(c) infringes the PVD, we must first construe Item 1(c) using normal domestic principles of construction: *CG Fry and Son Ltd v SSLHC* [2024] EWCA Civ 730 at [74]. Those principles include that the language must be construed in context and with regard to the purpose of the legislation.

81. In our opinion, the determination of whether or not the promotion condition conforms with the PVD depends largely on the purpose and function of the promotion condition.

82. In *Loughborough FTT*, having concluded that Item 1(b) was not ultra vires Article 132, Judge Kempster said this, at [86]:

> Secondly, the condition in Item 1(c) that the event must be promoted as being primarily for the raising of money. Again, this is not explicitly provided in art 132(1)(o). I assume (I heard no submissions on this specific point) the purpose of this condition is to ensure that persons attending (or planning to attend) a fundraising event are aware that it is such an event, and so they regard themselves as benefactors of the organisation rather than mere customers of the goods and services provided at the event. If that is the purpose behind the condition then I consider the restriction is unwarranted. If a charity organises a fundraising event (say, a jumble or nearly-new 20 sale of donated items) then the motivation of customers (benefactors or bargain hunters) does not, I consider, affect the character of the event as a fundraiser. Accordingly, I conclude that Item 1(c) is an unwarranted restriction on the availability of the exemption, and thus is ultra vires art 132(1)(o).

83. Ms Mannion said that HMRC did not accept that Judge Kempster had properly described the purpose of the promotion condition. It followed that the FTT had erred in law in following *Loughborough FTT* on this issue.

84. HMRC's position in relation to purpose and function is as follows:

(1) Item 1(c) is an essential aspect of the legislative definition of a fund-raising event, and provides the evidential tool to ensure that Item 1(b) is complied with, by requiring that the event is promoted in accordance with the primary purpose of raising funds. Ms Mannion's skeleton argument states that Item 1(c) "allows HMRC (and anyone else) to easily appreciate that the event is one which is designed to fundraise for charitable objects (per Item 1(b)), not simply make a commercial or even an incidental profit".

(2) Such a condition is permitted by Article 132(2), as a restriction necessary for the purposes of the exemption, understood in terms of the need to construe the exemption strictly.

(3) Additionally, the promotion condition operates to ensure the correct and straightforward application of the exemption and to avoid abuse, as permitted by Article 131.

85. In relation to the "evidential tool" argument, we accept that the way in which a charity promotes or advertises an event would in practice be one element of the relevant evidence in assessing whether or not Item 1(b), and for that matter Item 1(a), were satisfied on the facts. However, the promotion condition goes much further than that. It singles out one area of relevant evidence and elevates it to a distinct condition for the exemption. The question is whether such an additional restriction on the availability of the exemption is within the terms of the exemption which Member States must implement under Article 132(1)(o). Article 132(1)(o) addresses the status of the supplier, the need for an event, the purpose of the event, the need for it to be organised exclusively for the benefit of the charity, and the need to avoid distortion of competition. The exemption does not identify or address the purpose for which a qualifying event is promoted.

86. Ms Mannion's suggestion that the promotion condition allows HMRC and others to easily appreciate the purpose of the event seems to us to echo the purpose suggested, somewhat speculatively, by Judge Kempster, but which HMRC have rejected as part of their case.

87. Where an event is found as a matter of fact to be both organised for charitable purposes by a charity and to have as its primary purpose the raising of money (as required by sub-paragraphs (a) and (b)), HMRC have not demonstrated any justifiable basis on which that event should then fall outside the exemption in Article 132(1)(o) purely because it was not promoted as being primarily for raising money.

88. Ms Mannion argued that the promotion condition was justified under Article 132(2). This allows Member States to introduce "any restrictions necessary" for the purposes of Article 132(1)(o). We reject that argument, for the following reasons.

89. While the words "any restrictions necessary" are wide, they are not to be construed in isolation. Article 132(2) itself refers to "any restrictions necessary, in particular as regards the number of events or the amount of receipts which give entitlement to exemption". The reference to the number of events and amount of receipts is not exhaustive, but it is indicative of the types of condition which might be considered to be "necessary". An example of such a condition can be found in the definition of "fund-raising event" in the pre-2000 provision, which referred to an event "which is separate from and not forming any part of a series or regular run of like or similar events". Another example is set out in Notes 4 and 5 to Items 1 to 3 of Group 12, which state as follows:

> (4) Where in a financial year of a charity or qualifying body there are held at the same location more than 15 events involving the charity or body that are of the same kind, items 1 to 3 do not apply (or shall be treated as having not applied) to a supply in connection with any event involving the charity or body that is of that kind and is held in that financial year at that location.
>
> (5) In determining whether the limit of 15 events mentioned in Note (4) has been exceeded in the case of events of any one kind held at the same location, disregard any event of that kind held at that location in a week during which the aggregate gross takings from events involving the charity or body that are of that kind and are held in that location do not exceed £1,000.

90. The wording of Article 132(2) as a whole, and these examples, suggest that in determining whether a restriction to the exemption is "necessary", the central question is whether it is necessary to avoid distortion of competition. That proposition appears to have been the view of the Upper Tribunal in *Loughborough UT*, at [66], and is recorded as being agreed by counsel for HMRC in that case (at [57]). If that is correct, then since HMRC has produced no evidence, beyond mere assertion, that the promotion condition is necessary in order to avoid distortion of competition, we consider that HMRC's argument based on Article 132(2) is not made out. Indeed, as a matter of principle, we find it hard to see what relevance the promotion condition, as distinct from Items 1(a) and (b), could have to the prevention of distortion of competition.

91. Ms Mannion submitted that "necessary" in Article 132(2) has a wider meaning than necessary to avoid distortion of competition. However, even if that is correct, HMRC have not established on what basis the separate promotion condition would be *necessary* in relation to the exemption, as contrasted to being what HMRC describe as a helpful evidential tool in relation to Item 1(b). We agree with the FTT's observations and findings to this effect, at FTT[129]-[130].

92. HMRC's final argument was that the promotion condition is permitted under Article 131, which applies to all VAT exemptions, as being a condition imposed "for the purposes of ensuring the correct and straightforward application of [the exemption] and of preventing any possible evasion, avoidance or abuse".

93. We reject that argument, for three reasons.

94. First, the correct and straightforward application of the exemption must be determined by reference to the exemption as set out in Article 132(1)(o). That is an exemption for fund-raising events organised by charities for charitable purposes. As we have explained above, we do not agree that the correct application of an exemption on those terms requires or justifies a condition relating to promotion. Further, far from ensuring the straightforward application of the exemption, in agreement with the FTT we consider that, as a practical matter, a condition requiring determination of the primary purpose for which the event is promoted introduces additional uncertainty in its application.

95. Second, CJEU law establishes that Article 131 does not permit conditions which narrow the subject-matter of the exemption. In *Commission v Spain* C-124/96, the CJEU said this in relation to the predecessor to Article 131, Article 13A(1) of the Sixth Directive 77/388/EEC, at [10]-[13]:

> 10 The Spanish Government, supported by the United Kingdom Government, begins by arguing that the introductory sentence of Article 13(A)(1) of the

> Sixth Directive shows that Member States have a wide discretion in implementing the exemptions provided for.
>
> 11 It should be observed in that regard that the conditions which may be laid down pursuant to Article 13(A)(1) of the Sixth Directive to do not in any way affect the definition of the subject-matter of the exemptions envisaged by that provision (Case 8/81 *Becker v Finanzamt Munster-Innenstadt* [1982] ECR 53, paragraph 32).
>
> 12 Those conditions are intended to ensure the correct and straightforward application of the exemptions and refer to measures intended to prevent any possible evasion, avoidance or abuse (*Becker*, cited above, paragraphs 33 and 34).
>
> 13 The argument based on the introductory sentence of Article 13(A)(1) must therefore be rejected.

96. We consider that the promotion condition does affect the subject-matter of the exemption since, as we have said, that exemption is an exemption for fund-raising events organised by charities for charitable purposes.

97. Third, HMRC's case in relation to Article 131 is mere assertion, and that is not enough. In *Quadrant Amroq Beverages SRL* C-332/21, the CJEU stated as follows, at [63]:

> Consequently, the Member States cannot make the application of the exemption…conditional on compliance with conditions which are not proven, by concrete, objective and verifiable evidence, to be necessary to ensure the correct and straightforward application of such an exemption and to prevent any evasion, avoidance or abuse (see, by analogy, judgment of 9 December 2010, *Repertoire Culinaire*, C-163/09, EU:C:2010:752, paragraph 53).

98. That decision, and other CJEU decisions, concern exemptions said to be justified under provisions other than Article 132(2), but we see no reason why an exemption said to be justified under Article 132(2) should not require evidence.

99. In conclusion, we consider that the FTT was correct in deciding that the promotion condition is ultra vires Article 132(1)(o).

**A conforming interpretation of Item 1(c)**

100. In view of our conclusion that the promotion condition is ultra vires, it is necessary to determine whether Item 1(c) can be interpreted in conformity with Article 132(1)(o). The case of *Marleasing* establishes that national courts have a duty to interpret domestic legislation, as far as possible, in the light of the wording and the purpose of the relevant directive in order to achieve the result pursued by the latter; in other words, in conformity with the directive.

101. Following the hearing we directed the parties to provide further written submissions on a number of issues, including the potential application of *Marleasing* to Item 1(c). In a subsequent written reply, which had not been requested by the Tribunal, Mr Firth sought to raise the argument that the permission to appeal granted to HMRC was restricted to the issue of whether Item 1(c) was compatible with the Directive, and did not extend to whether (if it was not compatible) the FTT's application of *Marleasing* was permissible. We reject that argument. The relevant ground of appeal, for which permission was granted, was that "the FTT erred in law in its interpretation of [Item 1(c)] and wrongly excised it (or alternatively the word 'primarily') from the text of Item 1". While HMRC's primary case was that Item 1(c) was compatible with the Directive, this ground clearly encompasses a secondary challenge to both

of the alternative conforming interpretations on which the FTT relied, and that was clear from HMRC's skeleton argument.

102. The approach to be taken in applying a conforming interpretation was set out by Sir Andrew Morritt C in *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 ("*Vodafone 2*"), at [37]-[38]. The relevant principles can be summarised as follows:

> (1) The obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> (a) it is not constrained by conventional rules of construction;
>
> (b) it does not require ambiguity in the legislative language;
>
> (c) it is not an exercise in semantics or linguistics;
>
> (d) it permits departure from the strict and literal application of the words which the legislature has elected to use;
>
> (e) it permits the implication of words necessary to comply with Community law obligations; and
>
> (f) the precise form of the words to be implied does not matter.
>
> (2) The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
>
> (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed: an interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; and
>
> (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to evaluate.

103. Ms Mannion referred to the need first to identify precisely in what respects the domestic provision infringes EU law, before it can be decided whether a conforming interpretation is possible, relying for this proposition on statements made recently by this Tribunal in *The Trustees of the Panico Panayi Accumulation and Maintenance Settlements Numbers 1 to 4 v HMRC* [2024] UKUT 00319 (TCC), at [128] and [130]. Ms Mannion criticised the FTT for failing to have carried out this preliminary step.

104. For our part, while we agree that an acceptable conforming interpretation must identify the precise infringement and do no more than is necessary to remedy that infringement, we consider that a rigid approach whereby, as a separate step, the precise infringement must first be identified will not necessarily be the best way of approaching the issue in all cases. For the reasons set out above, we have concluded that Item 1(c) is not compatible with the PVD, and that the FTT was justified in reaching the conclusion. The next question in light of that determination is whether a conforming interpretation is possible. That will critically turn on whether or not a particular conforming interpretation goes against the grain of the legislation and crosses the line between interpretation and legislation. The proper resolution of that

question will necessarily take into account the precise infringement which has been determined to arise.

105. A conforming interpretation must not "go against the grain" of the legislation. In *Vodafone 2*, reference is made in this context to "the underlying thrust" of the legislation, and the impermissibility of an interpretation which is inconsistent with a fundamental or cardinal feature of the legislation.

106. This constraint is sometimes referred to as prohibiting an interpretation which is "*contra legem*". In *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen* (Case C-441/14), Advocate General Bot defined this as follows, at paragraph 68 of his Opinion :

> The Latin expression "*contra legem*" literally means "against the law". A *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of *contra legem* interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive. The Court has acknowledged that *contra legem* interpretation represents a limit on the obligation of consistent interpretation, since it cannot require national courts to exercise their interpretative competence to such a point that they substitute for the legislative authority.

107. If applied too literally, the expression *contra legem* might be thought to prohibit many conforming interpretations which have been reached by the CJEU and UK courts. The terms in which the constraint is expressed in *Vodafone 2* are, in our opinion, a more helpful way of framing the prohibition. We respectfully endorse the comments of the Court of Appeal to this effect in *British Gas Trading Ltd v Lock and Anor* [2016] EWCA Civ 983. Having summarised the passage above from the Opinion of Advocate General Bot, Sir Colin Rimer said this, at [102]-[104]:

> 102. As it seems to me, if this element of the *contra legem* principle as explained by the EU cases is applied at anything approaching face value, it would be likely to frustrate the possibility of a conforming interpretation in many cases…
>
> 103. What emerges from *Ghaidan* and the summary in *Vodafone 2*, the latter having since been endorsed by the Supreme Court in *Swift* and *Nolan*, is that the United Kingdom has dealt with the *contra legem* principle in a manner that is manifestly more in line with the EU objective of conforming interpretation at member state level than might be the case by anything approaching a rigid application of the principle summarised by Advocate General Bot in *Dansk*. When faced with the question of whether a conforming interpretation can be adopted, the courts of the United Kingdom do not confine themselves to a consideration of the literal meaning of the language that may appear to stand in their way; they approach the task by reference to the broader considerations of whether a conforming interpretation will be in line with the grain or underlying thrust of the legislation. That is an approach that ought, I would think, to attract nothing but commendation by the CJEU.
>
> 104… In my view the critical question comes down to whether the conforming interpretation of the WTR for which Mr Lock contends is or is not within the grain or underlying thrust of that legislation. If it is, I consider it ought to follow that the interpretation favoured by the tribunals below is one this court should uphold. If it is not, a conforming interpretation is not possible.

108. The further submissions from the parties as to the grain or underlying thrust of the relevant legislation produced similar results. Mr Firth stated that "the grain (as opposed to textual detail) of the legislation is exempting fundraising events organised by charities". Ms Mannion stated that "the 'purpose', 'grain' or 'thrust' of Item 1…is, narrowly, to encourage charitable fundraising through events. It does not extend beyond that specific purpose to wider activities which further charitable purposes, or support the application of a loose or weak definition of a fundraising event to further that supposed goal".

109. We consider that Ms Mannion is right to focus on the grain or thrust of Item 1 as a whole, rather than the grain or thrust of sub-paragraph (c), or (for example) the use of "primarily" in that sub-paragraph. We also agree with Mr Firth that, if the grain or thrust is considered at too granular a level, there is a risk that almost any conforming interpretation might be seen as prohibited.

110. In our opinion, the underlying thrust and purpose of Item 1(c) is to encourage fundraising events organised by charities for charitable purposes by providing that supplies in connection with such events are exempt.

111. The issue is whether the alternative conforming interpretations of Item 1(c) adopted by the FTT go against, or are inconsistent with, this underlying thrust and purpose, and cross the boundary between interpretation and amendment.

112. The FTT decided that there were two permissible conforming interpretations. The first, which we refer to below as Interpretation 1, is to delete sub-paragraph (c) in its entirety. The second, which we refer to as Interpretation 2, is to delete the word "primarily" from sub-paragraph (c).

113. We consider that Interpretation 2 is clearly preferable to Interpretation 1.

114. Ms Mannion argued that Interpretation 1 went beyond the type of construction permitted by *Marleasing*, because it entailed the wholesale deletion of one element of the definition of fund-raising event, and amounted to giving direct effect to Article 132(1)(o). Mr Firth argued that the authorities establish that the deletion of wording is not necessarily beyond the permissible limits of a *Marleasing* construction, and that the precise manner of such construction should not be constrained. He relied on the following passage from *Vodafone 2*, at [39]:

> Without in any way suggesting that it is incumbent on he who contends for a conforming interpretation to spell out exactly what it is…it undoubtedly assists in the consideration of whether or not it is a permissible interpretation to see on paper how it is suggested that it would be effected, whether by interpolation, deletion, rewording or otherwise.

115. We do not read this passage as authority that deletion is a permissible method of conforming construction. It is simply making the uncontroversial point that being able to consider the manner of achieving a particular construction is helpful to a court or tribunal in deciding whether that construction is permissible under *Marleasing* principles.

116. We do not have to decide whether or not Interpretation 1 is permissible, because we have concluded that Interpretation 2 is permissible. A construction of Item 1(c) which requires that the relevant event is promoted as being for the raising of money, but without requiring that it is promoted as being primarily for that purpose, is, in our opinion, a permissible conforming

construction. It does not go against what we have determined, or what the parties have submitted, to be the grain or thrust of Item 1. Nor is it inconsistent with Article 132(1)(o).

117. Ms Mannion stated in her further written submissions that "this approach was in principle permissible under *Marleasing*, but was not in accordance with it, because it was not effective in meeting any supposed infringement of EU law". Ms Mannion argued that "it could only be an effective remedy if the Tribunal found that the aspect of Item 1(c) which was incompatible with the PVD is not the imposition of the promotion requirement *per se*, but the requirement that the event is promoted as being 'primarily' for fundraising".

118. We do not agree with Ms Mannion's arguments. They amount to an assertion that the only justifiable conforming interpretation would be Interpretation 1, but since Interpretation 1 goes against the grain it is not permitted. That is illogical. As explained above, we have concluded that Item 1(c) infringes the PVD. In light of that conclusion, our task is to determine whether there is an acceptable conforming construction of sub-paragraph (c), keeping in mind that such a construction should go no further than is necessary to remedy any infringement and that it must not in any event go against the grain. We have concluded that Interpretation 2 meets those requirements. That is because it is a construction which is effective in meeting the infringement, while doing no more than is necessary, and not going against the grain of Item 1.

**Direct effect**

119. Since we have decided that the promotion condition can be interpreted in a way which conforms with the PVD, we do not need to determine whether Article 132(1)(o) should be treated as having direct effect. While we did receive written submissions on this issue, it is not straightforward and we have decided that it is best dealt with in a case where it is dispositive, particularly since the issue of direct effect was not the subject of submissions before the FTT and as a consequence was not discussed in the Decision.

**Item 1(c): Conclusion**

120. We interpret Item 1(c) in conformity with Article 132(1)(o) as requiring that the event be "promoted as being for the raising of money". On the basis of the FTT's finding of fact at FTT[131] (set out at paragraph 67 above), the Show satisfied this requirement. Therefore, HMRC's appeal in relation to Ground 2 is dismissed.

**DISPOSITION**

121. HMRC's appeal against the FTT's decision to allow the 2016 repayment claim by the Society is dismissed.

**MR JUSTICE EDWIN JOHNSON**
**JUDGE THOMAS SCOTT**

**Release date: 09 January 2025**