# TC03288

**Appeal number: TC/2009/14438**

***VAT- exempt services - Value Added Tax Act 1994, Schedule 9, Group 9, item 1(d), note (5) and Article 132(1)(l) of the Principal VAT Directive (2006/112/EC) - employers federation providing services to members in return for annual subscriptions - whether membership subscriptions exempt from VAT - whether 'trade union' association - whether primary purpose of federation included making representations to third party decision makers - whether objectives of association were for the collective interests of members***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**BRITISH PRINTING INDUSTRIES FEDERATION** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL**
**SUSAN STOTT**

**Sitting in public at Alexandra House, The Parsonage Manchester on 25 - 28 March 2013**

**Mr Philip Simpson for the Appellant**

**Mr James Puzey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### The Appeal

1. This an appeal by British Printing Industries Federation ("the Appellant" or "BPIF") against decisions by HMRC:

(a) dated 17 December 2008 and 8 September 2009, that the Appellant's membership subscriptions do not qualify for exemption from VAT and are taxable at the standard rate and the consequent decision to refuse payment of a voluntary disclosure submitted on 21 December 2007 in the net sum of £1,060,047 in respect of the period 1 September 2004 to 31 March 2007 ("the second period");

(b) dated 19 January 2010 and 19 March 2010, to refuse payment of a voluntary disclosure submitted on 27 March 2009 in the sum of £6,011,095, in respect of the period 1 January 1973 to 31 March 1996 ( "the first period" or "the Fleming claim");

(c) dated 30 August 2011, to refuse payment of a voluntary disclosure submitted on 28 June 2011 in the sum of £1,298,281 in respect of the VAT period 1 April 2007 to 31 March 2009 ("the third period").

### Background

2. The Appellant operates from 2 Villiers Court, Meriden Business Park, Copse Drive, Coventry, CV5 9RN and is registered for VAT under number 232 2271 07 with effect from 1 April 1973.

3. By letter dated 21 December 2007 the Appellant's representative submitted two voluntary disclosures, one relating to over declared output VAT in the sum of £1,375,870 and one relating to over claimed input VAT in the sum of £315,823, constituting a net repayment of £1,060,047. The disclosures were made on the basis that the Appellant had accounted for output tax on subscriptions charged to members and reclaimed input tax incurred on related costs.

4. The Appellant's view was that the subscriptions should have been treated as exempt under VAT legislation, with a proportion of VAT incurred on the costs of generating the income disallowed, which was calculated in accordance with their partial exemption special method. In accordance with VATA 1994 ("VATA") Item 1 of Group 9 of Schedule 9 its *"primary purpose was to make representations to government on legislation and other public matters affecting the business or professional interest of its members."*

5. The Appellant said that it was the principal support organisation for the UK print, printed packaging and graphic communications industry. It provided benefits to members in return for membership subscriptions. It also provided a range of training and consultancy services to its clients in the printing industry.

6. In broad outline the Respondents' grounds for refusing the Appellant's initial claim (the second period) were that the primary purpose of the Appellant was not to make representations to the UK government on behalf of its members. HMRC said that a review of the voluntary disclosures, and an analysis of the Appellant's turnover, the benefits of being a member, membership pricing and staff time, showed that the primary purpose of the Appellant was to provide a taxable service to members and non-members for a charge, either via a higher subscription fee, which related only to providing taxable services, or via additional charges.

7. In a decision letter dated 17 December 2008 HMRC said that their enquiries had established that:

a. the Appellant had 2,000 members and subscriptions were silver, gold or platinum, each respectively having an increased level of service, silver members only received telephone support compared to platinum members who received visits. Members received a range of goods and services including a discounted price on attendance at conferences, consultancy, legal and other services provided by the Appellant;

b. 51% of income in 2006/7 was obtained from providing services and not subscriptions;

c. the subscriptions themselves included many taxable services, and when the value of those services were calculated the percentage of income derived from the provision of taxable services to members and non-members was 81% of total income;

d. from the three levels of subscriptions, only 4.5% of membership income was derived from the basic subscription level, as the majority of members had gold or platinum memberships which provided the additional taxable services, even though the subscription rate was two to three times the cost of basic silver membership;

e. there were a total of forty-two benefits available to members from the three subscription levels, but only nineteen very basic benefits were available to silver members and, of those benefits, only nine could be considered to be connected to representation, amounting to 21% of all benefits;

f. in the prospectus provided to new members and on the Appellant's website, the area of representation formed a minor part of the benefits described for being a member of the organisation;

g. whilst it was difficult to calculate the actual time spent on making representations to the UK Government or related organisations, it was clear that it made up a minor part of the total work of the staff of the Appellant and most of the staff time appeared to be related to providing taxable services.

8. By letter dated 27 March 2009, the Appellant's representative re-stated that membership subscriptions were exempt supplies for the purposes of VAT and submitted the Fleming claim. This claim was subsequently rejected by the Respondents' in letters dated 19 January 2010 and 19 March 2010.

9. On 30 March 2009 the Appellant's representative responded and referred to paragraph 11.11 of the Respondents' Public Notice 701/05 which, in determining the primary purposes of an association, says:

"The primary purpose is not necessarily the sole purpose of a society, but is the main or principal purpose. An association can only have one primary purpose. The primary purpose should be clear from the following:

> (a) the objects/objectives set out in the associations Memorandum and Articles of Association or constitution;
>
> (b) the powers and activities of the association;
>
> (c) what the association itself considers its primary purpose to be;
>
> (d) what the members of the association consider its primary purpose to be."

10. The Appellant stated that the federation satisfied the above criteria and that the constitution and the powers and activities of the Appellant supported their view. The Appellant said that an organisation could have only one primary purpose, and the Respondents had not distinguished between that primary purpose and the activities performed to achieve that purpose. In order to represent its members and to lobby effectively, it stated that the Appellant had to be familiar with all the issues that concerned the industry, and the knowledge that was built up had to be shared with the members to ensure that they were aware of current issues affecting them that could be the subject of representations to the UK Government. All the activities and benefits referred to in the Respondents' letter of 17 December 2008 (as summarised in paragraph 7 above) were ancillary to the primary purpose of the Appellant.

11. After a reconsideration of their decision, the Respondents upheld their decision, notifying the Appellant of this in letters dated 23 July 2009 and 8 September 2009. The Respondents stated that members who signed up would not view the primary purpose of the Appellant as representation. On the Appellant's website, there was a nine point item of membership benefits, of which public representation was number eight. Furthermore, under "member levels", of which there were three, representation was listed within the last group of benefits headed as general services. The other benefits within that group, which included a monthly newsletter and bulletins, suggested that representation was not the main purpose. The first benefit listed was the group headed "Human Resources" and the Appellant described itself as a business support organisation. In the Respondents' view, the members would consider the primary purpose to be offering support in the area of human resources.

12. On 23 September 2009 the Appellant lodged a Notice of Appeal in respect of the decision of 17 December 2008 on the grounds that:

> "Exemption per item 1(d) of Group 9 of Schedule 9 of VAT 1994 should apply to membership subscriptions on the basis that lobbying is the primary purpose of the organisation. Customs will not accept that primary purpose is lobbying despite sufficient evidence having been supplied."

13. On 15 April 2011 the Appellant lodged "Amended Reasons for Appealing" stating that it is a trade union within the meaning of that expression as used in Article 132(1)(l) of the Principal VAT Directive (2006/112/EC), which was formerly enacted as Article 13A(1)(l) of the Sixth Directive (77/388/EC).

14. The Appellant said that:

a. Article 132(1)(l) and its predecessor had direct effect in so far as it was not properly implemented into UK law and that the services provided to members of the Appellant in return for their subscriptions should therefore be treated as exempt.

b. Alternatively, if not of direct effect, Item 1(d) of Schedule 9 to Group 9 of the Value Added Tax Act 1994 ("VATA") must be interpreted so as to include bodies with "aims of a trade union nature", as interpreted for the purposes of EU law.

c. That, in any event, the Appellant was a non-profit making organisation with aims of a trade union nature at all relevant times.

15. The amended Notice of Appeal also made it clear that the Fleming claim ran from 1 January 1978 rather than 1973 as it was accepted that no such entitlement to exemption existed prior to Article 13A(1)(l) coming into force.

16. On 28 June 2011, the Appellant submitted a further claim for the third period in the sum of £1,298,281, re-stating that membership subscriptions were exempt supplies for the purposes of VAT. This claim was subsequently rejected by the Respondents in a letter dated 30 August 2011.

17. In July 2011 the Appellant served a large amount of additional material on the Respondents, which the Appellant considered supported its case. This led to the appeals being stood over while the Respondents considered the material.

18. By Notice dated 9 September 2011, the Appellant appealed against the Respondents decision of 30 August 2011 on the same grounds as the earlier appeals. The new appeal was consolidated with the earlier appeals.

19. Having considered the additional material submitted in July 2011, by letter dated 13 June 2012, the Respondents advised the Appellant that the material did not provide grounds for the Respondents to change their ruling relating to the primary purpose of the Appellant and that, as a consequence, the decision not to repay the amounts submitted by the Appellant remained unchanged.

20. HMRC said that the evidence available to the Respondents shows that the Appellant does not supply to its members, services (and in connection with those services, goods) which are:

(a) both referable to its aims, and

(b) available without payment other than a membership subscription

(c) by a non-profit making organisation

(d) whose primary purpose is to make representations to the Government on legislation and other public matters which affect the business or professional interests of its members.

21. HMRC said that, taking each of the above in turn:

(a) Whilst the Appellant's constitution allows for representations to Government, no such evidence of this having been carried out had been provided.

(b) The Appellant provides services which are only available for a charge, either via a higher subscription fee or via additional charges. The exemption, if it applies, can only cover those benefits received in return for the membership fee, and other supplies, for which a separate charge is made, are taxable.

(c) The Appellant's constitution does not contain a non-distribution clause and the budget projection shows that the Appellant has a commercial division, which indicates that it aims to make a profit.

(d) The evidence available to the Respondents shows that the making of representations to the UK Government on legislation and other public matters which affect the business or professional interests is not the primary purpose of the Appellant. This provision is to be interpreted narrowly and, whilst it may form part of the Appellant's activities, the evidence discloses that the Appellant's primary purpose is the provision of taxable services.

Evidence

22. The Appellant's evidence included witness statements by individuals either employed by or associated with the federation, some of whom gave oral evidence to the Tribunal. We were also provided with miscellaneous documentation comprised in thirty-five lever arch ring binders extending to over 8,500 pages. As observed by HMRC the documentation was not grouped or sorted thematically or chronologically and many were not referred to in the witness statements or preliminary submissions. It is fair to say that we found it difficult to evaluate this volume of information, (which included four volumes of miscellaneous correspondence and e-mails for some but not all the relevant years, six volumes of national council, regional board and various committee minutes of meetings, copy publications such as the Appellant's Annual Review, again for some but not all years, training, miscellaneous promotional

material and information relating to various projects in which the appellant had been involved or promoted). The Appellant disclosed two lists of additional material in 2011 and produced these on CD Rom. There are several thousand documents thereon but we are informed that it is evidence on which the Appellant does not now seek to rely. We were also provided with a list of agreed authorities.

Agreed scope of the appeal

23. The Appellant stated at the beginning of the hearing that it was no longer insisting on the alternative ground of appeal that the Appellant's activities fell within the ambit of domestic legislation under item 1 of Group 9 of Schedule 9 VATA (*that its primary purpose is the making of representations to the Government on legislation and other public matters)*. The Appellant said that its principle aim consisted of making representations to third parties on behalf of its members, which it argued was an aim of a trade union nature and within the scope of Article 132 (1)(l) of the Principal VAT Directive.

24. HMRC observed that the Appellant's reliance on European Union law alone did not render consideration of domestic VAT legislation superfluous as it was still necessary to consider whether the membership of the Appellant is restricted wholly or mainly to persons whose business or professional interests are directly connected with the Appellant's purposes (note 5 to Group 9 Schedule 9 VATA).

25. HMRC agreed that for the purposes of the appeal the Appellant could rely directly on Article 132(1)(l) of the Principal VAT Directive (2006/112/EC) provided it established that it satisfied the necessary provisions.

26. It was agreed that the issue for determination by the Tribunal is whether the Appellant can rely on Article 13A(1)(l) to the Sixth Directive (now Article 132(1)(l) of the Principal VAT Directive) in so far as it refers…to the *supply of services to members in their common interest* by a non-profit making organisation (which is agreed), *with aims of a trade union nature*. HMRC accept that if the Appellant comes within the meaning of such a body, then it may rely on such exemption.

27. Following witness evidence on behalf of the Appellant, HMRC accepted that the Appellant had demonstrated that it was a non-profit making organisation, within the meaning of the European Union law and therefore this was not an issue for determination by the Tribunal.

28. The parties agreed that it was open to the Tribunal to make a declaration that the Appellant was an organisation falling within the provisions of European Union Law for part only of the relevant periods, but that if the Tribunal allowed the appeal they remained at issue with regard to a) unjust enrichment b) whether member subscriptions were paid for a single exempt supply or a mix of exempt and standard rated supplies and c) partial exemption calculations. These were therefore matters on which the Tribunal was not being asked to adjudicate upon in the appeal and would fall to be dealt with at a later stage if necessary.

Relevant statutory provisions

29. EU Law

Article 13A(1)(l) of the Sixth Directive

A Exemptions for certain activities in the public interest

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and preventing any possible evasion, avoidance or abuse:

…

(l) the supply of services and goods closely linked thereto for the benefit of their members in return for a subscription fixed in accordance with their rules by non-profit-making organisations with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civic nature; provided that this exemption is not likely to cause distortion of competition;

Article 131 of the PVD:

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 State 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.

Article 132(1)(l) of the PVD:

(1) Member States shall exempt the following transactions: …

(l) The supply of services, and the supply of goods closely linked thereto, to their members in their common interest in return for a subscription fixed in accordance with their rules by non-profit-making organisations with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civic nature, provided that this exemption is not likely to cause distortion of competition;

Article 133(a) of the PVD:

Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

(a) The bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

Article 134 of the PVD:

The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

(a) Where the supply is not essential to the transactions exempted;

(b) Where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.

Domestic Statute

Items 1(a) and 1(d) of Group 9 to Schedule 9 of VATA:

1 The supply to its members of such services and, in connection with those services, of such goods as are both referable only to its aims and available without payment other than a membership subscription by any of the following non-profit making organisations –

(a) a trade union or other organisation of persons having as its main object the negotiation on behalf of its members of the terms and conditions of their employment;

…

(d) an Appellant, the primary purpose of which is to make representations to the Government on legislation and other public matters which affect the business or professional interests of its members.

Notes 2 and 5 to Group 9 of Schedule 9 of VATA:

(2) "Trade union" has the meaning assigned to it by section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992. …

(5) Paragraph (d) does not apply unless the Appellant restricts its membership wholly or mainly to individuals or corporate bodies whose business or professional interests are directly connected with the purposes of the Appellant.

Meaning of "trade union"

30. The parties agreed that the leading authority on the meaning of "trade union" within the context of the provisions of EU law, and in fact the only decided case by the ECJ on the exemption, is the decision of the ECJ in case of *the Institute of the Motor Industry v CEC* [1998] ECR I-7052 ("*IMI*").

31. In the case of *IMI*, in respect of proceedings between the Institute of the Motor Industry and the Commissioners of Customs and Excise concerning the application of an exemption from VAT for items in Group 9 of Schedule 9 VATA, the VAT and Duties Tribunal referred to the ECJ for a preliminary ruling under Article 177 of the EC Treaty and determination of the ordinary meaning of the expression "trade union" used in the English version of Article 13A(1)(l) of the Sixth Council Directive 77/388/EEC.

32. The Tribunal in *IMI* observed that the term "syndicale" in the French version, and its equivalents in certain other language versions, appeared to be used in a wider sense than that of the expression "trade union" in the English version and its equivalents in other language versions. Consequently, the Tribunal was uncertain whether the Institute of the Motor Industry fell within the scope of Article 13A(1)(l) of the Directive.

33. In his preliminary Opinion the Advocate General observed (in paragraphs 33 to 37) that the expression "aims of a trade-union nature" in some of the language versions of the provision are capable of having a different meaning from those used in other language versions.

34. The expressions used in several versions, including the English ("aims of a trade-union nature"), refer essentially to the aims of workers' trade unions, whereas those used in other versions, including the French ("objectifs de nature syndicale"), refer also to the aims of professional Appellants which do not constitute such unions.

35. In arriving at its determination, the ECJ said:

> '16. It is settled case-law that the wording used in one language version of a Community provision cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of Community law. In the event of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see Case C-372/88 *Milk Marketing Board v Cricket St Thomas* [1990] ECR I-1345, paragraphs 18 and 19).
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> 17. It should be borne in mind here that the terms used to specify the exemptions envisaged by Article 13 of the Directive are to be interpreted strictly, since they constitute exceptions to the general principle that turnover tax is levied on all services supplied for consideration by a taxable person (Case 348/87 *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* [1989] ECR 1737, paragraph 13).

18. It must also be remembered that the aim of Article 13A of the Directive is to exempt from VAT certain activities which are in the public interest. As the Court has stressed on several occasions (Case 107/84 *Commission v Germany* [1985] ECR 2655, paragraph 17, and *Stichting Uitvoering Financiële Acties*, paragraph 12), that provision does not provide exemption for every activity performed in the public interest, but only for those which are listed and described in great detail.

19. In the light of those considerations, it must be held that a non-profit-making organisation which aims to promote the interests of its members cannot, where that object is not put into practice by defending and representing the collective interests of its members vis-à-vis the relevant decision-makers, be regarded as having objects of a trade-union nature within the meaning of Article 13A(1)(l) of the Directive.

20. The expression 'trade-union' in that provision means specifically an organisation whose main object is to defend the collective interests of its members - whether they are workers, employers, independent professionals or traders carrying on a particular economic activity - and to represent them vis-à-vis the appropriate third parties, including the public authorities.

21. Thus, a non-profit-making organisation whose main object is to defend and represent the collective interests of its members satisfies the criterion of exercising an activity in the public interest, which is the basis of the exemptions set out in Article 13A(1)(l) of the Directive, in so far as it provides its members with a representative voice and strength in negotiations with third parties.

22. It is for the national tribunal to assess, in the light of the above considerations, whether an Appellant such as the Institute is an organisation with aims of a trade-union nature within the meaning of Article 13A(1)(l) of the Directive.

23. The answer to the national tribunal's question must therefore be that, for the purposes of Article 13A(1)(l) of the Directive, an organisation with aims of a trade-union nature means an organisation whose main aim is to defend the collective interests of its members - whether they are workers, employers, independent professionals or traders carrying on a particular economic activity - and to represent them vis-à-vis the appropriate third parties, including the public authorities.'

36. The parties agree that the Tribunal is bound to apply the decision of the ECJ such that the meaning of "trade union", as explained therein, must be applied when determining whether the Appellant is a body with aims of trade union nature for the purposes of Article 132(1)(l) of the Principal VAT Directive.

37. HMRC do not accept that as a matter of law all the activities claimed by the Appellant as being within the scope of trade union activity achieve that designation, even on the basis of the wider definition provided in the *IMI* case. HMRC submit that further and alternatively, even if at some point in its existence the Appellant did have the primary purpose of acting as a trade union, it would not necessarily follow that that has been the position throughout.

Witness evidence

Mr Andrew Norman Brown

38. Evidence was given by Mr Andrew Norman Brown, a self-employed Public Affairs Advisor who was previously employed by BPIF between 1981 and 2011 in various capacities. In the early years he held positions which involved dealing with and advising on industrial relations in the print industry before becoming Director of Education and Training in 1992 and then Commercial Director, Industrial Competitiveness Director and finally Corporate Affairs Director until his retirement in 2006.

39. Mr Brown referred to the BPIF as "the principal employers association, trade association and business support organisation representing the UK print, printing packaging and graphic communications industry". He described how the federation was founded in the early 20th century "to provide a counterpoint to the growing strength of the unions in the printing industry". Small local bodies of employers formed in the late 19th century and came together in 1901 to form the Federation of Master Printers. This was a national federation with members throughout the UK. Members were local associations of printers, each of which had, in turn, its own members. In 1919 the federation was reconstituted and its members became regional Printing Industry Alliances each covering a larger area than the local associations. There were eleven alliances, which collected subscriptions from their local member companies, each alliance paying an affiliation fee to BPIF.

40. Mr Brown said the BPIF now covers England, Wales and Northern Ireland, there being a separate association for Scotland. It is divided into six regions being the North Western, North Eastern, Midlands, Eastern, South Eastern and South Western. The regions have been in existence since 1981 when the BPIF become a unitary trade association, which replaced the eleven alliances. Each region has its own board.

41. BPIF's governing body is the National Council. It has had a Board of Directors since 2000 and below that are heads of function (e.g. Marketing and Communications, Health and Safety, Legal and Human Resources and Financial Control). Mr Brown said that it could be seen from the minutes of the National Council that issues such as the profitability of the printing industry, employment, competition, public capacity and industrial relations were major topics on its agenda

42. Mr Brown said that, in his view, the main purposes of the BPIF are to:-

1. Represent the interests of its member companies, to external policy makers and influencers whose decisions and views impact upon them.
2. To provide networks, survey data and facilities for members to exchange ideas, information and best practice
3. To provide business support services to member companies (and to non-member companies) in order to assist in resolving problems in those companies and to improve their performance and profitability

43. The primary function of the federation according to Mr Brown was that of representation, and the Government is the principal audience to be influenced. It also represents its members to government agencies, trade unions and trade organisations. It engages in cross-sectorial lobbying of organisations such as the CBI and Trade

Association Forum ("TAF") and international organisations such as Intergraf, the International Confederation of Printing Employers Federation. Intergraf performs a similar role to BPIF in Europe and represents twenty-three national printing federations in twenty countries across Europe. Mr Brown said that the BPIF's main task is to promote and protect the interests of printing related industries and to work with European institutions to enhance the sector's competitiveness through lobbying and networking. In cross-examination Mr Brown agreed that he was adopting a wide definition of "lobbying" in terms of whether the federation "defends and represents its members against third parties" [a reference to *IMI*]. He also agreed that the federation was the principle business support organisation, which helped members to become more efficient, profitable and adaptable to changing technologies. He confirmed that the remit of the federation had broadened considerably over the last thirty years or so, and that primarily this was because its financial support structure had changed.

44. In cross-examination Mr Brown agreed that BPIF's Annual Review clearly stated that its goal was to make members more profitable. It advised on marketing, training, productivity and provided insurance services, financial planning advice and tribunal representation. Mr Brown argued however that the Annual Review was a marketing document aimed at attracting members. Many of the services were provided as a result of feedback from members. The Annual Review was not a constitutional document in terms of defining the federation's primary objects.

45. Brown said that the BPIF's constitution has been roughly the same since the 1970's to the present time (as set-out in paragraphs 112 – 123 below) in the constitutional objectives and the Industries Relations object in third place.

46. Mr Brown agreed that in some years it could be seen from statements made in the Annual Review that one of the federation's main goals was to improve the quality of its relationships between employers and employees and head-off industry disputes.

47. BPIF has a committee for each of its activities. One of these is the Government and Industry Committee, the function of which is to identify and to put into action lobbying activities. Another is the Education and Training Committee, which co-ordinated the structure of training within the print industry to avoid a piece-meal approach. Mr Brown said that the print industry was dependent on people with skills: the industry in general was subject to international competition and therefore the federation did what it did for its members to survive.

48. With regard to membership, BPIF is open to any organisation engaged in "the supply of printing services within the area of the BPIF" and "any organisations fulfilling the criteria for affiliated organisations:" There had however always been close scrutiny of membership criteria.

49. Since 1981, when Mr Brown joined BPIF, the overall trend in member numbers had been downward as the industry contracted in size. In 1988 there were 3,800 members when he joined, but over the years the number had reduced to 1,600. There were a number of reasons. Member companies had merged or consolidated: there had

been a reduction in demand for print and the industry was becoming increasingly automated. Mr Brown agreed that the federation did not represent the whole or even a majority of employers within the print industry. The three largest general printing companies in the UK, Polstar, Quebecor and St. Ives and their subsidiaries are not generally in membership of any trade association whether BPIF or otherwise. In 2005 by way of example the percentage share of the number of firms, which were members of BPIF, had reduced to just 16% of the total, although in terms of turnover Mr Brown said the figure was nearer 50%. He said that BPIF had both "union" and "non-union" members and that while its members used to be 100% unionised the figure had fallen to approximately 30% by 1995 and probably fallen further since then. Until 2000 there was only one category of membership but since then there were three categories namely silver, gold and platinum. Platinum members paid the most and received the most services as part of their membership, gold members received less services and silver a more basic service.

50. In the late 1980's, as the BPIF membership was falling, it was decided to diversify and increase other services such as training and consultancy in order to ensure funding for its representational activities. By 1998 the total income received from subscriptions had fallen to 29%, much of the remaining income coming from consultancy services, seminars, courses, exhibitions, publications and training. Mr Brown referred to minutes of the National Council which recorded the formation of the Training and Enterprise Council, a Government initiative with which BPIF endeavoured to maintain a close dialogue at regional and national level.

51. Mr Brown said that the federation is a non-profit making organisation and applies any surplus income over expenditure to generate reserves, support the repayment of a pension deficit, invest in new technology, products and services and to finance projects important to members. There had never been a distribution of "profits" to members.

52. BPIF has a number of publications which it circulates to members. Annually it publishes the Printing Industries Annual which became the "Printer's Year Book". The Annual Review is also published which outlines BPIF's activities each year and includes copy accounts and in some years an assessment of its activities in terms of value to members. There were also monthly news letters/magazines. Another publication was "BPIF Action" which kept members up to date with employer common law and statutory duties, director's obligations, employment law changes, dealing with training, accidents, discipline and grievance procedures. Some of the publications were not available to basic, "silver" members.

53. Mr Brown said that the BPIF had to take a lead in negotiations relating to the National Wage Agreement which was a major issue for the federation, but that following the failure of the National Wage negotiations in May 1980 there was a review of the BPIF's functions and operations. A review body was appointed, headed by Lord McGregor of Durris, which considered the relationship between BPIF and government bodies, including the European bodies. Up until then BPIF had been instrumental in negotiating a number of National Agreements with various trade

unions with regard to wage levels and dispute procedures. Mr Brown agreed in cross-examination that the review body's report was a recognition that the Federation was a combined trade and representative association. The Review Body said "... we have to face the question whether a combined employers and trade association could any longer satisfy the needs of a great variety of member firms producing a wide range of products". Mr Brown said it was around the time of the Review Body report that there was a large and sudden drop in membership. He said that the federation recognised it needed funds from the provision of services to members in order to maintain its profitability and in turn represent the collective interests of its members. The federation had no choice and its activities, of whatever nature, were ultimately for the benefit of the members generally.

54. BPIF and other stakeholders in the printing industries (the GPMU) the Print Education Forum (an educational body) the Industries Representatives Group and Vision in Print (a training body) set up a study into the competitiveness of the UK printing industry aimed at informing policy makers and shaping the future development of the industry. The study lead to the "three pillars" strategy which identified (1) productivity and competitiveness (2) training and (3) representation (to the Government and third parties) and partnership (between employers and trade unions). Mr Brown said that BPIF took responsibility for giving the lead with regard to representation and partnership.

55. As part of its representational function the federation undertook lobbying activities through its Government and Industry Committee, with the Government and the DTI at a national level and other organisations at a regional level in respect of issues of importance to the printing industry. BPIF's annual records recorded that, twice a year, federation members would "mingle on the House of Lords terrace" with parliamentarians. The federation was keen on an "all party group of MP's" being formed who could be called upon to represent the print industry if needed. Mr Brown did not know if the group had even been formed. It also lobbied at European level through the Confederation of British Industry and Intergraf in order to influence decisions, which could have affected the print industry principally in the context of environmental practices and regulations.

56. In 2003/2005 the BPIF was involved in "Partnership at Work", a project funded by the DTI. The purpose was for the BPIF and the GPMU (which later become 'Amicus' and then 'Unite') to update the National Agreement, which had been coming under strain because it was not meeting the challenges of the industry. Its aim was to examine the collective relationships between the parties at a national level and renegotiate a new National Agreement which took into account current conditions in the printing industries and the economy generally. Partnership at Work involved a survey of employers and employees in industry and consultations were undertaken with members at regional meetings. Other projects which BPIF were involved in included the Working Time Directive and the EC Carton Board Enquiry.

57. Mr Puzey referred Mr Brown to BPIF's Annual Review for 1994/95 which said "the National Board of Management has identified that the principle role of the

federation is to help their members improve their profitability by providing a range of tailored business solutions" and "we will help member companies exploit opportunities presented by the economic recovery, changing markets and new technologies. We will seek to improve skill resources and member companies in management marketing selling and manufacturing….." This was a statement made by the Director General of the BPIF in 1995. Mr Puzey also referred to another entry in that year's Annual Review which said "for individual members many benefits are included in the membership fee including advice on technical issues, training, health and safety, legal matters and employment affairs. Members should come to us for a range of specialist consultancy services geared to the printing industry". Mr Brown said that in his view these comments had to be read in the context of the fact that the document was more of a marketing publication rather than an indication of the organisation's constitutional objectives.

58. Mr Puzey then referred Mr Brown to BPIF's AGM minutes for June 1989 when the following priority tasks were identified for the purposes of the organisation's budget plan for 1989/90 – "addressing industry skills shortage, enhancing industry image, increasing the industries productivity and enhancing the industries marketing skills to increase profitability which was a fundamental objective of the federation". The minutes go on to say the federation would "continue the policy of increasing income from its non-subscription sources, which were budgeted to provide 37% of the total income for the year". The then President of the federation said that the federation's principle objective "remains to encourage the efficiency and profitability of the industry. The board agreed that the principle for the federation is to help their members improve their profitability by providing a range of tailored business solutions".

59. Mr Brown was referred to a statement by the Board of Directors in April 2004 and the key points in the organisation's business plan for that year. It was stated that the organisation "remained entirely dependent on commercial products in that it needed to substantially increase volumes to remain profitable because subscriptions did not fully fund membership services". It continued, "the BPIF is a business and its members are in business to make a profit". The business plan made reference to expanding legal and technical services and developing new products to generate future income streams because of significant reductions in subscription income. Mr Brown agreed that the organisation's strategic plan reflected its financial dependence on commercial services but he maintained that the terms of reference and priorities of the federation and its objectives had essentially remained unchanged. He said that monies received by the federation for various activities did not necessarily represent priority of importance.

60. Mr Brown was referred to the organisation's Board of Directors agenda in June 2004, which referred to its "core services" being to help members make a profit. Although the agenda made a point of emphasising that the organisation was "not for profit", it made no reference to its main objectives being representation of its members.

61. Mr Brown agreed that the printing industry has a number of UK wide or more geographically limited National Agreements for specific segments of the printing and printed packaging industry, which are negotiated between the GPMU and various trade associations without input by BPIF. Many larger companies negotiated their own individual agreements and some even questioned the value of the National Agreement, many felt that the industry is actually hampered by the lack of a single voice in relations with Government and Stakeholders. Mr Brown agreed that this had been recognised in articles appearing in BPIF's Annual Review. Mr Brown responded that in his view all BPIF's activities were necessary whether or not some were of a quasi-commercial nature in order for it to have the necessary funds to undertake its primary purpose of representing its members to government bodies and negotiating with unions.

Mr Stephen Paul Walker

62. Evidence was also given by Mr Stephen Paul Walker, who was employed as a Products Manager with BPIF. He had been employed by BPIF for twenty-three years and previously held positions as an Employment Advisor, Business Centre Manager and Regional Director.

63. Mr Walker said that the main changes to BPIF, which he noticed over the period he had been employed by the federation, was the reduction in the need for industrial relations services as the influence of unions diminished. Previously these services included representing member companies in National Agreement "dispute procedures". He said that the number of member companies had diminished and as this happened they increasingly expected the federation as its trade association to show value for money. Companies were more non-unionised and because they could easily manage their own individual industrial relations they expected support in other ways. Despite this, he said that lobbying was as crucial as ever at Government and European level in certain areas, for example environmental legislation.

64. Mr Walker said the consequences of a reduction in member numbers led to a reduced influence on Government authorities, trade unions and other third parties with the result that the attraction of membership diminished. To reduce or stop the gradual erosion of membership the BPIF undertook a "Value Added Measurement" in the years 2004/05 to ascertain a credible figure for the value which the federation added to its member's businesses.

65. Mr Walker said that the Value Added Measurement exercise was carried out before BPIF had any idea that it might be making an appeal to recover VAT on member's subscriptions. It was not based on the context that BPIF's primary purpose was representing its members to relevant third parties (or indeed on the basis that its primary purpose was lobbying Government). Therefore the exercise was entirely objective in its assessment of value of its activities.

66. The methodology used by the Value Added Measurement was taken from a similar exercise undertaken by the Trade Association's Forum some years earlier and

included participation in the TAF validation scheme, which made an assessment of the reliability of the results. Mr Walker explained that BPIF is a member of the TAF, which was set up in 1997 to allow trade associations a formal structure to exchange ideas for best practice and to promote the role of effective trade associations to Government and the wider public.

67. Mr Walker said that broadly the methodology of the scheme was:-

1. to identify BPIF's activities
2. to ascertain the costs incurred in carrying out those activities
3. to ascertain the costs those activities saved for the association's members
4. to ascertain the value of those activities created for member's businesses
5. to calculate the 'net value added' by those activities by adding (3) (4) and subtracting (2)

For the purpose of carrying out the assessment the federation's activities were listed as:-

1. "Member Services" which were sub-categorised as comprising publications, newsletters, information, statistics and website
2. "Events" which were sub-categorised as conferences, seminars, trade fairs and exhibitions
3. "Advisory Services" which were sub-categorised as legal, employment, health and safety and technical services
4. "Affinity Schemes/Discounts" which were sub-categorised as insurance, pensions, health care and credit card facilities
5. "Business Services" sub-categorised as consultancy, product testing/certification, and business development sub-categorised as (inter-alia) providing market research, promotion, advertising, codes of practise, dispute resolution, consumer services, exploit development, best practice and standard setting
6. "Representation" sub-categorised as industry training and education, industrial relations, trade forums and employers organisations.
7. "Promotions" sub-categorised as marketing, press relations
8. "Public Affairs" sub-categorised as policy research, critical intelligence and contact building
9. "Political Engagement" sub-categorised as primarily dialogue with Ministers, MP's, the EU commission, the EU Parliament, local Government, Alliances and consumer groups

68. In terms of time allocation, lobbying was estimated to take the greatest amount of time followed by committee work and then public relations and management. In a few instances there was no obvious value generated by an activity

69. The purpose of the Affinity Scheme was to allow members to purchase certain services from third parties through BPIF at a lower price than that which members would be able to obtain those services if purchasing direct. Mr Walker said that

some of the "Value Added" figures were based on estimates and not empirical evidence but were invariably on a conservative side. BPIF Business, showed a return of 2.5 times the cost of a consultancy project (at a charge out rate of £500.00) in terms of the estimated benefit to a member of the amount saved on consultants expertise. Similarly with regard to Health and Safety activities "Value Added" was estimated by deducting the amount it would have cost a member to obtain Health and Safety advice as against the benefit of reduced accident figures and a reduction in insurance costs. The estimate of "Value Added" in connection with HR was based on a number of Tribunal cases that it considered would have been lost instead of being won without a representatives visit or telephone advice.

70. Mr Walker said that BPIF sells the results of industry surveys to third parties (not necessarily members) and again reasonable estimates were made of the saving companies would make if they purchased the survey information. As regards BPIF's legal department most of the income is derived from standard conditions of sale, its legal helpline and tribunal representation and support. The OFT does not allow BPIF to restrict its services to member companies and therefore the services are available to the industry in general. Value Added figures were determined on the basis of how much a member would save by purchasing the standard terms and conditions of sale as opposed to having bespoke terms and conditions drawn by a solicitor. Value Added from tribunal support and representation was determined by reference to the amount a member would save in using BPIF's services as opposed to employing a law firm.

71. With regard to lobbying, Mr Walker said there were two major issues on which BPIF lobbied the Government (in 2004/05), one was statutory recognition for companies with fewer than 20 employees and the other was capital allowances for printing equipment. As regards the former an estimate was made of the cost of a company going through the procedure for recognising a union.

72. As regards National negotiations an estimate was made of the savings made by the print industry in wages when adopting the National Agreement as compared to the cost of conducting negotiations in the absence of a National Agreement. Mr Walker described how energy intensive industries could claim a reduction under the Climate Change Levy Reduction Scheme if they improved their efficiency. The organisation became involved by undertaking administration for various trade associations but the Government had to be comfortable in agreeing discounts for the industry. 12% was agreed as a reasonable figure and the organisation administered the scheme with trade associations. Tax was collected by the suppliers and the federation charged for facilitating the process.

73. Mr Walker referred to the "Vision in Print" project whereby, with the support of DTI funding, the BPIF set up an industry forum (which became known as Vision in Print) to improve the productivity within printing companies. He said most printing companies did not have the necessary in-house expertise to improve their processes and this was identified as a weakness in the industry and a barrier to competitiveness. Ten companies a year go through Vision in Print "master classes" which have been

calculated to deliver £166,000.00 of value to each company per annum. The total value added after deduction of cost was estimated at £1.857 million.

74. Mr Walker said that the results of the Value Added Measurement showed that the total value added by BPIF to the print industry in 2004/05 was approximately £78.8 million and that the results were approved by the TAF under its validation scheme.

75. Mr Walker said he undertook a similar exercise but in much less detail in the years 2006, 2007 and 2008. He agreed that much of the data and figures were extrapolated and were based on assumptions, but said that much of these were backed up by statistical evidence and views of heads of services e.g. industrial relations officers and legal advisors.

76. In cross-examination Mr Walker agreed that the Value Added Measurement exercise was partly undertaken to generate increased membership but added that in turn, one of the attractions of being a member was the opportunity of being able to lobby Government through the federation. Mr Walker also agreed that in some cases activities produced no immediately quantifiable business benefit and also for example that the savings made by companies which followed the National Agreement would probably have dropped significantly in more recent years. He also agreed that Government funding for education was available to any provider of education and was not purely or directly related to the federation's lobbying activities. He also agreed that many projects and schemes such as the Climate Change Levy Agreement were open to both members and non-members.

Mr Michael Gardner

77. Mr Gardner has been BPIF's Finance Director and Company Secretary since 2007. Prior to that he was on the BPIF's North West Regional Board and the federation's Government and Industry Committee. Mr Gardner said that each regional board canvasses opinions from members on legislation and trade union activity, economic activity and any other issues that may impact on the business of member companies.

78. Mr Gardner said that he was previously employed by companies which were members of BPIF and to his knowledge they had used BPIF for lobbying, trade union negotiations, health and safety risk analysis, human resources and legal services. In his view the main purpose of BPIF is the lobbying of the UK Government and Europe on issues impacting on members and which extends to local government, government training bodies and funding agencies, for example the Health and Safety Executive, to ensure that EU and UK legislation is not detrimental to the industry.

79. Mr Gardner referred the Tribunal to the minutes of the regional board meetings from which it could be seen that topics discussed regularly covered updates on national negotiations and reports from the Government and Industry Committee concerning, by way of example, EEC proposals on product liability, or VAT status,

education and noise in the industry. There was also lobbying on the ceiling for employer's national insurance, capital allowances and Government white and green papers relating to employment legislation and, for example, discussions on the Labour Party proposals for a Statutory Training Levy, the merger of various unions (EG and MGA and SOGAT to the GPMU). Mr Gardner said that the minutes were an accurate and representative record of the kind of discussions that predominately occupied the regional board's agenda.

80. Mr Gardner referred to spreadsheets taken from the Employer's Association Annual Return for the years up to 1993 and from BPIF's annual statutory accounts. The returns to the Employers Association are required for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992. He said that it showed any surplus for a year was carried to reserves and any deficit was made up from reserves. The figures showed that the income received by BPIF was used to provide "a range of products and services designed to improve the legal compliance, financial profitability, efficiency and economic well-being of its members". He said that BPIF is a member's organisation owned by the members with powers to raise funds to carry out the objects and aims of the organisation. It does not have shareholders or investors or equity. There are no shares and no distributions or dividends to any member.

81. Mr Gardner acknowledged that there had been a significant increase in education and training income over the years. BPIF worked with Government funding agencies and skills training councils to ensure that the industry had an appropriate level of apprenticeship training in place to meet industry needs. The income received from education and training helped to reduce the pressure on subscription income. In turn the lobbying of Government to obtain additional funding had to be stepped up. By way of example between 1987 and 1996 the income percentage received from non -lobbying activities increased from 25% to around 45%.

82. Mr Gardner said that BPIF also raised levies for specific purposes, for example a special levy in 1979 and 1981 when there was a break-down in national pay negotiations and unions took specific action against targeted member companies. The special levy was used to fight this union action. A dispute assistance fund had also been organised for member companies who had specific disputes with unions. He agreed that one of BPIF's key aims was the "long term success and support of its members, which gave added value to BPIF as a business". He said that many of BPIF's services were available to members free but others were only available at a cost and agreed that consequently some were not for the collective benefit of members

Mr Robert John O'Shea

83. Mr Robert John O'Shea who is the Director and Chairman of BPIF also provided a witness statement. There was no oral evidence or cross-examination.

84. Mr O'Shea said that he had been a member of BPIF since 1969 and the primary benefits of membership were networking opportunities and its trade association ability to influence Government at UK and European level. He said that he retired from day to day involvement of BPIF in 2009. He had been the longest serving member of the Education and Training Committee, which he served for approximately 20 years. Mr O'Shea's evidence was on the whole a re-iteration of evidence by Mr Brown, Mr Walker and Mr Gardner in so far as, in his view, the primary purpose of BPIF was to lobby and make representations to the Government, Trade Unions and other third parties for the general benefit of its members. He said that if this didn't happen there would be a serious vacuum in the industry. Most of his efforts had been devoted to publication and training which involved discussions and lobbying of the Department of Education and Science, the Department of Trade and Industry, Business Links and the Learning and Skills Council. He described how the BPIF was consistently liaising with the Government to promote re-training and minimise large scale redundancies

85. BPIF would lobby and make representations on Government proposals, relating to, for example, the "Working Time Directive" which BPIF considered was impractical for situations where continuous process printing machines had to be kept going for twenty-four hours. He said BPIF had good relationships with trade unions and the National Agreement was not just about wage rates, but also about terms, pay and conditions reflecting the reasonable aspirations of work forces and the needs of employers. The Government and Industrial Relations Committee of BPIF was often pre-occupied with trade union action on these matters and the national negotiations. Other topics frequently discussed were the "Partnership at Work" project and "Vision in Print."

Mr Christopher Rodney Smith

86. A witness statement was also provided by Mr Christopher Rodney Smith. He did not give oral evidence and was not cross-examined.

87. Mr Smith is the Director and Chairman of Halstan Group which has been a member of BPIF since 1977.

88. Mr Smith said that the company is a member of BPIF in order to benefit from representation at local, national and international level. Advice was provided mainly on human resources, health and safety, environmental law, networking opportunities and to a lesser extent on best practice, benchmarking and "lean manufacturing". He said that it was important that BPIF was able to represent the industry and also negotiate with trade unions, particularly because the federation was mainly dominated by small to medium sized companies who did not have the skills, knowledge or negotiating strength to reach agreement with national trade unions. Matters negotiated included pay, hours, holidays, money, disputes procedures and the Partnership at Work Agreement. He said that BPIF met with trade unions regularly to see if there was a common position on which to approach Government departments, the CBI and various other public bodies. At European level through its membership of Intergraf it lobbied the EU Commission and the EU Parliament on legislation. So far as

involvement in lobbying UK public bodies was concerned Mr Smith said that he would meet his MP and attend meetings with the CBI and had various ad-hoc meetings with the print industry which were organised through BPIF's Government and Industry Committee. This allowed him as a member to express views on print industry issues at a national, regional and local level.

**The Appellant's submissions**

89. The Appellant says that it is an organisation whose principle aims consist of defending the collective interests of its members and to do so by making representations to appropriate third parties, being persons or bodies with decision making power relating to the business or commercial interests of the Appellant's members. Applying the principles laid down in the ECJ's ruling in *IMI*, its activities fall within those which are regarded as in the public interest in so far as the Appellant provides its members with a representative voice and strength in negotiations with appropriate third parties. The Appellant is therefore an organisation with aims of a "trade union nature".

"Trade union" has a wider meaning under EU law

90. The Appellant submits that the first point to take from the *IMI* decision is that the term "trade union" has a wider meaning than is normally given to that term in English usage. The term does not bear the meaning commonly associated with it in the English language. As well as associations of employees, the term also encompasses associations of employers, independent professionals, or traders carrying on an economic activity. The Appellant says that the Respondent accepts that the Appellant is an employers' association within the meaning of this case law and so all that is necessary is that the Appellant makes representations to appropriate third parties in the public interest.

91. The Appellant accepts, on the basis of *IMI* that VAT exemptions are to be interpreted strictly, but it should be noted that this did not prevent the Court of Justice preferring a broader interpretation of the exemption to a narrower one.

92. The Court's approach to the interpretation of exemptions in other areas has been refined in subsequent case law. The Appellant cites C-45/01 *Christoph-Dornier-Stiftung fur Klinische Psychologie v. Finanzamt* GieJ3en [2003] ECR 1-12911, where the Court of Justice said,

> "the interpretation of the terms used in that provision must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT".

Thus, in that case psychotherapeutic services provided by psychologists not formally qualified as doctors counted as "medical care" within the meaning of Article 13A(1)(b) of the Sixth VAT Directive.

93. Also, in Case C-284/03 *Belgian Stale v. Temco Europe SA* [2004] ECR 1-11237 the Court of Justice said (paragraph 17),

> "the requirement of strict interpretation does not mean, however, that the terms used to specify exemptions should be construed in such a way as to deprive the exemptions of their intended effect".

Thus, the exemption for letting of immoveable property covered an arrangement between group companies in terms of which the company that was the owner of offices permitted the others to use those offices without granting them rights to specific areas.

94. The Appellant observes that in UK law the term "trade union" used to encompass employers' associations in the context of employment law, under the statute by which unions were first recognised until 1971. [Trade Union Act 1871 section 23, and Industrial Relations Act 1971, sections 61and 62]. Indeed, throughout the relevant periods the Appellant was registered as an employers' association under the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA") which can be seen from its annual returns to the registration office for the years 2005 to 2007. But for the change in terminology in 1971, in terms of TULRCA, the Appellant would have been a "trade union" in the UK as it had been until 1971.

95. The Appellant argues that the broader meaning of the term "trade union" in European law is reflected in Group 9 of Schedule 9 VATA. That Group recognises the exemption for subscriptions to trade unions (or "other organisation having as its main object the negotiation on behalf of its members of the terms and conditions of their employment"):

In item 1(a), note (2) specifically refers to the definition of "trade union" in TULCRA 1992;

Item 1(b) includes professional associations;

Item 1(c) includes associations for the purpose of fostering knowledge connected with professions or employments;

Item 1(d) includes associations of members based on their business or professional interests;

Item 1(e), includes bodies having objects a "political, religious, patriotic, philosophical, philanthropic or civic nature."

96. The Appellant submits that the objectives of these categories of associations and organisations together are intended to cover the same ground as the term "aims of a trade union nature" in the Sixth VAT Directive and the Principal VAT Directive. Item 1(e) covers the range of bodies referred to in the Directives' provisions, word for word.

97. The Appellant therefore argues that the term "trade union" has a wider meaning under EU law as recognised in *IMI*.

<u>An "appropriate third party" need not be a national government</u>

98. The Appellant says that the second point to take from the Court of Justice's Judgment in *IMI* is that the "appropriate third party" to whom representations are made need not be a national government, or indeed a public authority. It need simply be a third party, appropriate to the particular body in question.

99. This is clear from the fact that UK trade unions (in the narrow sense) are within the exemption and the principal aim of trade unions is usually to negotiate with their members' employers, as regards matters such as pay and conditions. Such employers may or may not be public authorities. The fact that members of an association may be employed by the private sector would clearly not preclude its subscriptions from obtaining exemption. The requirement for the activity to be in its members' interests does not involve a requirement that the third party be a public body.

100. That a trade union counts as a third party when the person seeking exemption is an employers' association is confirmed in *Heating and Ventilating Contractors Association v. Commissioners for Her Majesty's Revenue and Customs* [2008J UK VAT V20887, at paragraph 23 where the FTT accepted that the association's stated objects which included negotiating relations between employers and workers or organisations in the industry "to negotiate with the appropriate trade union or union .." clearly fell within the activities of a trade union within Article 132(1)(l).

101. Moreover, any third party counts for the purpose of the exemption regardless of the category into which the Appellant fits - in other words whether the association is of employees, employers, self-employed professionals or others, the exemption does not restrict who the third party may be, save that the third party must be "appropriate" having regard to the nature of the association in question.

102. It is accepted that there must be some limitation on which third parties are relevant, or appropriate. It is submitted that two control mechanisms are applicable, namely (i) the third party must have some decision-making power, and (ii) the decision-making power must relate to the business or commercial interests of the associations members. There is no justification for placing any stricter limits on who is a third party for the purposes of this case law.

103. The level of abstraction at which the "aims of a trade union nature" are determined is the interests of the members generally. The purpose of an employers' association may be to defend a number of different business interests of its members vis-à-vis a variety of third parties, but for the purpose of deciding whether the associations subscriptions attract exemption, all those interests and all those third parties are taken together.

104. So, if an employers' association spent a third of its time negotiating with unions, a third of its time lobbying government, and a third of its time providing other services to members, the first two activities would be taken together for the purpose of determining exemption, as they both involve defending the members' collective interests and representing them vis-à-vis to third parties.

105. The Appellant says that this is acknowledged in HMRC's VAT Manual "Trade Unions and Professional Bodies. VTUPB1200". There, the Respondent states:

- "Trade unions' functions are essentially to look after their members' interests in so far as these are connected with their employments. They are therefore concerned with negotiating pay and other conditions of employment, representing their members' interests in discussions with employers or the government, assisting members involved in legal disputes arising from their employment and similar matters.

- We therefore accept that organisations that perform comparable functions but which are not trade unions proper are also entitled to exemption

- We have implemented the article fully in respect of bodies of a trade union nature in Group 9 because, although only trade unions proper are covered in Item 1(a), Items 1(b) to 1(d) provide for exemption for other organisations which we consider perform functions broadly comparable to those of trade unions and were therefore meant to receive exemption under the article."

106. Thus, trade unions, even in the narrow sense, are regarded as meeting the requirements of the Directives by virtue of what they do in terms of (i) negotiating pay and conditions with employers, (ii) representing members' interests to employers or the government, (iii) assisting members with legal disputes arising from their employment, and (iv) similar matters.

107. The Appellant argues that, in short, it mainly does exactly what the Respondent describes a trade union as doing, except from an employer's point of view. So, the Appellant mainly (i) negotiates pay and conditions with employee unions, (ii) represents members' interests to employee unions or the government. (iii) assists members with legal disputes arising from their employment, and (iv) does similar matters.

<u>In the public interest</u>

108. The third point to be taken from *IMI* is that the term "public interest" also receives a wider than normal meaning in this context. Normally the "public interest" means something to do with a direct interest of the public generally. However the Court of Justice regards the requirement of acting in the public interest as satisfied in this context,

> "in so far as [the Appellant] provides members with a representative voice and strength in negotiations with third parties" (paragraph 21).

In other words, the Court of Justice regards it as in the public interest generally for employers to get a representative voice and strength in negotiations by grouping together through an association. Taking this a step further, it does not matter if the subject of representations / negotiations are public or private matters. For example, a classic employees' trade union is concerned principally with pay and conditions of its members. These are clearly private matters. Yet such a trade union is given an exemption on a "public interest" basis.

109. In summary, an organisation meets the requirements of Article 13A(1)(l) of the Sixth VAT Directive, and of Article 132(1)(l) of the Principal Directive, if it is an association of employers, its main object is to defend the collective interests of its members vis-à-vis third parties, and it is non-profit-making. It does not matter who the third parties are. All the Appellant's activities involving making representations to or negotiating with third parties are aggregated to ascertain whether that aggregation is the Appellant's main object.

Appellant's main aim

110. It is submitted by the Appellant that the principal circumstances to be considered in ascertaining its main objects are its constitution and the reality of what it did in the relevant periods. See *British Association for Shooting and Conservation Limited v Revenue and Customs Commissioners* [2009] S.T.C. 1421 where Lewison J referred to the *IMI* case and agreed with its conclusion that the professed aims of an organisation must be tested against what happens in reality. (Paragraph 41) and *HMRC v. European Tour Operators' Association* [2012] UKUT 377 (TC) where Henderson, J. said that the relevant enquiry is an objective one to be answered primarily by an examination of the stated objects and the actual activities of the body in question (at paragraph 28).

111. As regards the Appellant's activities, the Appellant says it is obvious that a simple list of representational and commercial activities is an inadequate means of assessing levels of importance. The impression a list gives can be misleading particularly if categorised at different levels of abstraction. It is therefore appropriate to consider analytical tools by which, on an objective analysis, the relative importance to the Appellant and its members of its representational and non-representational activities can be measured.

The Appellant's constitution

112. The Appellant's constitution has seen a number of different versions and there has been a degree of progression in its stated objects over the relevant periods.

113. In 1978 the objects of the Appellant were set out in clause V as follows:

> "OBJECTS AND POWERS
>
> The principal objects shall be:
>
> (a) To encourage the efficiency and profitability of the industry and to that end to provide such advice, information and services to members and others as the Council may decide.
> (b) To provide for the industry the means of formulating, making known and implementing policy in regard to labour, legal, economic, technical, commercial, fiscal, educational and all other questions affecting the industry and to act as a national point of reference for those seeking the industry's views.
> (c) To regulate relations between employers in the industry and their employees.

(d) To publicise the activities and achievements of the industry and the Federation."

114. Clearly, (a) covers non-representational services, but could also encompass services consisting in representation to, and negotiation with, third parties. Items (b) and (c) are representational and Item (d) relates to all areas of the Appellant's activities, and is subsidiary to them.

115. Following a review of the Appellant and its purposes in 1981/82, clause (c) was changed to:

> "To encourage good relations among all those engaged in the industry in order to promote its welfare and the well-being of the industry as a whole."

This relates to the Appellant's relationship with the unions.

116. There was also added clause (e):

> "To protect individual Members against attack directed specifically at them when a question of principle affecting Members collectively is in issue."

117. The Appellant says that this resonates with the dictum of the Court of Justice in *IMI that* an Appellant qualifies for exemption as a "trade union" if its main object is to defend its members' collective interests.

118. As at June 1985 the reference in (a) to the Council had been replaced by a reference to the National Board of Management; in (b), the last phrase, "to act as a national point of reference for those seeking the industry's views" had been replaced with the more active, "to make the industry's views known to Government and other bodies or persons as appropriate"; and in (d) there had been added the aim, "to encourage membership of all firms engaged in the industry that may be eligible for membership of the federation". This last provision is probably neutral, though it might be argued that the more members, the more strength the Appellant would have in negotiations with third parties.

119. Finally, in January 2009, the constitution was amended so that the objects clause read:

> "Objects and powers
>
> The principal objects shall be:
>
> (a) To assist Members and others in improving their efficiency and profitability by providing a range of business support services.
>
> (b) To formulate, make known and implement policy in regard to significant questions affecting the industry, and to make the industry's views known to Government and other bodies or persons.

(c) To engage in dialogue and where appropriate, negotiate agreements with, trade unions and to assist Members and others in managing their employees.

(d) To publicise the activities and achievements of the industry and the BPIF and to recruit into Membership organisations engaged in the industry that are eligible for Membership or Associate membership.

(e) To promote and defend the collective interests of Members.

(f) To provide for Members and Associate members to meet, exchange information and best practice, and undertake collective projects and initiatives in each case as hitherto for profit-making purposes."

120. The Appellant says that the reference to profitability and the implication that there was an existing profit-making purpose was clearly an error. It does not fit the facts and was recognised as an error and amended again in 2010 so as to state that the Appellant had previously been non-profit-making.

121. In any event, the fact that one of the objects was assisting the efficiency and profitability of the industry does not detract from the Appellant's case. This is the ultimate purpose of any trade association that represents its members and provides them with strength in negotiations. Such activities are not undertaken in a vacuum, but with the practical purpose of advancing the business and commercial interests of members. This, in short, means improving those members' profitability.

122. Overall it can be seen that most of the "principal objects" of the Appellant consist of representation, negotiation or defence of collective interests. It is at least the case that the Appellant's constitution does not disqualify it from exemption

123. So far as the Appellant's constitution is concerned, its main object throughout the periods under appeal has consisted of aims of a trade union nature.

The Appellant's activities

124. As can be seen from the Appellant's witness evidence, its activities include a significant amount of lobbying. Included in the most significant third parties were:

(a) the UK legislature, including individual Government ministers, individual Government departments, parliamentary parties (whether in government or in opposition), individual MPs, and select committees

(b) European institutions, including the EU Commission, individual Commissioners, and Members of the European Parliament, including representations made through organisations such as Intergraf and the British Business Bureau (the latter being part of the CBI)

(c) Public authorities in the UK, including the OFT, Ofcom, local government, and other public bodies including funding bodies

(d) The Thames Water Authority, Ofgem, the Learning Skills Council, the Office of Government Print Buying, regional development agencies, technical education colleges, and the UK universities, the Strategic Procurement Board

(d) Private bodies, including trade unions whose members are employed in the printing industries, and for example, the Royal Mail.

125. There were also one-off lobbying activities. So, for example, submissions were made to the Leggatt Inquiry.

126. The Appellant has one committee devoted almost entirely to lobbying, namely the Government and Industry committee. That it devotes a committee to lobbying shows that the Appellant considers its lobbying activities as being of importance to it. This is shown also by the fact that the Appellant lobbied to organise an All-Party Parliamentary Group of MPs interested in the printing industry (pursuant to the recommendation of the Review Body set up in 1981) and holds an annual event to meet members of the Group.

127. The Appellant's activities include a significant amount of negotiations with trade unions, in relation to pay and conditions in the industry. So, for example, the Printing Industries Annual 1978 contains almost 500 pages of agreements negotiated between the Appellant and various unions. Annually, throughout the relevant periods, the Appellant has negotiated an agreement with the principal unions in the industry on pay and conditions. From 2003 to 2005 the Appellant took part in a DTI-funded project with the GPMU (the main union for the printing industry) to agree a framework document for pay and conditions in the industry

128. Moreover, the annual negotiations with the unions are of great importance to the Appellant. For example, the Appellant has one committee devoted entirely to union matters, namely the Industrial Relations Committee. Second, the failure to reach a deal with the unions in the annual negotiations in 1980 led to a crisis in the Appellant Federation, and the appointment of the Review Body to examine the whole structure and operation of the Appellant. The First Report of the Review Body described the Appellant's industrial relations function as being "of critical importance to members". Third, in the Fleming Period the National Board of Management (one of the main organs of the Appellant) normally held a special meeting in March each year to consider the progress of the then current annual negotiations. This all takes place in an industry where the unions were traditionally strong, and the employers included a high proportion of smaller companies who did not have the expertise or bargaining power to counter the unions.

129. There must also be considered the scope of what is covered by making representations to third parties, and defending the collective interests of members. For example, in order to make representations to third parties, it is necessary to obtain information from members as to what their needs are and what they want represented and to whom. So, for example, in the material periods the Appellant conducted an annual wages survey, which provided "important statistics for use in the national

negotiations": (National Board of Management Minutes, 21st May 1991). Members were also canvassed on specific issues: for example, when the Labour Party produced a paper on a compulsory training levy in 1991, members were canvassed as to what they thought of it, and how the Appellant should respond to the Labour Party (National Board of Management Minutes, 21st May 1991).

130. As regards non-representational activities, these consist primarily in the provision of consultancy services of one sort or another. Witness evidence confirms that in the mid-1980s the Appellant made a deliberate decision to increase the amount of consultancy services it provided (in order to fund representation activities). The Appellant accepts that from then they formed an increasing part in the Appellant's activities, but it is clear that the position the Appellant started from was that of a "trade union" (as that term applied in UK legislation when the Appellant was founded in the early 20th century and until 1971), the main object of which was representing members and negotiating with third parties.

131. The question is whether there has come a point in the relevant periods at which the Appellant's main object has switched from being representation and negotiation to being the provision of commercial services (or whether there has come a point at which the latter has come to be as important as the former). It is necessary to weigh the Appellant's activities against one another to determine which is the more important.

The Value Added Assessment

132. It is submitted that the best measure of the Appellant's activities is the benefit to members of the activities carried out.

133. For the Fleming Period there is no available evidence as to what benefit members received from the Appellant's various activities.

134. However, for the Second Period a series of calculations were done by Mr Walker to measure the benefit, in financial terms, of the Appellant's activities for its members. The methodology used had been worked out by the Trade Association Forum.

135. As regards particular points of methodology, the Appellant accepts that the result from national negotiations and lobbying is an industry wide figure and not referable to members of the Appellant. However it is none the worse for that.

136. As regards lobbying, the Appellant was (and is) regarded by the Government as the leading voice of the printing industry and it is not unreasonable to recognise the weight of the Appellant's lobbying power by reference to the industry it represented. However the Appellant accepts that there is no evidence that anything the Appellant did actually changed the Government's mind on statutory recognition for employees. (Although it is only the benefit to the printing industry that was taken into account in the results.)

137. In the period covered by the calculation the Appellant lobbied on a number of matters. None of these have been shown as leading to any calculated financial benefit, but that does not mean they had no value. Given the nature of lobbying activity the Appellant says that it is extremely difficult to put any specific justifiable value on such activities.

138. The Appellant referred the Tribunal to the results for the first three years of the Value Added Assessment, which were published in the Appellant's Annual Reviews for each of 2005, 2006 and 2007. In each of those years, national negotiations with unions and lobbying were the top two activities in terms of financial benefit to the Appellant's members. In the year to 2005, the combined contribution to national negotiations, lobbying, and representation in employment disputes was £40.2m out of a total of £83.9m; in the year to 2006 it was around £31.5m out of £82.0m; in the year 2007 it was around £75.5m out of £124.6m. Overall, the benefits from representational activities in these three years were therefore just over 50% of the total benefits.

139. Similar results could be seen in the year to 31 March 2008. National negotiations produced the most valuable benefit, and lobbying was second. National negotiations (£58.8m) plus lobbying (£15.1m) together totalling £73.9m make up about one half of the total for that year (£144.7m).

140. The Appellant says that its analysis assumes for example that the Climate Change Levy Rebate obtained via an umbrella agreement between the Appellant and DEFRA, and the surveys activity, do not count as representation activities. As regards the Climate Change Levy Rebate, this is something that the Appellant negotiated on behalf of the industry. Surveys are used not only to communicate information to members for them to use, for example in individual wage negotiations, but also to inform and justify the Appellant's positions in negotiations with unions and in lobbying third parties. If these activities were included, the total benefits to members from representation activities were £46.3m in the year to 31 March 2005, £39.4m in the year to 31 March 2006, £84.6m in the year to 31 March 2007 and £83.8m in the year to 31 March 2008.

141. The Appellant acknowledged that the figure for value added by website activities in each year was overstated. In 2005 the amount of the overstatement was approx. £5.04m. So the value added total for the year to 31 March 2005 of £83.9m after allowing for the overstatement should be approximately £78.8m, and a similar reduction should be made for the subsequent years.

142. These changes say the Appellant proportionately increase the financial benefit derived from activities that point towards exemption. On this footing, over the three years in question they contributed £170.3m out of a total of £276m representing approximately 62%.

143. The Appellant accepts that this methodology (or indeed any other methodology for measuring benefit in financial terms) does not produce precisely accurate results and involves a number of assumptions and best estimates. However, it says that (i) the

assumptions and best estimates Mr Walker and others made, were made at a time before the current claims were discovered, (ii) the purpose of the exercise was to demonstrate to members and potential members the value the Appellant added to members financial outcomes, and to do this by "credible figures" addressed to participators in the industry and (iii) the figures were assessed for reliability by the Trade Association Forum, and found to be acceptable.

144. The Appellant says that the purpose of putting this evidence before the Tribunal is not to seek a finding in precise figures, but to provide evidence of the relative importance of the Appellant's various activities. All things being equal (and the Appellant submits that there is no reason to suppose that any of the figures are skewed in different directions) whether the individual figures are accurate or not, it is submitted that their relationships to one and another are reasonably accurate in the context of ascertaining what the Appellant's main object is.

Meeting Agendas

145. The Appellant argues that the second indicator of the relative importance of the Appellant's representational activities is the extent to which they are discussed at meetings of committees.

146. In this regard, the National Board of Management and its successor, the National Council, were the Appellant's main organs responsible in particular for policy making. It is clear from the witness evidence that throughout the relevant periods, the topic given most prominence in meetings of this body was national negotiations. Thus, so far as substantive matters are concerned, they are always discussed first. Mr Brown in oral evidence said that there was an annual cycle to what was discussed at National Council level, but national negotiations were discussed at every stage in that cycle. When the Partnership at Work project was underway, it was always discussed at National Council level, and was discussed immediately after national negotiations. In the 1980s the National Board of Management held a special meeting each year to discuss the outcome and, if appropriate, approve it. It is also appropriate to consider what was discussed at regional board meetings. The regional boards are organs that cover the whole of the Appellant's activities within and from the viewpoint of a particular geographical region.

147. It is clear from the minutes of the North West Regional Board (the only regional board minutes still extant for the Fleming Period) that national negotiations were also discussed at every board meeting. Mr Gardner, who sat on the North West Regional Board from 2002 to 2005, and on the South East Regional Board from 2005 to 2007, says that these minutes are typical of what was discussed at regional board meetings generally. In the regional board minutes included as part of the National Council's board papers in the Second and Third Periods, it can also be seen that national negotiations were the only matter running through all the minutes.

148. Accordingly, it is submitted that in principle discussions at National Board of Management / National Council level and at regional board level are a reasonably accurate reflection of what was important to the Appellant in the relevant periods. The

content of those discussions lays the greatest emphasis on national negotiations. This points towards the conclusion that the Appellant's main activity in the relevant periods was making representations to and negotiating with appropriate third parties.

Commercial Activities Subsidiary to Primary Objects

149. The Appellant argues that it is necessary to consider why the Appellant engages in commercial activities. The evidence is that the purpose is to make profit that will subsidise its representational and negotiation activities. This can be seen from the evidence of Andrew Brown, the North-West Regional Board minutes, 26th September 1996 and the Financial Strategy and Management Document dated 8th June 2004

150. HMRC suggest that other measures of importance include income and staff time, but in the context of the Appellant, neither of these is a good measure of the relative importance of its representative and other activities. The fact that expense was incurred, for example to provide the Appellant's training and health and safety consultancy services for what is a relatively low return on capital employed (in the context of the Appellant's operation), does not suggest that these are more important functions than activities such as negotiating with unions and lobbying third parties, that cost little but produce far more benefit to members.

151. As regards staff numbers, to a significant extent representational activities involve members of the Appellant who are not on its staff, whereas commercial activities tend to involve employees. For example, the Government and Industry Committee is composed mainly of non-employees. The regional boards have an input into lobbying and national negotiations, and they are likewise composed of non-employees. So if a large proportion of total staff time is spent on commercial activities this is likely to be misleading as a measure of the importance of those activities to the Appellant.

152. Accordingly, for the above reasons the Appellant submits that by reference to its constitution and its activities, the main purpose of the Appellant throughout the relevant periods was such as to make it a body having "aims of a trade union nature" within the meaning of the European provisions.

Membership interests and connection to Appellant's primary purposes

153. The Respondent argues that the Tribunal must consider whether membership of the Appellant is restricted:

> 'wholly or mainly to persons whose business or professional interests are directly connected with the Appellant's primary purposes'.

- in accordance with note 5 of Group 9 Schedule 9 VATA.

154. The Appellant submits that it is not clear whether this domestic provision is thought to be in implement of the relevant exemption, or is a measure taken within the scope of the UK's discretion to lay down conditions for the purpose of ensuring the correct and straightforward application of the exemption and the prevention of

evasion, avoidance or abuse. However, for the purposes of this appeal it is accepted by the Appellant that it needs to prove that this criterion is satisfied.

155. The obvious starting point on this issue is the Appellant's constitution.

156. As at 1978, the Appellant was an Association of member organisations. It described itself as comprising, "organisations of employers (hereinafter referred to as Member Organisations) in the printing and kindred trades" (Constitution, clause II).

157. Following the 1981/82 reports of the Review Body chaired by Lord McGregor of Durris, the Appellant re-structured into a body with direct membership. Thus, the 1985 edition of the Constitution provided:

> "Membership
>
> 1 Eligibility
>
> (a) Any firm engaged in the industry and having management control of operative plant for such purposes within the area of the Federation shall be eligible for Membership of the Federation.
>
> …….
>
> 4 Termination of membership
>
> (a)…….
>
> (b) Membership of the Federation may also be terminated:
>
> (i) if the Member is not, or is no longer, engaged in the industry and does not have management control of operative plant for such purposes;"

158. By 2006, clause IV(1) of the Constitution read:

> "1 Eligibility
>
> Any firms engaged in production processes associated with printing, or in the supply of printing services, within the area of the BPIF shall be eligible for Membership of the BPIF."

159. The power to expel members was unchanged from 1985 (except the singular "Member" had been changed to the plural "Members"), though there was in 1996 a proposal to delete the words, "and do not have management control of operative plant for such purposes".

160. In 2009 the Constitution was amended so as to read:

> "Membership
>
> 1 Eligibility

> Any organisations engaged in production processes associated with printing, or in the supply of printing services, within the area of the BPIF and any organisations fulfilling the criteria for Affiliated Organisations shall be eligible for Membership of the BPIF
>
> 2 Applications and entitlements
>
> British Printing Industries Federation Ltd and BPIF 2009 Limited are hereby admitted to Membership as Affiliated Organisations.
>
> 6 Affiliated Organisations
>
> (a) Organisations of employers in the industry, including organisations overseas, may be admitted as Affiliated Organisations on such terms and conditions as the National Council shall from time to time decide."

161. The termination provision had been amended as proposed in 2006.

162. The change from the reference to "management control of operative plant" to being -

> "engaged in production processes associated with printing, or in the supply of printing services"

- was explained by Mr Brown, as an expansion of the membership base to include print management companies having no plant of their own.

163. So far as the constitutional position is concerned, the Appellant's objects (as in force from time to time) are linked to "Members" and "the industry". There is no reason to suppose the term "industry" meant something different in the different provisions.

164. Accordingly, so far as the Appellant's constitution was concerned its objects were linked to its actual members and to the industry that those members must be involved in if they are to become and remain members.

165. As regards actual members, there is no evidence to the effect that in practice, the Appellant accepted a significant proportion of, or indeed any, applications for membership from persons not within the limits set out by the constitution (as amended from time to time). Indeed, Mr Brown's oral evidence is that the membership criteria as per the constitution were applied in practice, and that no-one who did not meet those criteria was admitted to membership.

Financial strategy

166. Finally, the Appellant submits that some support for its position can be derived from the federation's financial strategy generally. As at 2004 this was set out in the Financial Strategy and Management document dated 8th June 2004:

> "The financial objective of the BPIF

> 3 The BPIF exists for the benefit of its members. It aims to provide core services to its members at the lowest possible subscription, by efficient operation and by generating surpluses from other services supplied commercially to members and non-members.
>
> 4 BPIF aims to help its members to make profits, not generate them itself for distribution to them. BPIF is not an investment vehicle for its members."

167. The document indicates that the Appellant's purpose in engaging in commercial activities is to fund its "core services". This is a reference to services that are provided in exchange for the subscription, and thus excludes commercial services provided for additional payment. That commercial activities generally are not an end in themselves, but a means of supporting what must be a principal activity, supports the case that the Appellant's main object brings it within the exemption.

168. Accordingly, the Appellant argues that by reference to its constitution and its activities the main purpose of the Appellant throughout the relevant periods was such as to make it a body having "aims of a trade union nature" within the meaning of the European provisions.

169. All the evidence concerning the Appellant's activities is that those activities related to the printing industry and the interests of its members. There is no evidence that so far as the Appellant's activities consisted in representation and negotiations, anything it did was not related to the business or professional interests of its members (in other words, was not related to the interests of the printing industry). Accordingly, the Appellant says that the criteria in note 5 to item 1 in Group 9 of Schedule 9 to VATA94 is satisfied.

**HMRC's submissions**

170. HMRC say that *IMI* is the cornerstone of the Appellant's arguments. From this case the point is made that the Appellant comes within the definition of a trade union in EU terms and that the representational function should not be confined to lobbying the Government but should include negotiations with employees' trade unions or other third parties, and the provision of advice/representation in Employment Tribunals. Furthermore, it is said that the different aspects of this representational function may be combined in the one overarching purpose of defending members' interests and representing them to third parties.

171. The Appellant places emphasis on paragraph 20 of the Judgment, (see paragraph 35 above). However, this should be read in the context of the immediately preceding paragraphs 17 – 19. Paragraphs 17 and 18 explain that the exemptions of Article 13 are to be construed strictly given that they constitute exemptions to the general principle of turnover tax being levied on all services supplied for consideration by a taxable person (paragraph 17). Furthermore, paragraph 18 is a reminder that the purpose of Article 13A was to exempt only certain clearly described activities in the public interest, rather than every activity in such interest.

172. That warning is then acted upon at paragraph 19.

173. The reference to the "relevant decision-makers" and also to the "appropriate third parties" in paragraph 20 illustrates that it is not every body or person to whom the Appellant makes representations who will satisfy these criteria. Furthermore, the Appellant must have as its object defending/representing the collective interests of its members in relation to the "relevant decision-makers". This does not extend, say HMRC, to performing legal services for individual members in their cases before the Employment Tribunal. This is simply the provision of legal services to individuals, and not collective representation.

174. The ECJ's conclusions were underpinned by the opinion of Advocate General Cosmas. At AGO 51 he explains that the aim of the organisation seeking exemption for its subscription income must be the defence of the interests of its members in relation to the decisions of the "decision-makers".

> "….. Consequently, it is not sufficient for a non-profit-making organisation simply to promote the interests of its members where that does not go hand in hand with the defence of those interests and representation of its members in regard to decision makers affecting it."

175. The AGO at paragraph 54 quoted a written answer by the Commission to the European Parliament, which he said goes "in the same direction" as his "definition" of the expression "organisations with aims of a ... trade union ... nature":

> "The Commission is indeed aware of the linguistic discrepancies in the wording of Article 13A(1)(l) of the Sixth Directive. Terms such as "syndical" and "sindicale", which cover a variety of meanings, and are used in some language versions while the terms used in others are very specific (e.g. "trade union" and "gewerkschaftlich"). The Commission feels that these discrepancies should not, in practice, affect non-profit-making organisations (whether trade, employers' or employees' organisations) *whose activity is confined to representing the collective interests* of their members. In such cases, these organisations act as the collective emanation of their members whose subscriptions are then a tangible manifestation of their membership of a collective organisation and do not represent a consideration for services rendered. Such organisations should therefore be outside the scope of VAT. Organisations of the kind referred to above whose activity is not confined to representing the collective interests of their members are liable to fall within the scope of the tax where the subscriptions charged by them do, in fact, represent a consideration for individual services supplied to members."

176. There must be no risk of the distortion of competition and, as apparent from the opinion of the AGO in *IMI,* for a body to be accepted as a "trade union" within the meaning of the exemption, its activities have to be essentially those of representation because otherwise the concept would become so widely framed as to be meaningless and the exemption could be abused (AGO 61):

> "In my view, a professional Appellant such as the Institute cannot be regarded as pursuing aims of a trade-union nature within the meaning of the Directive because the result of unreasonably stretching the limits of that concept would be to water it down. Thus, organisations such as that described by the national court cannot be subsumed under the concept of 'organisations with aims of a ... trade-union ... nature' because to

> do so would be to alter the content of that vague legal concept with the result that it would end up being a concept having nominal value only and being without any binding legal effect and, in the final analysis, without any specific practical usefulness."

177. The principles set down in *IMI* were applied in *Heating and Ventilating Contractors Association*, which provides many parallels in terms of the case presented by the Appellant in that case to those in this appeal. At paragraphs 19 and 23 of the Decision, in response to the Appellant's submission that it was acting as the collective voice of its members, the Tribunal observed that it was more than that, that its aims went well beyond "merely representing the views of its members or acting as their collective voice". The aims extended to the promotion and safeguarding of the members' interests generally and the adding of value to its members' businesses. The Tribunal held that the promotion of members' interests generally did not satisfy the terms of Article 132(1)(l) as interpreted in the *IMI* case.

178. In the present case the Appellant has characterised itself as "an employers' association" in contra distinction presumably to an "employees' association". The Appellant is said to defend members' interests against third parties simpliciter without it being explained who those third parties are. The problem that the Appellant's arguments fail to deal with is that identified by the AGO in *IMI*, namely that the meaning of "trade union" becomes so elastic as to remove any practical usefulness from the concept of "trade union", as used in the Directive.

179. In this respect it is right to consider Article 134(a) of the PVD (formerly Article 13A(2)(b) of the Sixth Directive), which provides that a supply of goods or services shall not be granted exemption under Article 132(1)(l) "where the supply is not essential to the transaction exempted". In this case the transaction exempted would be the payment of subscriptions in order to be a member of a trade union. However, unless what is supplied in return for the subscription by way of goods or services is essential to the supply of membership, then those goods or services are not exempt supplies. The services provided to members are, say HMRC, for the most part nothing to do with the Appellant acting as their collective voice; Henderson J in *European Tour Operators v HMRC* [2012] UK UT 377, at paragraph 43 said:

> "I would add one further point. Although I heard no argument on the question, it seems to me, as at present advised, that a substantial protection for HMRC may be available in art 13A(2)(b) of the Sixth Directive (now art 134(a) of the Principal VAT Directive), which provides that the supply of services or goods shall not be granted exemption under, inter alia, para (1)(l) if "it is not essential to the transactions exempted". There is a considerable amount of EU jurisprudence on the interpretation of this restriction as it applies in relation to other exemptions under art 13: see *BASC* at [27] to [34]. There may be room for an argument—I put it no higher—that, in the context of art 13A(1)(l), the "transactions exempted" are to be regarded as those goods or services which are supplied pursuant to the aims which qualify for exemption (in the present case, aims of a political nature), and that only supplies which are essential to the attainment of those aims are to be granted exemption. On such an approach, ancillary fund-raising activities, although of obvious assistance to the attainment of the Appellant's political aims, would appear to be disqualified, because such activities are not essential to the advancement of political aims."

180. The Appellant's construction of the exemption, if accepted, would also appear to run counter to the comments of the Court in the *IMI* case concerning the need for the exemption to be construed strictly (paragraphs 17 and 18).

181. In the case of *The Committee of Directors of Polytechnics v Customs and Excise Commissioners* [1992] STC 873, Brooke J stated as follows:

> "Of course, one must look at the purpose of the exemptions as set out in the Sixth Directive and seek to give effect to those purposes. But if and in so far as the activities of an organisations which claim exemption do not fall within the activities of the organisations which are listed in art 13 of the Sixth Directive, then the court should not strain to make new law by suggesting that perhaps if those who make European legislation had thought about it, an organisation like that of the committee, which was somewhat similar to trade union and had purposes connected with education, should qualify for exemption on the proper construction of the Sixth Directive. The judgments of the European Court of Justice make it completely clear that a judge in a national court should look carefully at the categories of exemptions set out in art 13, and should not strive to write in what he may think to be gaps in a directive which was intended to lead to the standardisation of value added tax law throughout the Community."

182. In *British Association for Shooting and Conservation Ltd v HMRC* [2009] STC 1421 the BASC claimed exemption for subscriptions on the basis of the civil and political aims exemption in Article 13A(1)(l) and/or the services relating to sport exemption in Article 13A(1)(m). As is apparent from the *IMI* case and the wording of Item 1 to Group 9 of Schedule 9, the Courts and Tribunals in cases such as the present must establish what is the main object or primary purpose of the said organisation. Guidance on how this task was to be approached was provided in the BASC case.

183. Mr Justice Lewison, having considered paragraphs 19, 20 and 21 of the *IMI* case, said as follows,

- at paragraph 41:

> "41. I derive two things from this extract:
>
> i) That the professed aims of an organisation must be tested against what happens in reality (para 19); and
>
> ii) Where an organisation has multiple aims, then it is its "main object" that counts (paras 20 and 21)."

184. His Lordship then considered the case of the *Expert Witness Institute v Customs and Excise Commissioners* [2002] STC 42 and noted the following at paragraphs 43 and 45.

> "43. I derive from this case that:
>
> i) The aims of an organisation are (at least prima facie) to be found in its constitutional documents, tested against the reality of what it does;

> ii) It is permissible to approach the activities of an organisation on the basis that it has a main or primary aim which characterises its fiscal treatment;
>
> iii) An organisation will not have aims of a civic nature if its objectives are solely (or perhaps mainly) for the benefit of its members. ...
>
> Mr. Cordara criticised the tribunal for approaching the case on the basis of having to identify the primary object or objects of an organisation. I do not agree with this criticism. It is, in my judgment, clear both from the Motor Institute case and the Expert Witness case that identifying an organisation's main object is one element in deciding whether it falls within the exception. In addition the tribunal's use of the plural ('object or objects') clearly left room for the possibility that BASC might have multiple objects no single one of which could be said to be predominant."

185. Although the BASC's case was primarily concerned with a claim that its aims were civic, it also claimed it had political aims. Lewison J pointed out that the fact an organisation undertakes political activities does not necessarily mean that its aims are political (paragraph 51).

186. This approach was followed by Henderson J in the *European Tour Operators* case, where at first instance the Tribunal had said that the primary purpose of that Appellant was "what its directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions" (paragraph 32(1)). Henderson J, in applying the words of Lewison J, disagreed with the Tribunal's formulation.

> "28. In my judgment it is wrong to regard the "primary purpose" test as a subjective one, and the FTT erred in law when it directed itself that the primary purpose of the Appellant was "what its directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions." The relevant enquiry is an objective one, to be answered primarily by an examination of the stated objects and the actual activities of the body in question. The subjective views of the members or officers may throw some light on this enquiry, but they cannot be elevated into a diagnostic test. That this is the correct approach is in my judgment clear, both as a mater of principle (the aims or purposes of an organisation are an objective concept, and may be quite distinct from the subjective views or motives for joining of individual members), and on the authority of BASC where at [47] Lewison J commented as follows on the Tribunal's approach in that case: *"I see no legal error in this conclusion. The tribunal has looked at BASC's constitutional document, supplemented it by reference to other materials from which, objectively, conclusions about its objectives can be drawn, and tested that against the reality of what it does.""*

187. These Judgments were recently considered by Morgan J in *British Association of Leisure Parks v HMRC* [2013] UKUT 130 (TCC) where, at paragraph 14, his Lordship summarises the principles to be derived from the *BASC* and *European Tour Operators'* appeals, as explained above.

188. HMRC argue that the Appellant has adopted a very broad construction of "trade union" activity. It argues that "the exemption does not restrict who the third party may be, save that the third party must be "appropriate" having regard to the nature of

the Appellant in question". Thus, when it is asserted that the Appellant is an employers' association, which defends the business interests of members "vis à vis a variety of third parties", it is not stated who these third parties are nor how members' interests are defended.

189. The Appellant has abandoned its former position, that its primary purpose is the making of representations to Government on legislation and other public matters, and instead the case as to the third parties which the Appellant deals with on behalf of its membership is defined in terms of Government, Unions, legal disputes and "similar matters". The *IMI* case emphasised the need for clarity as to the objects or purposes of a trade union who is seeking to claim the benefit of exemption and that it is not every third party with whom a trade union deals who is "appropriate"; instead the ECJ referred to "the relevant decision-makers".

190. The Appellant also suggests that it does not matter who the third parties are and that "it simply needs to be a third party appropriate to the particular body in question". This is an assertion which goes well beyond the contemplation of the ECJ as referred to above. By adopting such a broad construction of the exemption, the Appellant can then claim that almost any action it engages in, in relation to a third party can be said to represent trade union activity. This would not be compatible with the view of the ECJ at paragraph 19 of the *IMI* case.

The Primary Purpose Test

191. As explained by Lewison J in *BASC,* regard must be had to the objects of the Appellant as set out in its constitution or other equivalent documents. There must then be a consideration of what the Appellant was actually doing during the relevant periods.

192. With regard to the objects of the Appellant in 1978 at the outset of the claim period (see paragraph 113 above), the Appellant maintains, that principle object (a) covers both representational and non-representational services; that (b) and (c) are solely representational; and that (d) refers to all areas of the Appellant's activity. It is not suggested by the Appellant that the objects are listed in any order of importance, although HMRC would observe that (a) must go to the heart of the matter with its reference to encouraging the efficiency and profitability of the industry. HMRC would also not necessarily accept the Appellant's categorisation of the various objects: principle object (a) does not as the Appellant suggests necessarily involve representational services although it is accepted that object (b) would be capable of including both representational and non-representational activity. However the risk involved with any attempt to categorise these brief objects is to assume that they refer to that which the reader wishes them to refer to and only that. It is for the Appellant to prove on the balance of probabilities that its main or primary object is an exempt one. If there is no one primary object its appeal fails.

193. The objects in force at the end of the period subject to the appeal have essentially remained the same since 2001. (See paragraph 119 above):

194. Objects (a) to (d) retain reasonable congruence with the 1978 objects. Those at (e) and (f) have been inserted since. Again, the most that might be said in the Appellant's favour about this list is that there is no predominant theme as to either representational or non-representational services. The Appellant's claim that most of the principal objects favour the former category is a hopeful but not convincing submission and again shows the risk of trying to divine and then add up one type of activity or another.

The Appellant's activities

195. The Appellant provides submissions upon its evidence filed in support of the primary purpose argument. That evidence consists of thirty-five lever arch folders of material.

196. HMRC accept that amongst the documents in the thirty-five files are many dealing with discussions with unions, or union/BPIF agreements, more so at the earlier part of the period subject to the appeal where there was severe industrial unrest in the industry. The fact that during the early 1980s there was such unrest means that, consequently, much of the Appellant's surviving documentation from that period refers to the same. It is no doubt of some historical value. However, that does not result in the conclusion that due to those particular circumstances the Appellant's primary purpose was that of acting as a trade union. In fact the disillusionment of the Appellant's membership with its response to the unrest resulted in the reviews undertaken by Lord McGregor of Durris. Not only did those reviews consider the Appellant's role in industrial relations but also its position as a trade association providing a range of other services to its membership.

197. Thus, from the outset of the claim period, there is material demonstrating that the Appellant's role extended well beyond that of acting as the collective voice of the printing industry.

198. Throughout its modern history the Appellant has retained an important function in the training of workers and managers within the industry. Yet this significant aspect of its activity has not been addressed, and only one volume of training documentation has been served despite many references to training within committee minutes and annual reports.

199. The focus in the Appellant's submissions and in the served material on its role in industrial relations is in contrast to its previous position in the pleadings to the effect that lobbying Government on legislation was its primary purpose.

200. Nevertheless, the provision of a range of services to the Appellant's membership has been a feature of its activity throughout the claim period. The 1978 Printing Industries Annual details the various committees of the Appellant, but even those that the Appellant claims to be concerned with representational activity are also concerned with providing services for individual members.

201. The 1991/1992 yearbook explains what services were being provided then in return for subscriptions, and it is apparent therefrom that the range of services

extended well beyond representational functions. Thus, where Mr Gardiner seeks to distinguish between subscription income and other "non-lobbying income" during the 1980s and 90s, it must be remembered that the subscription income was not simply referable to lobbying activity but extended to other services.

202. Stephen Walker explained how the role of trade associations in industrial relations diminished along with the influence of the unions upon the industry. The number of industrial relations advisers employed by the Appellant's regions sharply reduced from three to one. He states that "member companies now expect its trade Association to show value for money" and that "more companies are non-unionised and expect support in other ways"; also "unionised companies can more easily manage their own industrial relations".

203. There were 3,800 members in 1981 but by 2005 that number had fallen to 2,110 or only 16% of the print industry. Thus, according to Mr Brown, the Appellant increased the range of services it provided from the mid-1980s.

204. It is apparent that by 2003/04, when the Appellant published its strategic plan, the representational aspect of its activity was firmly in decline. Its 2004 Business Plan stated that "the BPIF is a business and is in business, as our customers are, to make profits".

205. The analysis carried out by the Respondents' decision-making officer, Mr Vincent, and contained in his letter of 17 December 2008, explains the tiered membership structure of the Appellant with silver, gold and platinum levels and how the level of services is matched to the level of subscriptions. Mr Vincent points out that in 2006/07 - 49% of income was from subscriptions. All levels of membership benefited from representational activity but only 19% of total turnover could be attributed to the benefits included in the most basic level of membership (silver). Of the nineteen benefits listed in the prospectus for silver membership, only one relates to representation. Only one page of the prospectus concerned the benefits of representation; fourteen pages related to the provision of what would be taxable services.

206. The percentage of time spent by staff on representations to Government or subscription maintenance was calculated by Mr Vincent as 4.5%. He acknowledged, however, that various committees contained volunteer members who may have had input into representations to Government.

207. In contrast to this analysis, Stephen Walker put forward an analysis of added value to members' businesses by reason of their membership of the Appellant. In his work the two most significant benefits to members in terms of added value or saved costs are negotiation/national agreements with unions and lobbying. However, although the membership amounts to 16% of the trade sector, the figures put forward by Mr Walker are on the basis of added value to the whole industry. In any event, there are inherent difficulties with an assessment of primary purpose based on added value because there is no necessary correlation between the two. Furthermore, no analysis is provided to demonstrate that but for the lobbying or national negotiations

by the Appellant the added value would not have accrued or would have accrued in a lesser sum. It is stated that the best measure of the Appellant's activities is the financial benefit to the members of the activities carried out. No evidence or justification is put forward for this contention at all.

208. The Tribunal has to determine the primary purpose of the Appellant (if there is one) on the basis of an objective assessment of all the evidence rather than the subjective views provided on behalf of the Appellant. The ECJ was clear in the *IMI* case that qualification for the exemption would be based on clearly defined activity coming within the terms of the Article. The Appellant has provided no clear delineation of its activities nor a balanced and logical appraisal of their relative importance.

Conclusion

209. The question before us is whether the Appellant can rely upon Article 132(1)(l) of the Principal VAT Directive 2006, formerly enacted as Article 13A(1)(l) of the Sixth Directive in so far as a member state must exempt the supply of services and goods for the benefit of and in the common interests of its .. members in return for a subscription by .. non-profit making organisations with aims of a .. trade union nature provided the exemption is not likely to cause distortion of competition.

210. Article 134 of the Principal VAT Directive states that the exemption shall not apply where the supply is not essential to the transactions exempted.

211. The parties agree that the Appellant is a non-profit making organisation and therefore that issue is not before us.

212. The Appellant does not pursue its earlier ground of appeal, that the Appellant's activities fall within the ambit of domestic legislation, that is items 1(a) and 1(d) of Group 9 to Schedule 9 of VATA.

213. The *IMI* case is the leading, if only, decided case within the context of the provisions of EU law on the meaning of "trade union". At paragraph 23 the ECJ said that a "trade union" means an organisation whose main aim is to defend the collective interests of its members – whether they are workers, employers, .. and to represent them vis-à-vis the appropriate third parties, including the public authorities. Paragraph 23 must be read in the context of the preceding paragraphs 17 – 22 in which the ECJ refers to appropriate third parties as ".. relevant decision makers .." (paragraph 19), and that an organisation satisfies the above criterion in so far as it provides its members "with a representative voice and strength in negotiations with third parties" (paragraph 21).

214. At paragraph 17 the ECJ says that the terms used to specify the exemptions envisaged by Article 13 of the Directive are to be interpreted strictly, and at paragraph 18 that the aim of Article 13A is to exempt from VAT those activities which are in the public interest.

215. As observed by the AG in his preliminary opinion, there is a danger in widening the definition of "trade union" to the point where the distinction between such an organisation, in the context envisaged by EU exemptions, would be blurred with that of an organisation undertaking commercial activities for individual members.

216. In determining the main aim of the organisation it was decided in the *BASC* case that its professed aims must be tested against what happens in reality, and if it has multiple aims it is ".. the main object which counts" (paragraph 41) and that, as was made clear in the *IMI* case and *Expert Witness* case, it is necessary to decide whether the organisation has a primary purpose (paragraph 45).

217. If there are multiple objects and no dominant purpose which characterises the fiscal treatment of an organisation undertaking activities of a trade union nature, or if the organisation does not have aims of a public nature and its activities are solely or mainly for the benefit of its members, it does not satisfy the test (paragraphs 43 and 45 of the *BASC* case).

218. Although it is possible that the activities of the Appellant were once those of a trade union and the parties agree that it is left open to the Tribunal to determine that the Appellant was an organisation fully within the EU exemption provisions for only part of the relevant periods, we have not been presented with any substantive or detailed submissions in that regard, and therefore the question is whether the main aim or primary object of the Appellant satisfies the exemption provisions throughout the periods that are subject to the appeal.

219. Mr Simpson on behalf of the Appellant, says that, as recognised in the *BASC* case and *European Tour Operators* case, the principal circumstances to be considered in ascertaining the federation's main aims are its constitution and the reality of what it does. Mr Puzey for HMRC agrees with this.

220. In 1978 the first principal object stated in the Appellant's constitution was (a) to encourage the efficiency and profitability of the *industry* and to that end provide such advice, information and services to members *and others* as the Council may decide. Mr Simpson agreed that (a) did not cover representational activity, but said that services could encompass negotiation and lobbying. We do not agree that is a correct interpretation and it also has to be observed that the Appellant's activities were not only for its members but for the industry in general and non-members. We agree that the other objects at (b), (c) and (d) included representational activities in one form or another.

221. The Appellant's constitution largely remained the same throughout the relevant periods and in 2009 the first principal object was "(a) to assist members *and others* in improving their efficiency and profitability by providing a range of business support services". Mr Simpson explained that the reference to improving profitability was an error in so far as it implied that the Appellant was not a non-profit making organisation previously and the wording was amended in 2010. The Appellant's constitution does not state that the order in which its principal objects are listed implies any degree of priority or importance. However, the fact that the first principal

object referred to improving members profitability by providing either advice or business services (in many cases for an additional fee) to either members or non-members clearly detracts from the contention that the Appellant's primary aims are representational and in the collective interests of its members. The Appellant's other main objects in 2009 include representation but are not confined to that. The object "to promote and defend the collective interests of members" appears in the penultimate paragraph (e). As HMRC argue, there is no predominant theme of representational services.

222. With regard to the Appellant's actual activities, we accept that there is an abundance of evidence to show that it was in discussions with government, public authorities and unions, particularly in the early years when there was a considerable amount of industrial unrest in the industry. However, this does not lead to the conclusion that the Appellant's primary purpose was that of a trade union defending the collective interests of its members in the public interest. The Appellant engaged in other activities, many of which were of a commercial nature. There were a variety of different committees overseeing these activities, eleven in total, and it is apparent that the range of services extended well beyond representational functions.

223. Mr Brown in his evidence said that the Appellant's services were simply a means to an end and that the predominant purpose was representation, lobbying, negotiating and defending its members' interests. However the evidence does not bear this out. In fact Mr Brown describes the Appellant as "an employer association, a trade association and a business support association". All the Appellant's witnesses say that the Appellant's main aim is lobbying and representation. In the case of Mr Brown and Mr Smith, this may reflect the nature of the activities they were involved with, but does not accurately describe the Appellant's broad range of activities and ultimate aim to make its members and the industry in general more profitable.

224. Mr Walker agreed that the Appellant's purpose was to advance the commercial interests of its members. The federation provides training, consultancy services, legal advice and many other commercial services. Mr Gardner said that the members chose the services they wished to take, and many services were of a human resource function for individuals at a personal level rather than in the general interests of members as a whole. There may have been annual negotiations with unions, particularly with regard to the national pay agreement, but less than 25% of the industry was unionised.

225. Particularly after the 1980s it is clear that the print industry, at least in terms of member numbers, was in decline. The number of members went from 3,800 to 2,100, which meant that the federation had to increase its commercial services to off-set the reduction in subscriptions. This in turn led to the introduction of numerous benefits for a separate fee, and a tiered level of membership ("gold" and "platinum" as opposed to basic "silver"). The gold and platinum memberships included various aspects of business support, health and safety advice, consultancy services, HR support and schemes which provided discounts on products such as pensions and insurance.

226. The Appellant's annual review in 1995 referred to the principal role of the federation being to "help members improve their profitability by promoting a wide range of tailored business solutions" and that it would help members "exploit opportunities presented by the economic recovery, changing markets and new technologies .." and also ".. improve skill resources in management, marketing, selling and manufacturing". The annual review also encouraged members to use the federation's ".. specialist consultancy services .." . Mr Brown said that these comments had to be read in the context that the Annual Review was more of a marketing publication than one indicating the federation's constitutional objectives. We find that difficult to accept. The board of directors' agenda nine years later referred to the federation's "core services" being "to help members make a profit". There was no reference to representation.

227. Mr Simpson argues that the best method of ascertaining the principal purpose of an organisation is by an analysis of the benefit of its activities to members. Mr Walker, in cross examination regarding his value added analysis, accepted that there was not necessarily any correlation between the cost of providing certain services and the value added or returned to members, so that, for example, the cost of lobbying and representation may have, proportionally, taken up much of the federation's time without there being any discernible substantive benefit. He was also not able to provide any forensic evaluation to support some of his assumptions, or for example that there had been changes in legislation as a result of lobbying. As HMRC say, what Mr Walker's analysis did show was the sheer breadth of the organisation's activities.

228. With regard to specific projects, we were not provided with any evidence that, for example, the "Partnership at Work" agreement achieved its objectives in terms of the aims of the project being eventually incorporated into contractual terms between employers and employees. Also, the benefits and improvements derived from the setting up of the "Vision in Print" organisation formed with government funding to help promote "lean technology" was not specifically for the Appellant federation, but for the industry as a whole.

229. Mr Simpson says that the fact that certain activities may increase members' profitability is not the correct level of abstraction at which to view the issues. He said that this could be said of many organisations which enjoy the VAT exemption. If the federation did nothing but lobby, it could still be argued that the objects promoted the improvement of its members' profits. He says that it is necessary to regard the commercial activities as a means to an end and ask whether the Appellant's primary aims are principally representational. He says that HMRC's own guidance (VTUPB 1200) states that trade unions must be able to show that ".. essentially they look after their members' interests .." and acknowledges that assisting members involved in legal disputes relating to their employment is a recognised trade union activity which should enjoy exemption. He says that this cannot be reconciled with HMRC's arguments, that the Appellant's services in providing legal advice and representation and similar services at an individual member level does not fall within the exemption and could result in a distortion of trade. It is not possible for a trade union or other organisation to do nothing but lobby, and by definition much of its activities have to be parasitic to the main objects. He argues that although the Appellant's commercial

activities increased significantly after the late 1980s, this did not mean that its main objects had changed. There had to be a weighing exercise and the federation had to appeal to members on an industry wide scale, otherwise membership would fall and the financial viability of a non-profit making organisation, which existed only for the benefit of its members, would be threatened. There had to be an element of budgeting and financial strategy and the level of commercial activity was only commensurate and subsidiary to the main purposes.

230. Mr Simpson's submissions are not borne out by an examination of the Appellant's constitution, its core objects as stated in numerous publications and in its declared financial strategy, all of which refer to its main objectives being to improve member profitability and to add value to their businesses.

231. Moreover, many of the services provided by the Appellant are not " .. essential to the transactions exempted" (Article 134 of the Principal VAT Directive). While members will clearly regard some of the activities and objects as useful, they are no more than that. Similarly, while some can be said to be in the general public interest – for example, providing structured training, promoting technological improvements and organising networking opportunities, they are of a quasi-commercial nature and not sufficient to entitle the Appellant to exemption as a trade union. As an observation, it could be argued that the purpose of many of the Appellant's services is to raise additional income ".. through transactions which are in direct competition with those of commercial enterprises subject to VAT" (Article 134(b) Principal VAT Directive). The Appellant's stated objects in 2004 were "to provide core services to its members at the lowest possible subscription .. by generating surpluses from other services supplied commercially to members and non-members". Although it is therefore implied that commercial services are not part of the core services, that is clearly not always the case, and therefore some of the Appellant's activities would be in direct competition with commercial enterprises subject to VAT.

232. In our view the main aims or primary purpose of the Appellant goes beyond defending the collective interests of the federation's members and representing them vis-à-vis third parties and in the public interest. The federation supplies services to members and non-members which add value to their businesses, and as such could lead to distortion of competition which would place the members at an advantage compared to other suppliers.

233. The burden is on the Appellant to establish that it is entitled to exemption under Article 132(1)(l) of the Principal VAT Directive, formerly Article 13A(1)(l) of the Sixth Directive as it seeks an exemption from the general principle that turnover tax is levied on all services supplied for consideration by a taxable person. As stated in *IMI* the terms used to specify the exemptions are to be interpreted strictly. Whilst a court should not reject a claim relying on the exemption where the claim comes within a fair interpretation of the words of the exemption because there is another more restrictive meaning of the words which would exclude the supplies in question (*BASC* and *European Tour Operators),* there is insufficient evidence which would enable the Tribunal to find that the principal objective of the Appellant was restricted to that of an organisation whose main aim was to defend the collective interests of its members

and represent them vis-à-vis third parties. Accordingly, the Appellant has not established that it satisfies the criterion for exemption from VAT.

234. For the above reasons, the appeal is dismissed.

235. 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.

**MICHAEL S CONNELL**

**TRIBUNAL JUDGE**

**RELEASE DATE: 4 February 2014**