[2014] UKUT 0370 (TCC)

Appeal number FTC/44/2013

VALUE ADDED TAX - exemption for cultural services - supplies of right of admission to cinema by body governed by public law - whether Article 13A(1)(n) Sixth Directive sufficiently clear and precise to have direct effect - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

BRITISH FILM INSTITUTE

Respondent

Tribunal: Mr Justice Hildyard
Judge Greg Sinfield

Sitting in public at the Royal Courts of Justice, The Rolls Building, Fetter Lane, London EC4 on 12 May 2014

Sarabjit Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

David Milne QC and Zizhen Yang, counsel, instructed by Deloitte LLP, for the Respondent

DECISION

Introduction

1. The Commissioners for Her Majesty's Revenue and Customs ("HMRC") appeal against the decision of the First-tier Tribunal (Judge Peter Kempster and Mrs Lynneth Salisbury) ("the FTT") released on 5 December 2012 ("the Decision").

2. The Decision related to a preliminary issue in an appeal by the British Film Institute ("the BFI"), namely whether Article 13A(1)(n) of Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment ("the Sixth Directive") had direct effect between 1 January 1990 and 31 May 1996 ("the Claim Period").

3. Article 13A(1)(n) of the Sixth Directive exempted supplies of "certain cultural services and goods closely linked thereto by bodies governed by public law or other cultural bodies recognised by the Member State concerned". During the Claim Period, UK domestic legislation did not provide exemption for cultural services and the BFI accounted for VAT at the standard rate on the sale of tickets for admission to screenings of films.

4. The FTT decided that Article 13A(1)(n) of the Sixth Directive had direct effect during the Claim Period. In doing so, the FTT rejected HMRC's submission that the opening words of the provision, "certain cultural services", gave the United Kingdom (and other Member States) discretion not to exempt some cultural services. The FTT concluded, at [68] of the Decision, that those words meant "all cultural services" and, accordingly, that supplies of the right of admission to cinemas by the BFI in the Claim Period were exempt supplies for VAT purposes without the need for any national implementing legislation.

5. There is no dispute that a provision of a directive has direct effect, ie can be relied upon by a person against all national legislation which does not conform to it, if it is unconditional and sufficiently precise - see Case 8/81 *Ursula Becker v Finanzamt Munster-Innenstadt* [1982] ECR 53 at [25].

6. Before us, it was not disputed that admission to a cinema or other venue showing films was a cultural service for the purpose of Article 13A(1)(n). It was also agreed that the BFI was a body governed by public law or other cultural body within the meaning of Article 13A(1)(n).

7. Thus, the only issue in this appeal is whether, as the FTT held, the terms of Article 13A(1)(n) were (a) sufficiently clear and precise for it to have direct effect, and (b) not such as to permit the Member States any latitude or discretion in its application. The answer turns on the meaning of the opening words of the provision: "certain cultural services".

8. For the reasons given below, we agree with the FTT that Article 13A(1)(n) of the Sixth Directive did have direct effect during the Claim Period. It was sufficiently clear and precise, and it did not allow Member States any substantial latitude or

discretion in applying it. Accordingly, we dismiss HMRC's appeal against the FTT's decision.

Background

9. As the Decision related to a preliminary issue of law, the relevant facts, which were not in dispute, can be stated briefly in order to put the issue in context.

10. The BFI was formed in 1933 as a private company limited by guarantee. In 1951, it was agreed that the BFI would run the National Film Theatre (now the BFI Southbank) which opened to the public in 1952.

11. Until 31 December 1989, a transitional provision, namely Article 28(3)(a) of the Sixth Directive, allowed Member States to make certain otherwise exempt services, including cultural services, chargeable to VAT. Although there was no transitional provision in force from 1 January 1990, the UK did not implement Article 13A(1)(n) until 1 June 1996 when the VAT Act 1994 was amended so as to grant exemption for supplies of cultural services described in group 13 to schedule 9 to the Act.

12. During the Claim Period, the BFI accounted for VAT at the standard rate on supplies of the right of admission to films shown at the National Film Theatre and at various film festivals.

13. On 30 March 2009, the BFI submitted a claim to HMRC for repayment of overpaid output VAT of approximately £1.2 million plus interest. The basis of the BFI's claim was that its supplies of the right of admission to films during the Claim Period were cultural services and exempt under Article 13A(1)(n) of the Sixth Directive. HMRC rejected the BFI's claim.

Legislation

14. Article 13A(1) of the Sixth Directive (now Article 132(1) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("the VAT Directive")) contained provisions relating to exemptions for certain activities in the public interest. The relevant parts of Article 13A(1) were as follows:

> "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 of preventing any possible evasion, avoidance or abuse:
>
> ...
>
> (m) certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education;
>
> (n) certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned;

..."

15. Although Article 13A(1)(m) relates to the supply by non-profit organisations of services closely linked to sport or physical education, not "cultural services", and so is not directly relevant to the BFI's services, we have set it out because it deploys the words "certain services" which are in contention, and because its meaning has been the subject of decisions by the Court of Justice of the European Communities, later the Court of Justice of the European Union, (together "the ECJ"). These are discussed below: suffice it for the present to note that the BFI rely on these decisions as confirming its contentions and as, in effect, displacing earlier domestic authority. HMRC, on the other hand, rely on the differences in subject matter and wording between the two provisions in support of their contention that those decisions on Article 13(A)(1)(m) do not substantially assist the BFI.

16. Articles 13A(1)(m) and 13A(1)(n) of the Sixth Directive were considered together in the First Report from the Commission of the European Communities ("the Commission") to the Council dated 14 September 1983 (which was not before the FTT). This was a report by the Commission on the application of the common system of value added tax in the Member States following the implementation of the Sixth Directive into national legislation on different dates from 1 January 1978. From page 48 of the Report, it is clear that the Commission regarded the wording of both Articles 13A(1)(m) and 13A(1)(n) as extremely vague. The Report stated:

> "It seems paradoxical to introduce cases of compulsory exemption and leave the substance to the discretion of each Member State. There is however no doubt that in adopting the text of these provisions the Council considered that the Member States should grant only limited exemptions in the two areas of sporting and cultural activities, for otherwise there would have been no reason to use the adjective 'certain'. The Commission considers that it is especially necessary to achieve genuine harmonization in these areas as Member States may continue, during the transitional period [ie the period that ended on 31 December 1989], to tax those services which should be exempt: confusion is therefore complete, since the substance of such services has not been determined."

17. Article 13A(2)(a) of the Sixth Directive allowed Members States to make the granting of exemption to bodies other than bodies governed by public law subject to one or more specified conditions. Article 13A(2) provided as follows:

> "Member States may make the granting to bodies other than those governed by public law of each exemption provided for in 1 … (m) and (n) of this Article subject in each individual case to one or more of the following conditions:
>
> - they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied,
>
> - they shall be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned,

> - they shall charge prices approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to value added tax,
>
> - exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises liable to value added tax."

18. Annex H to the Sixth Directive contained a "List of supplies of goods and services which may be subject to reduced rates of VAT" that included:

> "Admissions to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities."

Case-law

19. Case C-124/96 *EC Commission v Spain* [1998] STC 1237 concerned the exemption for services closely linked to sport or physical education under Article 13A(1)(m). The Spanish Government had restricted the exemption to services supplied by private bodies or establishments of a social nature whose entry fees did not exceed a specified amount. The Commission took infraction proceedings. The Spanish Government, supported by the United Kingdom as intervener, argued that the use of the term "certain services" permitted Member States to limit the scope of Article 13A(1)(m), not only by excluding certain services provided by sports establishments from the exemption, but also by applying other criteria, such as the amount of the consideration for the services.

20. The Advocate-General (La Pergola) agreed with the Commission that the exemptions in Article 13A(1) were mandatory exemptions and the Member States had no discretion as regards their grant. In a footnote to [5] of his Opinion, the Advocate General said:

> "I need scarcely point out that the Spanish Government's argument to the effect that Member States are free to determine the services which may benefit from an exemption since Article 13(A)(1)(m) provides only that '*certain* services [emphasis added]' are exempted cannot be accepted. I do not believe that the Community legislature intended to confer such a wide discretion on Member States. The term in question ('*certain*') doubtless constitutes an unfortunate formulation of the provision, but it does not have the scope attributed to it in the Spanish Government's defence; it simply means that not all services are to be exempted but merely those which, as the provision states, are 'supplied by non-profit-making organisations'. Moreover, since the latter constitutes the aim which justifies the grant of the exemption, the rule in question must in any event - in so far as it lays down the services to be exempted - be capable of pursuing that aim."

21. The ECJ in *Commission v Spain* recorded the Spanish Government's submissions as follows:

> "14. The Spanish Government then argues, concerning the exemption of supplies of services referred to in Article 13A(1)(m), that, unlike other exemptions envisaged by that provision, letter (m) provides for the exemption of 'certain' supplies of services. In its submission, that permits Member States to limit the scope of Article 13A(1)(m), not only by expressly excluding certain services provided by sports establishments from the exemption, but also by applying 'other criteria', such as the amount of the consideration for the services in question."

22. The ECJ then dealt with the first of those arguments as follows:

> "17. To apply the criterion of the amount of membership fees may lead to results contrary to Article 13A(1)(m). As the Advocate General has pointed out at paragraph 5 of his Opinion, to apply such a criterion may result, first, in a non-profit-making body being excluded from the benefit of the exemption provided for by the provision and, secondly, in a profit-making body being able to benefit from it.
>
> 18. Moreover, there is nothing in that provision to the effect that a Member State, when granting an exemption for a certain supply of services closely linked to sport or physical education provided by non-profit-making bodies, may make that exemption subject to any conditions other than those laid down in Article 13A(2)."

We consider that, in [18], the ECJ was addressing and rejecting the first of the arguments of the Spanish Government, set out at [14], namely that the word "certain" in Article 13A(1)(m) permits Member States to limit the scope of the exemption by expressly excluding certain services provided by sports establishments.

23. In Case C-144/00 *Criminal Proceedings against Hoffmann* [2004] STC 740, the issue was whether "bodies governed by public law or … other cultural bodies recognised by the Member State" in Article 13A(1)(n) included individual artists appearing as soloists. The ECJ held that "other cultural bodies" did not exclude individual performers.

24. In *Hoffmann*, the Advocate General (Geelhoed) noted at [30] of his Opinion that:

> "The Court regards the concepts used in Article 13 of the Sixth Directive as independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another. Title A exempts from VAT certain activities which are in the public interest. That provision does not however provide exemption from the application of VAT for every activity performed in the public interest, but only for those which are listed and described in great detail in it. Most of those exemptions - including exemption (n), which is at issue here - cover organisations acting in the public interest in a social, cultural, religious or sports setting or in a similar setting. The purpose of the exemptions is therefore to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes."

25. He considered how the term "cultural bodies" should be interpreted by first considering the scope of the term "cultural services". He noted at [44] that:

> "In the first place it must be established which cultural services fall within the scope of the exemption provided for in Article 13A(1)(n). However, cultural services are not eligible for exemption in all cases. The exemption applies only where the services are supplied by certain cultural bodies."

26. At [47] of his Opinion, the Advocate General observed:

> "As I stated in point 31, the Community legislature opted for a measured system of VAT on art. Certain, but not all, cultural services are covered by the exemption provided for in Article 13A."

27. Mr Sarabjit Singh, who appeared for HMRC, relied on the passage from [47] of the Opinion of the Advocate General in *Hoffmann* as showing that the FTT was wrong to conclude that "certain cultural services" meant all cultural services. We do not consider that the Advocate General was indicating in that passage that Member States had a discretion to choose which cultural services should be exempted. In our view, the Advocate General was simply stating that certain cultural services, ie ones supplied by bodies governed by public law or by other cultural bodies recognised by the Member State, are exempt under Article 13A(1)(n). We consider that is confirmed by the Advocate General's comment in a footnote to [65] as follows:

> "In *Commission v Spain*, for example, the Court defined the following limit: the criteria which the Member States use must not affect the substantive scope of the exemption by resulting in certain cultural services being excluded from the VAT exemption."

The Advocate General also stated, at [85] of his Opinion, that the wording of Article 13A(1)(n) related only to "cultural services supplied by certain cultural bodies" which suggests that he did not see the word "certain" as permitting any restriction of the scope of the term "cultural services".

28. The ECJ recorded the submissions of Germany, the Netherlands and the United Kingdom in *Hoffmann* at [19] as follows:

> "The wording and scheme of Article 13A(1)(n) of the Sixth Directive show that only 'certain' cultural services, and supplies of goods which are 'closely' linked to them, may be exempted from VAT. Furthermore, those services must be supplied by specific 'bodies', the Member States having in that regard a discretion as to the bodies other than public-law bodies which they recognise."

29. The ECJ gave its answer to these submissions at [24]-[30], noting at [27], that:

> "Consequently, the principle of fiscal neutrality requires that individual performers, as long as their services are recognised as cultural, may be regarded, like cultural groups, as bodies similar to public-law bodies supplying certain cultural services mentioned in Article 13A(1)(n) of the Sixth Directive."

30. The ECJ in *Hoffmann* did not consider the meaning of "certain" in Article 13A(1)(n) specifically since it does not seem to have been the subject of the questions referred to the Court or any argument before it. The ECJ considered the effect of the phrase "certain activities" in the heading to Article 13A, which was the subject of the second question referred, in [37]-[40]:

> "37. In that regard, it must be observed that the heading of Article 13A of the Sixth Directive, the wording of which is 'Exemptions for certain activities in the public interest', does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision.
>
> 38. First, the activities which are to be exempted from VAT, those which may be exempted by the Member States and those which may not, as well as the conditions to which the activities eligible for exemption may be made subject by the Member States, are specifically defined by the content of Article 13A of the Sixth Directive. Second, as is confirmed by paragraph 2(a) of that article, which authorises, but does not oblige, the Member States to restrict exemption to bodies other than public-law bodies which do not have a systematic profit-making aim, the commercial nature of an activity does not preclude it from being, in the context of Article 13A of the Sixth Directive, an activity in the public interest.
>
> 39. The possible restrictions on the benefit of the exemptions provided for by Article 13A of the Sixth Directive may be imposed, as is pointed out at paragraphs 28 and 29 of this judgment, only in the context of the application of paragraph 2 of that provision.
>
> 40. The reply to the second question must therefore be that the heading of Article 13A of the Sixth Directive does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision."

31. In Case C-253/07 *Canterbury Hockey Club and Canterbury Ladies Hockey Club* v *HMRC* [2008] STC 3351, one of the questions referred to the ECJ by the High Court was whether the expression "certain services closely linked to sport" in Article 13A(1)(m) permitted a Member State to limit the exemption only to individuals taking part in the sport concerned. In *Canterbury Hockey Club*, the ECJ (there was no Advocate General's Opinion) held, at [27], that:

> "… Article 13A(1)(m) of the Sixth Directive is not intended to confer the benefits of the exemption under that provision only on certain types of sport but covers sport in general …"

32. The ECJ noted the submissions on behalf of the United Kingdom and set out its views at [37]-[39]:

> "37. The United Kingdom Government submits that the Member States are free to limit the scope of the exemption to supplies of services which are provided to individuals, since Article 13A(1)(m) of the Sixth Directive requires the exemption only of 'certain services closely linked to sport'.
>
> 38. In that regard, the different categories of activities which are to be exempted from VAT, those which may be exempted by the Member

> States and those which may not, as well as the conditions to which the activities eligible for exemption may be made subject by the Member States, are specifically defined by the content of Article 13A of the Sixth Directive (Case C-144/00 *Hoffmann* [2003] ECR I-2921, paragraph 38).
>
> 39. The possible restrictions on the benefit of the exemptions provided for by Article 13A of the Sixth Directive may be imposed only in the context of the application of paragraph 2 of that provision (see *Hoffmann*, paragraph 39). Thus, when a Member State accords an exemption for certain services closely linked to sport or physical education supplied by non-profit-making organisations, it may not make that exemption subject to conditions other than those laid down in Article 13A(2) of the Sixth Directive (see Case C-124/96 *Commission* v *Spain* [1998] ECR I-2501, paragraph 18). …"

The ECJ concluded, at [40], that "the expression 'certain services closely linked to sport', in Article 13A(1)(m) of the Sixth Directive, does not allow the Member States to limit the exemption under that provision by reference to the recipients of the services in question."

33. We were also referred to a recent decision of the ECJ that had not been available to the FTT, namely Case C-18/12 *Město Žamberk v Finanční ředitelství v Hradci Králové* (2013). The issue in that case was whether non-organised, unsystematic and recreational sporting activities carried out in a municipal aquatic park were sport or physical education within Article 132(1)(m) of the VAT Directive (the successor to Article 13A(1)(m) of the Sixth Directive). The ECJ (again, there was no Advocate General's Opinion) observed, at [17], that:

> "… it is the Court's settled case-law that the exemptions referred to in that article constitute independent concepts of European Union law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another …"

and held, at [21], that:

> "As regards Article 132(1)(m) of the VAT Directive, it must be pointed out that, according to its wording, that provision covers taking part in sport and physical education in general. Having regard to that wording, the provision is not intended to confer the benefit of the exemption under it only on certain types of sport (see, to that effect, *Canterbury Hockey Club and Canterbury Ladies Hockey Club*, paragraph 27)."

34. We were also referred to a number of decisions of the VAT and Duties Tribunal which was the predecessor to the FTT, namely:

(1) *Glastonbury Abbey v Commissioners of Customs and Excise* [1996] V&DR 307;

(2) *Trebah Garden Trust v Commissioners of Customs and Excise* [2000] VTD 16598,

(3) *Chichester Cinema at New Park Limited v HMRC* [2005] VTD 19344;

(4) *Northampton Theatres Trust Limited v HMRC* [2006] V&DR 27; and

(5) *The Corn Exchange Newbury v HMRC* [2007] VTD 20268.

35. Before the FTT and us, Mr Singh relied on *Glastonbury Abbey*, *Trebah Garden Trust*, and *Chichester Cinema* in which the VAT and Duties Tribunal had concluded that the phrase "certain cultural services" gave Member States a margin of discretion and so Article 13A(1)(n) did not have direct effect. In the Decision, the FTT also referred to *The Corn Exchange Newbury* which had not been cited but also supported HMRC's submissions. The FTT, at [58] and [69]-[73] of the Decision, concluded that the earlier decisions of the VAT and Duties Tribunal were not binding and, in any event, were decided per incuriam as they had been decided without any consideration of the ECJ's decision in *Commission v Spain*.

36. The VAT and Duties Tribunal was referred to *Commission v Spain* in *Northampton Theatres Trust*, a decision not cited to the FTT or referred to in the Decision, where the Tribunal concluded that "no effect should be given to the word 'certain' in [Article 13A(1)(n)]." Mr Singh observed that it did not appear from the decision that the Tribunal in *Northampton Theatres Trust* heard any argument on the meaning of "certain".

37. We do not consider that it is necessary to refer to the earlier Tribunal decisions in any detail. We agree with the FTT that those decisions (*Glastonbury Abbey*, *Trebah Garden Trust*, *Corn Exchange Newbury* and *Chichester Cinema*) have been overtaken by the decisions of the ECJ (*Commission v Spain*, *Hoffman*, and *Canterbury Hockey*) and, in any event, they are not binding on us.

The FTT's decision

38. On the basis of the ECJ's decisions in *Commission v Spain*, *Hoffmann* and *Canterbury Hockey*, the FTT rejected HMRC's submission that "cultural services" is too general, vague or unspecific a description to allow sufficient precision to invoke direct effect. The FTT observed that the same objection could be made to the phrase "certain services closely linked to sport or physical education" in Article 13A(1)(m). The FTT concluded, at [66], that the restrictions in Article 13A(2) gave no discretion to Member States to discriminate between services closely linked to sport (in the case of Article 13A(1)(m)) nor to discriminate between cultural services (in the case of Article 13A(1)(n)).

39. The FTT decided that Article 13A(1)(n) of the Sixth Directive had direct effect during the Claim Period. In doing so, the FTT rejected HMRC's submission that the opening words of the provision, "certain cultural services", gave the United Kingdom (and other Member States) discretion not to exempt some cultural services. The FTT concluded, at [68] of the Decision, that those words meant "all cultural services" and, accordingly, supplies of the right of admission to cinemas by the BFI in the Claim Period were exempt supplies for VAT purposes without the need for any national implementing legislation. The FTT also noted, at [72], that the paradox noted by the Commission in its Report, and referred to by the VAT and Duties Tribunal in *Chichester Cinema*, disappears if "certain" is read as "those", as suggested by the Advocate General in *Commission v Spain* in footnote [5] to his Opinion.

Submissions

40. Mr Singh submitted that the term "certain cultural services" is not sufficiently clear and precise for Article 13A(1)(n) of the Sixth Directive to have direct effect because it allowed Member States to decide which cultural services to exempt. He contended that the FTT was wrong to hold that the phrase "certain cultural services" meant "all" cultural services because the word "certain" would then be redundant. The word "certain" did not appear in the descriptions of several other exempt supplies listed in Article 13A(1) and, accordingly it must have been included in Article 13A(1)(n) for a reason. It followed that Member States were not required under Article 13A(1)(n) to exempt all cultural services that are supplied by bodies governed by public law or by other cultural bodies recognised by the Member State (that also meet any conditions imposed under Article 13A(2)). Mr Singh did not shrink from suggesting that a Member State could comply with Article 13A(1)(n) by exempting a single cultural service while continuing to tax all the others. Mr Singh further submitted that, even if the word "certain" is ignored or read as "those" (as the BFI contended it should be), the concept of "cultural services" is too vague, as the Commission's 1983 Report recognised, for Article 13A(1)(n) to have direct effect.

41. Mr Singh submitted that the FTT was wrong to rely on *Commission v Spain* and *Canterbury Hockey* because they concerned the exemption in Article 13A(1)(m) of "certain services closely linked to sport or physical education" which is differently worded to Article 13A(1)(n). He also contended that *Commission v Spain* concerned whether the Spanish Government could restrict the exemption to supplies made by certain sporting establishments whose membership fees did not exceed a specified amount, which was a different point to the one being argued by the BFI. In *Commission v Spain*, the ECJ only stated that a Member State could not make the exemption in Article 13A(1)(m) subject to conditions other than those laid down in Article 13A(2), which was uncontroversial. The ECJ did not say that "certain services" meant "all services". Similarly, the Advocate General in *Hoffmann* did not say that "certain services" meant "all services" but, at [47] of his Opinion, said:

> "Certain, but not all, cultural services are covered by the exemption provided for in Article 13A."

42. Mr David Milne QC, who appeared with Ms Zizhen Yang, for the BFI conceded that "certain" may be confusing or, as the Advocate General in *Commission v Spain* put it, "an unfortunate formulation of the provision". However, Mr Milne submitted that it would be surprising if one Member State were allowed to exempt supplies of cultural services while another taxed such services. The ECJ had referred to the purpose of the exemptions being to avoid divergences in the application of the VAT system as between one Member State and another. He contended that it would be equally surprising if "certain" meant one thing in Article 13A(1)(m) and another in Article 13A(1)(n). Mr Milne urged us to adopt the solution suggested by the Advocate General in *Commission v Spain* of substituting "those" for "certain" as the FTT had done. He said that if "certain" is replaced by "those" so that the exemption reads "those cultural services … supplied by bodies governed by public law or by other cultural bodies recognised by the Member State" then all the problems of interpretation disappear.

43. Mr Milne also submitted that Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust plc v HMRC* [2008] STC 1180 supported the BFI's arguments in that if the ECJ said what they had said in that case in relation to the BFI then, a fortiori, cultural services should be exempt. *JP Morgan* concerned a different exemption under Article 13B(d)(6) of the Sixth Directive for "the management of special investment funds as defined by Member States". The ECJ held that did not mean that a Member State could exclude something that meets the criteria for exemption. On that basis, even if there is a discretion in Article 13A(1)(n), the UK cannot define cultural services to exclude a service from the exemption if it is clearly a cultural service in EU terms. Mr Milne pointed out that Annex H to the Sixth Directive, which related to supplies that Member States may subject to a reduced rate of VAT, included "Admissions to … cinemas … and similar cultural events and facilities". He submitted that it followed from *JP Morgan* that Member States did not have any discretion to exclude supplies of the right to admission to cinemas from being considered as cultural services for the purpose of the exemption while allowing other similar services, eg admission to theatres, to be so treated.

Discussion

44. Mr Singh sought to persuade us that the two formulations in Article 13A(1)(m) and (n) produced different results. If his submission were correct then the phrase "certain cultural services" would permit a Member State to choose whether to exempt specific cultural services, provided it exempts at least one, whereas "certain services closely linked to sport or physical education" requires the Member States to exempt all services closely linked to any type of sport. He justified the different effect of each provision by saying that "certain" qualified "cultural services" in Article 13A(1)(n) whereas "sport or physical education" in Article 13A(1)(m) was not qualified by "certain" so that provision had a more general effect. He accepted that this relied on a semantic analysis, and permitted divergences between one Member State and another in the context of one sub-paragraph which would not be permitted in the context of another. But he submitted that if such had not been the intent, words (indeed the word "those" such as Mr Milne proposed) might easily have been adopted; and that a central purpose of the whole Article was to accommodate and "grandfather" historic curiosities and divergences between Member States in their VAT treatment of certain supplies.

45. We consider that a semantic approach to the construction of EU legislation is not appropriate. In our view, EU legislation, such as Articles 13A(1)(m) and (n), requires a teleological approach to interpretation. As the ECJ observed in *Město Žamberk* at [17], the purpose of the exemptions is to avoid divergences in the application of the VAT system as between one Member State and another. Interpreting Article 13A(1)(n) in the way suggested by Mr Singh would inevitably lead to divergences between the tax treatment of the supplies in different Member States. It would, moreover, mean that "certain" has a different meaning or effect in two sequential paragraphs, Articles 13A(1)(m) and (n), of the same provision: and we do not consider that to have been the likely intention.

46. Although Mr Singh relied on the Report by the Commission in 1983 as showing that Articles 13A(1)(m) and (n) gave Member States discretion as to the substance of the exemptions, we consider that it supports the view that both exemptions should be regarded in the same way. It is clear that the Commission regarded Articles 13A(1)(m) and (n) as being of similar effect. As the decisions of the ECJ in *Commission v Spain*, *Canterbury Hockey* and *Město Žamberk* have shown that the Commission's concerns about Article 13A(1)(m) were misplaced, we consider that it follows that the same concerns about Article 13A(1)(n) were equally misplaced. The cases show that the term "certain services closely linked to sport" does not allow Member States to exclude some services provided by sports establishments from the exemption or to exempt services linked to certain types of sport while taxing others and thus Article 13A(1)(m) has direct effect. We consider that the comments of the Advocate General, in the footnote to [65], and the approach of the ECJ in [27] and [37]-[40] of *Hoffmann* show that the same interpretation must be applied to "certain cultural services" in Article 13A(1)(n). The solution suggested by Mr Milne of substituting "those" for "certain" in Articles 13A(1)(m) and (n) is attractive as it is consistent with the ECJ authorities and applies the same meaning to both provisions.

47. Finally, Mr Milne submitted that *JP Morgan* showed that Member States could not distinguish between cinemas and theatres when defining "cultural services". We are not sure that this point properly falls within the scope of the preliminary issue but it may be appropriate to indicate our view briefly, as we heard argument on it. In summary, we consider that "cultural" should be interpreted in the same way as "relating to sport or physical education". That is to say that "cultural services" should be given an independent EU law meaning and the exemption may not be made subject to conditions other than those laid down in Article 13A(2) of the Sixth Directive.

Conclusion

48. We have concluded that Article 13A(1)(n) of the Sixth Directive was (a) sufficiently precise and (b) not in terms intended to allow latitude to Member States in its application so that (c) it had direct effect during the Claim Period. In our view, the FTT made no error of law in the Decision.

Disposition

49. For the reasons set out above, HMRC's appeal is dismissed.

Mr Justice Hildyard

Greg Sinfield
Judge of the Upper Tribunal

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