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VAT: Stuck in a Bunker

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HMRC find themselves stuck in a bunker. There are two ways in which this might be true. They could be holed up in an underground shelter awaiting the same fate as befell Hitler (and at risk of sliding into similar insanity) or their little round ball could be in a sand pit, defying each attempt to be clubbed onto the green. In HMRC's case, both of these are true. Their attempt to defend their increasingly doomed interpretation of the EU VAT rules for non-profit sporting bodies, a battle waged now since at least 2008 when they lost round one in the Canterbury Hockey Club case, has reached a point where even they must think that further resistance is futile. This arises in the recent decision by the CJEU in the case of Bridport & West Dorset Golf Club. This case related to whether members' sports clubs were able to treat charges made to non-members as being exempt in the same way that they treated supplies to members. The UK VAT legislation specifically forbids this treatment, but the case was based on UK legislation's apparent incompatibility with the over-arching EU VAT law. The CJEU issued a decision on 19 December 2013 to the firm effect that the UK law was incompatible with EU law and that the supplies to non-members ought to be exempt. This is not merely a tactical reversal. The UK legislation wrongly restricts the exemption to supplies to 'individuals' (held by the CJEU to be wrong in the Canterbury litigation) and to members (where there is a membership scheme) which is the specific point on which the CJEU has now also decided against it. The legislation is thus far too restrictive. Admittedly, as far back as 2010 HMRC issued a Brief to the effect that the exemption could apply to services supplied from one club or association to another where the underlying beneficiaries of the arrangement are individuals, but they did not start the process of changing the actual UK legislation. It would be a stretch to argue that the current legislation literally supports that policy, so we have had to live for some while with a messy disconnect between the actual UK legislation and the interpretation of it that brings its meaning into conformity with the superior EU legislation. One cannot imagine that the ultra-explicit carve-out from the exemption for non-members can be glossed over in quite such a cavalier fashion. HMRC now has some thinking to do, and a belief that they may yet be rescued by some miracle is not going to be a satisfactory response. The fact is that the exemption for sports activities was introduced both late and with unlawful restrictions, and represents a failure by HMRC to face up to the breadth of an exemption that they were unwilling to embrace. Similar problems are playing themselves out in the cultural field in which reversals in the cases of British Film Institute and Wildfowl & Wetlands Trust (to give the two that featured in 2013) show a similar trend of unwillingly being dragged to accept the extent of the EU sanctioned exemptions. The time has come for a root and branch reconsideration of the sporting and cultural exemption legislation and to abandon a futile and expensive war. That said, there are problems in the sporting field, in particular, which hint at the far distant dawn of 'something completely different'. In fairness to HMRC, the exemption applicable to non-profit sports clubs is in stark contrast to the taxability of proprietorial clubs. To some small extent, the taxation of charges to non-members helped redress the unlevel nature of the playing field. This may have held at bay some of the desire on the part of the proprietorial sector to 'clamber aboard' the exemption through structures that have been found (generally) not to work. What now, is to stop a non-profit members' club selling most of its services to non-members on an exempt basis and keeping the membership restricted to a favoured few? Of course, those persons could never profit from the position, but nonetheless, is it fair? Well, the short answer is probably not. But that is what the EU law says (or seems to say) and the result can only be changed by changing EU law. And that feeds directly into the agenda of the EC Commission to eradicate troublesome exemptions and to broaden the base of the tax. If they removed the exemption from all sport (or culture for that matter) they would address the problem in a trice. Most EU governments cling to exemptions for fear of something worse, but this kind of outcome might change minds at the top table. Or else we might vote as a country to leave the EU altogether, and in that case one can predict that the EU inspired sporting VAT exemption will soon be history. Sometimes it takes a truly nuclear option to win a war.

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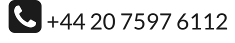
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