



Appeal numbers: TC/2009/01176
TC/2012/07487
TC/2009/11023
TC/2012/10291
TC/2009/11597
TC/2012/09070

VAT – Unjust enrichment – Claim for repayment of VAT on green fees following CJEU decision in Bridport & West Dorset Golf Club – Whether appellant golf clubs would be unjustly enriched – If so extent of unjust enrichment – Whether course maintenance costs have “direct and immediate” link to tee advertising and/or buggy hire – Liability of supply of green fees to corporate bodies and to tour operators under the Tour Operators Margin Scheme

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

- (1) THE BERKSHIRE GOLF CLUB
- (2) THE GLEN GOLF CLUB
- (3) THE WILMSLOW GOLF CLUB

Appellants

- and -

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

**TRIBUNAL: JUDGE JOHN BROOKS
SANDI O’NEILL**

Sitting in public at the Royal Courts of Justice, London on 22 – 26 June and 6 July 2015

Amanda Brown and Victor Cramer of KPMG LLP for the Appellants

Raymond Hill, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Prior to the appeal by the Bridport and West Dorset Golf Club (“Bridport”) HM Revenue and Customs (“HMRC”) considered that green fees, the charges made by non-profit making members’ golf clubs to non-members to play at and use their facilities, were subject to VAT under schedule 9, Group 10, Item 3 of the Value Added Tax Act 1994 (“VATA”). However, in an appeal to the First-tier Tribunal (*Bridport and West Dorset Golf Club v HMRC* [2011] UKFTT 354 (TC)) Bridport, a non-profit making members’ golf club, which sought to recover output tax of £140,358.16 for which it claimed it was not liable to account, successfully argued that green fees should have been exempt, pursuant to the sporting exemption contained in Article 132(1)(m) of the Principal VAT Directive (and previously Article 13A(1)(m) of the Sixth VAT Directive).
2. HMRC, which had contended before the First-tier Tribunal that they were entitled to exclude the supply of green fee rounds of golf to non-members (“green fee golf”) by such clubs from the exemption under Articles 133(d) or 134(b) of the Principal VAT Directive, appealed to the Upper Tribunal which referred the question to the Court of Justice of the European Union (“CJEU”) in Luxembourg which held (*HMRC v Bridport and West Dorset Golf Club* [2014] STC 663) that the United Kingdom was not entitled to rely on Articles 134(b) or 133(d) to exclude the supply of green fee golf by non-profit making clubs from the exemption.
3. Following the decision of the CJEU, HMRC paid Bridport’s claim in full. However, as a result of the Bridport litigation other similar non-profit members’ golf clubs also sought repayment from HMRC of output tax on green fees.
4. As HMRC wished to consider whether to raise a defence of unjust enrichment to these claims and most, but not all, of the golf clubs concerned were represented by KPMG, the Tribunal (Judge Bishopp) issued directions on 9 October 2014 under which KPMG and HMRC were required to select four clubs that were together broadly representative of all of the claims.
5. It was agreed that these clubs would give disclosure of relevant documents and would answer questions in interview. This would allow HMRC to obtain an expert report, which would enable them to decide whether to plead unjust enrichment as a defence. Other clubs which were not represented by KPMG did not object to the Tribunal making those directions.
6. The parties in fact selected three golf clubs, The Berkshire Golf Club (“The Berkshire”), the Wilmslow Golf Club (the “Wilmslow”) and The Glen Golf Club (“The Glen”). They also agreed that Bridport would be the fourth club to provide the relevant documents and information, albeit that its claim had already been settled. These clubs (the “Clubs”) were deliberately chosen to cover a range of geographies, levels of (local, regional and national) competition and qualities to be representative of the different types of golf courses in the UK.

7. HMRC instructed Professor Stefan Szymanski, the Stephen J Galetti Professor of Sport Management at the University of Michigan, as their expert economist and also instructed an economic consultancy, Frontier Economics Limited (“Frontier”), to gather evidence from the four clubs identified by the parties after the 9 October 2014 directions hearing.
8. Professor Szymanski asked Frontier to concentrate on four main questions when carrying out its research:
- (1) How competitive is the market for non-member golf at the Club?
 - (2) What is the price elasticity of demand for non-member golf in the relevant market?
 - (3) What is the price elasticity of supply for non-member golf in the relevant market?
 - (4) What direct evidence exists from Club records or other sources on how changes in VAT rates affected prices charged to non-members?
9. Frontier conducted interviews with representatives of the Clubs in October and November 2014 based on a prepared topic guide. The interviews, which were attended by representatives from KPMG who also asked questions, were recorded and full transcripts taken. Frontier also collected evidence from the Clubs as well as from their websites. Additionally, Frontier obtained background evidence on the market for golf from publically available sources. Frontier’s reports on the four clubs were served on 22 December 2014 together with Professor Szymanski’s initial report on pass through of VAT on green fees to non-members which drew on Frontier’s analysis.
10. As a result of Professor Szymanski’s initial report, HMRC decided to plead unjust enrichment as a defence to the claims of the golf clubs.
11. KPMG served an initial response to Professor Szymanski’s initial report on 12 January 2015 from their in-house expert economist, Mr Simon Trussler, a director in KPMG’s Economics and Regulation Team who runs their Fiscal and Government Affairs Practice and who had access to all of the data obtained by Frontier. Following a meeting between them, Mr Trussler and Professor Szymanski produced a Joint report, as directed by the Tribunal, identifying those areas on which they were in agreement in relation to unjust enrichment and those on which they did not agree. This was served on the Tribunal on 27 February 2015.
12. In the light of the discussions between the experts, Professor Szymanski updated his report “The economic incidence of VAT charged on green fees by golf clubs to non-members and the economic losses borne by golf clubs”, serving a final version on 20 March 2015. Mr Trussler served his final response on behalf of The Berkshire, the Wilmslow and The Glen on 17 April 2015.
13. In a direction of the Tribunal (Judge Brooks) dated 16 May 2015 the appeals of The Berkshire, the Wilmslow and The Glen were specified as “lead cases” and the appeals of the other golf clubs stayed as “related appeals” in accordance with rule 18

of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber Rules) 2009 as giving rise to the following common issues of fact and law:

5 (1) Whether the economic evidence contained in the reports prepared by Professor Stefan Szymanski dated 23 December 2014 and 20 March 2015 and relied upon by the respondents [HMRC] demonstrate that on the balance of probabilities the appellants will be unjustly enriched if the whole or part of the sums claimed are repaid.

10 (2) If the respondents' economic evidence does establish that the appellants will be unjustly enriched what percentage restriction should be applied to each of the appellants' claims.

(3) Whether supplies of green fee golf by the appellants which are on-supplied to individuals by tour operators are exempt or subject to VAT at the standard rate.

15 (4) Whether, if the customer of the appellant is a body corporate, there is a distinction between a "corporate day" package (which all parties accept is taxable) and the supply of access to play golf.

(5) Which categories of course maintenance costs are properly treated as residual in each of the following circumstances:

20 (a) The club provides advertising services from locations on the golf course but has no corporate day income;

(b) The club has neither corporate day income nor course advertising income; and

25 (c) The club has taxable income from the hire of other golfing equipment, including but not limited to golf buggies, trolleys or clubs.

30 (6) Whether the link between course maintenance costs and taxable tee advertising, corporate day or rental income is sufficiently direct and immediate to give rise to at least partial input tax recovery and whether this depends on the category of cost incurred and is the Tribunal able to identify, on the evidence before it, which categories do give rise to a sufficiently direct and immediate link.

35 14. In relation to the first two issues, the unjust enrichment issues, on which the burden of proof lies with HMRC, it is common ground between the experts that the three lead case golf clubs have suffered an economic loss through the incorrect imposition of VAT on green fees. This comprises first the VAT that could not or was not passed on to the green fee visitors by the Clubs but absorbed by them and secondly the lost profits (net of costs) on rounds of golf that would have been played if VAT had not been payable and the resulting higher price had not deterred some green fee golfers from playing. This definition of economic loss was agreed by both
40 experts.

15. Therefore the issue before us is not whether the Clubs have suffered an economic loss, but the extent of that loss. HMRC contend that the Wilmslow and The Glen have

suffered an economic loss of about 53%-54% of the VAT paid and that The Berkshire has suffered an economic loss of about 35% of the VAT paid whereas the Clubs argue that, because of the minimal marginal costs they would incur from the number of additional rounds of green fee golf that would be played, the economic loss is, at the very least, 95% of the VAT paid in all three cases.

16. There is little, if any, common ground between the parties with regard to the remaining issues (the “Other Issues”) other than it is accepted that the burden of proof lies on the Clubs and that the evidence, contained in the witness statements, of Bryan Williamson, the current Finance Convenor of The Glen, Ian Farquharson a member of The Glen’s finance committee who was its Finance Convenor between 2010 and 2014 and Captain from April 2013 to February 2015, Peter Foord, the secretary of the Berkshire and Andrew Robinson, Honorary Treasurer of the Wilmslow, is not disputed.

17. The Clubs were represented by Amanda Brown and Victor Cramer, both of KPMG. Raymond Hill of counsel appeared for HMRC. We are grateful to them for the assistance given by their clear and succinct submissions, both written and oral.

18. As in the hearing we shall consider the question of unjust enrichment before the Other Issues.

UNJUST ENRICHMENT

19. It is convenient to first set out the relevant Community and domestic law in relation to unjust enrichment before considering its application to the evidence and our findings of fact.

Law

20. Under EU law Member States are required in principle to repay taxes levied in breach of EU law (*Amministrazione delle Finanze dello Stato v Spa San Giorgio* [1983] ECR I3595 (“*San Giorgio*”) at [12]; *Dilexport Sri v Amministrazione delle Finanze dello Stato* [2000] AIIER 600 (“*Dilexport*”) at [23]; *Kapniki Mikhailidas AE v Idrima Kinonikon Asphaliseon (IKA)* [2000] ECR I-7163 (“*Michailidis*”) at [31]; *Weber’s Wine World Handels-GmbH v Abgabenberufungskommission Wein* [2005] AIIER 224 (“*Weber’s Wine World*”) at [93]; *Lady & Kid AIS v Skatteministeriet* [2012] STC 854 (“*Lady & Kid*”) at [17]; and *Alakor Gabonatermelo es Forgalmazo Kft. v Nemzeti Ado es Vamhivatal Eszak* [2013] EUECJ C-191/12 (“*Alakor*”) at [22-24]).

21. Although Member States may deny repayment of unlawfully levied tax in circumstances which would involve the unjust enrichment of the claimant (*Hans Just I/S v Danish Ministry of Fiscal Affairs* [1980] RCR 501 (“*Just*”) at [26]; *Michailidis* at [31]; *Weber’s Wine World* at [94]; and *Lady & Kid* at [18]) the extent of a Member State’s right to refuse repayment on the grounds of unjust enrichment is to be interpreted restrictively (*Weber’s Wine World* at [95]; and *Lady & Kid* at [20]).

22. Repayment may only be resisted by a Member State where it is established that the charge has been borne in its entirety by someone other than the trader. Where the burden has been passed on only in part it is for the national authorities to repay the amount not passed on (*Comateb* at [27] and [28]; and *Michailidis* at [33]).

5 23. The passing on of a charge in whole or in part does not necessarily have the consequence that repayment of the sum would entail the trader's unjust enrichment. In order to establish whether a repayment would constitute unjust enrichment it is appropriate for the court to take account of damage suffered by the trader as a consequence of the imposition of the unlawful charge (*Just* at [26]; *Comateb* at [29]
10 and [30]; *Michailidis* at [34] and [35]; *Weber's Wine World* at [98] and [99]; and *Lady & Kid* at [21]).

24. However, it is incompatible with the principles of Community law for the Member State to impose requirements which render it virtually impossible or excessively difficult to secure the repayment, whether this is by way of presumption
15 or rules of evidence (*San Giorgio* at [14]; *Bianco and Girand* at [12]; and *Michailidis* at [36]).

25. It is also clear from the decisions of the CJEU that it is for the national courts to determine, in the light of the facts of each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons and if so whether
20 reimbursement to the trader would amount to unjust enrichment (*Société Comateb v Directeur général des dainane et droits indirects* [1997] STC 1006 at [25]; *Michailidis* at [32]; *Weber's Wine World* at [96]; and *Les Fils de Jules Bianco SA, J Girard Fils SA v Directeur général des douanes et droits indirect* [1988] EUECJ R-331/85 ("*Bianco and Girand*") at [17]).

25 26. These EU law principles law have been implemented into domestic law by s 80 VATA which, insofar as it applies to the present case, provides:

(1) Where a person—

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

30 (b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount.

(1A)-(2) ...

35 (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) ... above that the crediting of an amount would unjustly enrich the claimant.

(3A) Subsection (3B) below applies for the purposes f subsection (3) above where—

- (a) an amount would (apart from subsection (3) above) fall to be credited under subsection (1) ... above to any person (“the taxpayer”), and
- 5 (b) the whole or part of the amount brought into account as mentioned in paragraph (b) of that subsection has, for practical purposes, been borne by a person other than the tax taxpayer.
- 10 (3B) Where, in a case to which this subsection applies, loss or damage has or may be incurred by the taxpayer as a result of mistaken assumptions made in his case about the operation of any VAT provisions, that loss or damage shall be disregarded, except to the extent that of the quantified amount, in the making of any determination–
- (a) of whether or to what extent the crediting of an amount to the taxpayer would enrich him; or
- 15 (b) of whether or to what extent any enrichment of the tax payer would be unjust
- (3C) In subsection (3B) above–
- 20 “the quantified amount” means the amount (if any) which is shown by the taxpayer to constitute the amount that would appropriately compensate him for loss or damage shown by him to have resulted, for any business carried on by him, from the making of the mistaken assumptions; and
- “VAT provisions” means the provisions of–
- 25 (a) any enactment, subordinate legislation or Community legislation (whether or not still in force) which relates to VAT or any matter connected with VAT; or
- (b) any notice published by the Commissioners under or for the purposes of any such enactment or subordinate legislation.
27. As the CJEU noted in *Weber’s Wine World*, at [100]:
- 30 “... the existence and the degree of unjust enrichment which repayment of a charge which was levied though not due from the aspect of Community law entails for a taxable person can be established only following an economic analysis in which all the relevant circumstances are taken into account.”
- 35 28. The Advocate General at [73] of his opinion (which was approved by the CJEU at [35] of its decision) in *Commission v Italy* [2003] ECR I-14637 considered the following approach to be appropriate in cases such as the present:
- 40 “It will first be necessary to examine whether a charge which increases prices is actually passed on in the price of a product. The fact that the price of the product is increased does not automatically mean that the price increase is directly connected with the charge imposed. In the light of the dynamic of market conditions and prices it is by no means certain as to what effect a charge will have on the level of a price. Prices of products are not static. In general producers regularly

5 adjust their prices depending on the circumstances of the market. With the exception of the cost price, a trader will base his pricing policy inter alia on factors such as expectations concerning the development of the market and the position of a particular product on the market. A charge increasing the cost price is only one of the factors in determining the price.”

He continued, at [78]:

10 “These considerations lead me to the conclusion that it will be virtually impossible to demonstrate the degree to which the economic burden resulting from the charge has been passed on. In order to do so it is necessary to conduct a thorough analysis of the market, taking into account a large number of variables such as the structure of the market concerned (more or fewer providers) and the availability of possible substitutes for the product affected by the charge. Account must also be taken of the fact that market conditions are dynamic in nature and that prices fluctuate according to changes in supply and demand. This makes it particularly difficult to establish what effect a charge has on the level of the retail price. In order to establish that effect it would ultimately be necessary to establish how the prices and the sales would have developed if no charge had been imposed.”

29. Where evidence is no longer available, for example due to the effluxion of time, it is clear from the observation of Moses J (as he then was) in *Marks and Spencer v Customs and Excise Commissioners* [1999] STC 205 at 241 that:

25 “Lacunae in the evidence should not be considered to the detriment of the trader. It was, after all, the taxing authority which caused the problem in the first place. Thus, it seems to me, if, after considering all the evidence, there is uncertainty or absence of detail, that should not be held against the trader.”

He continued:

30 “...I observe, at this stage, that the tribunal ought not to place reliance upon any failure to produce detailed facts and figures when that failure will normally be the fault of the taxing authority which levied a charge to which it was not entitled. A tribunal should only conclude that the defence of unjust enrichment is made out where the evidence satisfies it that a repayment will cause unjust enrichment.”

Evidence and Facts

30. The only oral evidence in relation to unjust enrichment was that of the two experts, Professor Szymanski and Mr Trussler. In addition, we were provided with several bundles of documents which included their individual reports, the Joint Report they had produced and the data obtained from the Clubs by Frontier.

31. Frontier’s reports on each Club were appended to Professor Szymanski’s report. As far as we are aware, Frontier did not try to look for “patterns” or draw conclusions from the oral evidence of the Clubs’ representatives that might have assisted us in looking at the question of unjust enrichment (and the Other Issues) for all membership

golf clubs in the UK. Although we are acutely aware of the potential risks of taking specific comments made by individuals as an indication of a policy or practice that is followed by all membership clubs of a similar quality or type we are, however, grateful for the time and effort the Clubs' representatives took in answering Frontier's questions and do quote some of their comments in this decision where we believe that it helps our understanding of the issues. We are also aware that the factual and oral information will inevitably tend to represent the more recent past and not the earlier period of each Appellant's claim. Frontier helpfully provided statistics for the Clubs and on the golf market in general for the earlier period wherever possible.

32. We summarise selected information from the Frontier reports on each Club as background information before addressing the issues raised by the experts.

The Berkshire

33. The Berkshire is a high quality golf club located outside Ascot and therefore close to London and Heathrow airport. It comprises two courses which rank 22nd and 28th in England. Visitors need to have a handicap (men 18, women 24) to play there.

34. Visitors totalled 14,519 in 2013 generating green fee income of £772,000 (27% of total revenue of £2.9 million). Societies comprised 56% of all visiting golfers; members' guests (who are restricted to six attendances in any one year) 37% and casual visitors 7%. Visitors are able to play at all times except weekend mornings. The different fee rates meant that in 2013 71% of visitor income came from society players, 16% from members' guests and 13% from casual visitors. Frontier reports that the weekday rates for 2014 were £183.50 for society visitors (before any discount which may have been negotiated), £130 for a casual visitor and between £20 and £40 per members' guest depending on the number of guests playing. The arithmetic average green fee was £54.17 including VAT (by dividing the total green fees by the number of visitors). The majority of visitor income is from green fee players driving to the Club "on the day" but there are some overseas visitors.

35. While there are 46 clubs within a 30 minute driving time from The Berkshire, Frontier and the Club identified 12 clubs which they considered to be competitors and information on the green fees charged were collected from 9 of these, including Wentworth and Moor Park which are proprietary clubs. This is shown in the bar chart appended to the decision as Figure 1. The Berkshire (at £130 per weekday casual visitor) is in the middle of the distribution with the championship courses of Wentworth (at £180) and Sunningdale (at £160) at one extreme and Woking and West Hill (at £80) at the other.

36. The Berkshire reported benchmarking its rates against competitors' green fees. As its secretary told Frontier:

"... looking at our competitors, and what our competitors charge, either by getting information from other societies, or speaking to .. other secretaries. ... I actually play in a couple of golf societies... so I see those rates... I know where we want to position ourselves and

where we are positioned within the market, and therefore, I know what other clubs charge and relative to them where we should be”

Also, the 2008 Captain’s Report states:

5 For some time [members’] guest green fees have been £20 for the first guest, £30 for the second and £40 for the third. The committee decided that these should rise to £20, £40 and £60 to bring the fees more into line with rising subscriptions and sums charged by similar courses.

37. Frontier reports that The Berkshire is close to capacity especially in summer but that the Club has used access to the greens at certain times either to stem or increase
10 the demand for visitor rounds and income.

38. In 2013 The Berkshire’s costs were £2.75 million, of which 37% related to course expenditure and 31% was related to the clubhouse (the balance was Administration). Staff costs totalled nearly half of all costs.

Bridport

15 39. Bridport is located just outside the town of Bridport, Dorset in an area which has a higher than national average population over 65 years of age. It is ranked 15th in Dorset but is outside the top 100 in England. Visitors with handicaps are preferred but this is not enforced.

40. Visitors totalled 3,310 in 2013. Green fee income was £55,000 representing only
20 12% of the Club’s total revenue of £470,200 in 2013. Green fee income had been £82,000 in 2005, representing 19% of total revenue £428,000. In 2013-14 67% of all visitors were casual. 48% received some form of concessionary rate including county cards, “2 for 1” rates and twilight rates and only 19% paid the full green fee. 19% of visitors were societies and 15% were members’ guests. Frontier recorded that the
25 2014-5 summer rates were £40 as a standard green fee, £50 for a day pass, £50 plus a course fee of £10-12 for a week’s pass and a twilight rate of £25 after 3pm. There were several different society packages including food and drink but Frontier did not quote the rate for any summer one. Members’ guests paid £20 in the summer and were restricted to six attendances per year. The cost of entry for non-members into
30 open competitions was cheaper than the standard green fee rate. The figure for the year (2013) show that the (arithmetic) average green fee was £16.60 inc VAT. Visitors were local residents but also tourists/societies visiting the area.

41. Only five clubs were identified within a 30 minute drive time of Bridport, of which four were considered by the Club to be its competitors. Frontier collected
35 information on a further two clubs but which had significantly lower rates. Bridport’s summer standard weekday green fee rate at £40 was the same as that charged by Yeovil (old course), Lyme Regis and Came Down. The two other main competitor courses were £25 and just over £35. Figure 2 in the appendix shows that Bridport, along with the three main competitors, is at the upper end of the price range for green
40 fees in the local area. All competitors are member-owned clubs. A proprietary club, the Chedington, closed in 2010.

42. Frontier suggested that the Club had compared not only its fees, but other aspects of its operations, with its competitors relatively frequently in the last 20 years. The Club sets rates on the basis of what competitors are charging and what it perceives the market will bear. Its representatives told Frontier:

5 “We benchmark ourselves against the other four courses ... that’s how we look at our green fee prices, on the market we think we can attract.”;

 “... you try to put yourself in the market to get as much income as you can” ; and

10 “You have to factor the membership into that as well .. you cannot just reduce the green fees. The members would probably be upset that you’re allowing other people to play the course at a cheaper rate, and we’re here primarily for the members.”

15 43. Frontier gave examples of where the Club had both changed its green fees and access to the courses to either stem or increase demand from a particular type of visitor.

44. In 2013, costs totalled £490,200 of which 52% were staff costs. 13% of the non-staff costs were related to the course and 12% to the clubhouse.

Wilmslow

20 45. The Club is located near the town of the same name in Cheshire. It is ranked 15th in Cheshire but is not in the top 100 of English clubs. Visitors need to have a recognised handicap and are restricted to six visits per year.

25 46. In 2013-14 there were 3,389 visitors of which 30% were societies, 29% members’ guests and 18% were participants in matches. Casual visitors made up only 5% of the total visitors. Frontier defined the balance of 18% as “complementary and other” visitors. Green fee income was £70,543 representing just over 9% of total income. The published 2014-5 weekday rates for visitors (for 1 round of golf) were £60 for casual members, £45 for society players (or £55 for the day) and £20 for members’ guests. The (arithmetic) average green fee for 2013-14 was £20.82 including VAT.

30 47. Frontier found 27 clubs within a 30 minute drive time of the Wilmslow but only 9 which charge comparable fees (see Figure 3 in the appendix below). The Club said that it benchmarked itself against “the top 20 clubs in Cheshire and the top ten clubs in Lancashire” but did not specifically identify those it considered to be its key competitors. Frontier collected green fee information on 12 golf courses, which we
35 understand are all member-owned although there are some proprietary clubs in the catchment area. The Wilmslow is at the top end of the range of fees with the De Vere Leisure Club, Prestbury (at £60) and Sandiway and Delamere (at £55). At the bottom of the range are four clubs charging £40 for summer weekday rates.

40 48. Frontier saw evidence of the Club’s representatives meeting those of the Prestbury, Sandiway and Stockport clubs annually to share “financial information as

well as operational best practice”. The club officials reported that in setting its green fees:

5 “We have to have regard to what is out in the market place and the market place is very, very competitive. ... It’s not us who really sets the prices”.

The Club argued that it was proprietary clubs which determine market prices:

 “... And of course the deals that ultimately determine the market price are those set by proprietary clubs”.

10 Individual deals are negotiated for societies and green fees for members’ guests are considered “a perk of membership ... nominal and not related to market price”. Casual visitors pay the standard rate except where they possess a County card. The Club is mindful of not encouraging an excessive number of visitors:

 “... there’s a level below which ... we are not prepared to have the disruption to our private members’ golfing access”

15 Restrictions on visitor access to the course have been used as a means of maintaining a balance between members’ and visitors’ usage.

49. Total costs in 2013-4 were £754,131. 45% were course-related and 29% were clubhouse-related (and the balance was general expenses). Staff costs were 51% of the total costs.

20 *The Glen*

50. The Glen is a links course in North Berwick on the East Lothian coast, 25 miles from Edinburgh. Formerly a municipal course, it has been a member-owned club since the early 1990s. The course is rented from the Local Authority. The Glen is ranked 13th in the Lothian region and 75th in Scotland. There is no formal handicap requirement and the Club says that some members are on waiting lists for the more prestigious clubs.

51. Visitors totalled 11,218 in 2013. They accounted for 46% of the total number of rounds played and green fees accounted for a much higher proportion (41.5%) of the Club’s revenue than for the other Clubs. Visitors have access to the course at all times. Current summer mid-week visitor rates are £53; tour operators obtain a 20% discount and groups a 10% discount plus 1 in 10 players play free of charge. Twilight green fees are £34. Juniors play for £16. Members’ guests are charged £10 but are limited to playing twice a month but members have no restriction placed on the number of guests they can bring to the Club. The (arithmetic) average green fee was £22.17 including VAT in 2013.

52. 14 clubs, both member-owned and proprietary, were identified within a 30 minute drive time of The Glen, primarily located along the coastline. Some, like Muirfield, charge significantly higher green fees. Seven clubs were identified to be key competitors and Frontier collected information on another two, including North

Berwick where winter rates are more in line with The Glen's. Frontier's figures showed The Glen, at £53, was in the middle of the range of fees from just under £60 to just under £40. The Club had the same or very similar green fees to four of its competitors. The two clubs added by Frontier had rates in excess of £60. See Figure 4 in the appendix, below.

53. In 2013, The Glen benchmarked its green fees against 18 clubs within a 40 minute drive as it stated that players are prepared to drive longer distances in winter to coastal courses which are less prone to closure for bad weather. Frontier states that pricing tends to be driven by what is charged by the other clubs. Starters are given flexibility to discount rates to encourage use of "quiet times" but the Club said that it would probably have to respond to price cuts by competitors that were causing potential visitors to go elsewhere:

"if we found we were losing revenue sharply we would have to react to it or if we found there were a lot of people phoning up ... but not booking, then we'd probably have to react to it.We ourselves depend on the income because there's no fat left in the club to absorb significant deficits."

54. Frontier found some documentary evidence that in the early 2000s the Club raised green fees in order to maintain visitor income while reducing visitor numbers. The Club has seen a significant fall in membership numbers (a decline of 24% from 2011 to 2014) and is actively promoting itself to attract visitors to play on weekdays and the quieter times at weekends. Frontier also reported that there was "considerable evidence" that the Club is willing and able to switch the availability of tee times between members and visitors depending on its revenue needs and prevailing market conditions.

55. The Glen had total costs of £598,783 in 2013 Course-related costs, including staff costs accounted for 38%; Clubhouse costs were 13% and Administration and finance costs 48%.

Applying an economic model to calculate the economic loss borne by the Clubs

56. HMRC instructed their expert, Professor Szymanski, to evaluate the theory on economic incidence and to consider the application of the theory to the circumstances of the Clubs. He was asked to provide his best estimate of the extent to which the VAT charged on the green fees was borne by the Clubs (and, therefore, not passed through to those non-members who paid them) and his best estimate of the economic loss, if any, borne by the Clubs as a result of charging VAT on green fees. Professor Szymanski relied on the academic literature on tax incidence and the work of Frontier in coming to his conclusions.

57. Professor Szymanski took us to a number of academic texts including Kotlikoff and Summers "Tax Incidence" (1987) which states:

Taxes tend to be borne by inelastic suppliers or demanders if demand is completely inelastic or supply perfectly elastic, consumers

will bear the entire burden of an excise tax. Conversely, if supply is perfectly inelastic, the entire excise tax will be borne by suppliers. More generally taxes will be borne by those who cannot easily adjust. The greater the buyers' abilities to substitute other commodities for the taxed commodity, the greater their ability to shift taxes. Likewise if producers have no fixed factors and can leave an industry where taxes are being levied, their supply is perfectly elastic and the tax must be borne by the consumers.

Thus, sellers will bear most of a tax if the buyers have ready alternatives while the buyers will pay most of the tax if the sellers have ready alternatives. Economic loss is directly related to incidence. Both experts agree that if all of the VAT paid is absorbed by the Clubs, then the Clubs' economic loss is 100% of the VAT.

58. Both experts also agree that the extent to which VAT will have been passed on to green fee visitors or retained by the Clubs will be a function of the price elasticity of demand, the conditions of supply and the nature of competition between the golf clubs in the relevant market. Economic models of demand and supply are used "extensively" to analyse economic problems. However, the results obtained in calculating economic loss from economic theory will depend on which economic model is applied and, as Mr Trussler explained in evidence, "the purpose of an economic model is to help interpret the facts of the case."

59. As we might expect the experts agree on the principal features of the theoretical economic models representing perfect competition in the market and imperfect competition in the market (oligopolistic and monopoly models) and that the two 'extreme' models of market behaviour are the perfectly competitive market and its opposite extreme of a monopoly i.e. a single supplier serving the market. However, although Professor Szymanski and Mr Trussler agree that the green fee market is clearly not a monopoly, they do not agree which model is the appropriate one to use in looking at the information gathered by Frontier.

60. Professor Szymanski is of the opinion that the information from the Clubs about the market in which they operate is sufficiently close to the model of perfect competition to adopt that model. In assuming certain values for the price elasticity of demand and the price elasticity of supply he argues that the magnitude of pass through of VAT when rates are 20% of The Berkshire is 67% (so that 33% of the VAT is borne by the Club) and that of the Bridport, Wilmslow and The Glen clubs is 50%. His calculation of lost net profit is 2% of the VAT for The Berkshire and 4% for Bridport, the Wilmslow and The Glen so that the extent of the economic loss in Professor Szymanski's opinion is 35% of the VAT paid by The Berkshire and 53-54% of the VAT paid by the other three clubs.

61. However, Mr Trussler is of the view that the Clubs are operating in an imperfectly competitive market in which it is not possible to derive a supply curve so that the calculation of economic loss needs to be considered from the evidence of the actual costs of making an additional supply, ie a round of green fee golf, in the relevant range of the number of additional green fee visitors that would have arisen if VAT had not been imposed. He believes that Professor Szymanski has overstated pass

through of VAT to green fee golfers and, therefore, understated the VAT borne by the Clubs and their economic loss. In Mr Trussler's opinion the economic loss suffered by all the Clubs is around 95% of the VAT paid, so that HMRC's defence of unjust enrichment should be restricted to no more than 5% of the VAT reclaimed.

- 5 62. Although Professor Szymanski and Mr Trussler do not agree which economic model is the appropriate one to use to interpret the information supplied by the Clubs and Frontier's analysis, neither Mrs Brown nor Mr Hill contend that we should prefer the model adopted by one over that advanced by the other. Rather that, having heard the evidence of both experts, we should reach our own conclusions.
- 10 63. As such, the parties argued that it was necessary for us to consider:
- (1) Which economic model should be applied to the evidence;
 - (2) The price elasticity of demand with particular reference to The Berkshire;
 - (3) The nature of competition in the green fee market in relation to pricing and to supply;
 - 15 (4) The marginal cost of supply; and
 - (5) The calculation of pass through of VAT and economic loss.

Discussion of the Parties' Submissions and our Conclusions

(1) Which economic model should be applied to the evidence?

- 20 64. For HMRC, Mr Hill argues that the evidence gathered by Frontier from all the Clubs show that they are operating in an environment that approximates a perfectly competitive market. In evidence Professor Szymanski said, "It's hard to think of any more widely applied economic model of any kind. It's ubiquitous, not just in schools and universities, but in public and private policy decision making." With quantity on
- 25 the x axis and price on the y axis of a graph, the theoretical model of a perfectly competitive market has a downward sloping demand curve and an upward sloping supply curve. Price elasticities of demand and supply can be derived from these curves.

- 30 65. The demand curve relates the amount that consumers are willing to buy to the price (per unit) which they are asked to pay. Demand is usually inversely related to price: an increase (decrease) in price tends to cause a fall (rise) in demand. Demand is elastic if a 1% increase (fall) in price leads to a more than 1% fall (increase) in demand. Conversely, demand is inelastic if a 1% increase (fall) in price leads to a less than 1% fall (increase) in demand. If demand does not respond to price changes at all,
- 35 then it is said to be totally inelastic. If even a slight increase in price causes demand to fall to zero, it is said to be totally elastic.

66. The amount that firms are willing to supply is usually positively related to price: an increase (decrease) in price tends to cause a rise (fall) in supply. Supply is elastic if a 1% increase (fall) in price leads to a more than 1% increase (fall) in supply.

Conversely supply is inelastic if a 1% increase (fall) in price leads to a less than 1% increase (fall) in supply. If supply does not respond to price changes at all, then it is said to be totally inelastic. If even a slight decrease in price causes supply to fall to zero it is said to be totally elastic.

5 67. From the point of view of the seller (the golf club in this case), the key assumption of the model of perfect competition is that the price is determined by the market and not by the seller. In this economic model, there is a single market price at equilibrium (where the demand and supply curves intersect) from which no firm can deviate. If the club was to increase its green fee rate above the market level, it would lose all of
10 its green fee income to its competitors (and the implied price elasticity of demand at the firm level is infinite even if the market level price elasticity of demand is not). If the club was to reduce prices, then it would make an economic loss.

68. In the context of this case the important fact derived from the economic model of perfect competition – and agreed by the experts – is that at equilibrium, the price or
15 green fee equals marginal cost (that is, the cost of supplying an additional round of green fee golf) and firms, the Clubs, generate zero economic profits. This does not mean that accounting profits will be zero. Firms must recover a sufficient amount to reward investors of capital at the market rate, which may either be included in marginal cost or recovered via quasi-rents on inframarginal units. That is, even firms
20 in perfect competition do not earn zero profits: they earn profits in line with what could be considered a ‘normal rate of return’.

69. Several assumptions are required for the textbook model of perfect competition to hold exactly. Textbooks vary about the precise range of assumptions required, but the experts agreed in their Joint Report that a typical list would include the following:

- 25 (1) some textbooks assume that there is a large number of buyers and sellers in perfect competition (although do not specify how many firms constitute a large number) while others assume that perfect competition requires an infinite number of buyers and sellers;
- 30 (2) there is product homogeneity in that. the products sold by all firms in the market are identical (ie rounds of golf at the competing golf clubs are identical experiences for the player)
- (3) full information is available to both buyers and sellers;
- (4) there is “free” (ie unhampered) entry and exit to the market (i.e. new golf clubs can be set up and existing golf clubs close);
- 35 (5) all factors of production (or supply in the case of golf club rounds) are perfectly mobile (meaning that all factors should be able to change their economic use);
- (6) firms, the Clubs, maximise profits; and
- (7) buyers, green fee players, maximise their utility.

As a result, perfect competition is usually described in the economics literature as a limiting case, which markets may resemble to a greater or lesser extent, rather than an exact description of a given market.

5 70. Professor Szymanski accepts that not all these assumptions are met. He says that no economic model is going to fit any set of data exactly, but in his view the green fee market resembles perfect competition “to a significant extent” and the issue is “not whether the data fits exactly but whether it is sufficiently close to make it reasonable” to assume that the market is perfectly competitive.

10 71. On behalf of The Clubs, Mrs Brown argues that, if any of the assumptions are not met, the market may be competitive but it is not a ‘perfectly competitive’ market. The more the conditions in paragraph 69 above are relaxed, the more closely market outcomes resemble a model of imperfect competition.

15 72. Mr Trussler, the Appellants’ expert, looked at the market in relation to four economic models of imperfect competition; the Bertrand competition model with homogeneous products, Bertrand competition with differentiated products and the Cournot competition with homogeneous products and Cournot competition with differentiated products. He said in evidence that “There are umpteen different oligopoly models you could choose. These models are ... the workhorses of oligopoly theory”. In his report he stated:

20 “I do not necessarily consider that any of these economic models precisely describe the market for green fee visitors However, I consider that the collection of assumptions behind each of these economic models are more likely to accurately describe the market for green fee visitors than the model for perfect competition.”

25 In Mr Trussler’s opinion the Bertrand model and the Cournot model with differentiated products are the two models that more accurately describe the market for green fee golf.

30 73. Mr Trussler accepts that both the Bertrand and Cournot models with homogeneous products could show also show that price is equal to marginal cost. He explained that in the Bertrand model (where firms compete on price) it would take only two competitors for it to do so, while in the Cournot model (where firms compete on the basis of quantity given a prevailing market price) the number of competitors would need to be large. When product differentiation is introduced into either model, prices can be expected to increase relative to marginal costs. In both
35 models, firms behave as monopolists when products are totally differentiated irrespective of the number of firms in the market.

74. In imperfectly competitive markets, the seller (the golf club in this case) would be able to set a price (the green fee) in excess of marginal cost to reflect its power in the market and generate positive economic profits. As the number of competitors falls,
40 the market power of the seller to set the price above marginal cost will increase, all other factors being equal. When sellers (rather than the market as in perfect competition) are able to set the price, there is no ‘supply curve’. A supply curve

identifies the amount the firm will supply at a given market price and in imperfect competition there is no given market price.

75. Mr Trussler states that the assumption of profit maximising behaviour may not always hold true when applied to golf courses setting the price for green fee visitors, although it may be quite common. Golf clubs may have the business objective of minimizing the number of visiting non-members subject to meeting a revenue target from them, and that very revenue target may include an element of cross-subsidy of membership fees by green fee income.

(2) The price elasticity of demand with particular reference to the Berkshire

10 *Bridport, the Wilmslow and The Glen*

76. In the absence of any market or club statistics which were of a sufficient time series in order to undertake an econometric analysis in respect of Bridport, the Wilmslow and The Glen, both experts had to rely heavily on the limited data collected by Frontier and on the interviews with representatives from each of the three clubs.

- 15 77. Professor Szymanski was of the opinion that demand was neither inelastic nor elastic and believed that the price elasticity of demand for Bridport, the Wilmslow and The Glen was -1.0, ie a 10% increase in green fees would result in a 10% fall in demand. However, because of the limited data available, he put a wide confidence level of -0.75 to -1.25 around that estimate. In support of his opinion, Professor
20 Szymanski quoted from the responses of Club officials in the interviews carried out by Frontier when asked about the effect of a 10% reduction in green fees on demand.

78. The Club captain of the Wilmslow suggested that a unilateral price cut of 10% would not lead to much additional visitor demand, but that larger price cuts could stimulate additional demand. A 10% reduction in the green fee

- 25 “... would probably generate slightly more visitor traffic but I don’t think it would be significant ... What would be significant would be if you were to come up with a ridiculous deal. You know our headline rate is £60, if you reduce it to £57, is it going to bring [more visitors] – no. If you reduce it to £50 people will start to get interested. If you
30 reduce it to £40 then, you know, they obviously will come. But, you know, are we prepared to sell the golf course at £40. I mean that’s, you know, you’ve got to say that would really be devaluing what we think is our status.”

79. The Finance Director of Bridport said in response to the question about the effect
35 of a unilateral reduction in green fees of 10%:

- “Again it’s difficult to say because you’re just guessing. I’m not sure it would have a major effect. People if they want to play golf then they’ll pay the going rate. But I say if it was cheaper the you might get a few more, but overall as I say we’re trying to maximise our income, so if
40 you reduced it too much then you’d probably end up with less income.”

80. Mr Trussler was critical of Professor Szymanski's view which, he said, was based on anecdotes and quotes of how demand had changed at individual points in time. It was not based on a robust statistical analysis and a consideration of any non-price factors which could also have affected demand largely because Frontier had been
5 unable to collect sufficient data. However, from his own consultancy experience Mr Trussler accepted that a price elasticity of demand of -1.0 was plausible, saying during cross-examination:

10 "…it would not be a surprise if the price elasticity of demand were minus 1 for these golf courses given what I believe to be the evidence on their cost structure."

The Berkshire

81. Professor Szymanski believes that demand is more inelastic for The Berkshire than for the other three Clubs and has estimated the price elasticity of demand for The Berkshire to be -0.5. He bases his view on the fact that the Club's clientele is likely to
15 be relatively wealthy and more insensitive to price changes. Most of The Berkshire's green fee income comes from societies with high repeat booking rates and he says that customer loyalty can suggest a relatively low elasticity of demand. Also, some visitors drive long distances (plus there are some overseas visitors) so that the green fee represents a smaller proportion of the total cost of the round of golf for these
20 visitors. He quoted the Club Captain saying that although green fee income rose 6% in 2012 over 2011 the number of visitors declined by 12%.

82. In his response to Professor Szymanski's report, Mr Trussler says that Professor Szymanski's estimate of a price elasticity of demand for The Berkshire of -0.5 is inconsistent with the findings of Frontier and it is not derived from a sufficiently
25 robust analysis of the evidence, specifically by incorrectly weighting the data for the different types of visitors and failing to take account of the course closures due to snow and wet weather conditions during the early part of 2010. Mr Trussler also noted that Frontier reported that the effect of a change in the green fee on demand at The Berkshire could take some time to materialise, so that, in his opinion, Professor
30 Szymanski's very approach of comparing one six month period in 2010 with that of 2011 could understate the price elasticity of demand in any event.

83. Mr Trussler argues that Professor Szymanski appears to have placed excessive weight on the low price elasticity of demand of casual visitors relative to that of society visitors, who are more price sensitive, even though casual visitors represented
35 only 7% of the total green fee visitors. Frontier's figures showed that the number of casual visitors fell by 5% to 358 in 2011 from 377 in 2010 while the green fee increased by 20% from £100 to £120, implying a price elasticity of demand of -0.25. Frontier found it more difficult to calculate a price elasticity of demand for societies because of the range of fees charged and lack of detailed information on society
40 visitors but estimated that the number of these visitors fell by 378 to 3,369 in the same period while the intermediate society rate rose by 11.5% to £145, implying a price elasticity of demand of -0.87. The mid-point between these two figures is -0.56. Frontier provided no estimates for the price elasticity of demand for members' guests who made up 37% of the total green fee visitor numbers, so Mr Trussler recalculated

the price elasticity of demand by weighting the two figures of -0.25 and -0.87 by the customer numbers for those groups to derive a price elasticity of demand of -0.82.

84. The Tribunal notes that the fees for members' guests are significantly lower than those paid by casual visitors and the published rates for society visitors. Frontier recorded the 2014 green fee weekend rate for members' guests as £25-60 compared to a casual visitor rate of £175 and a standard society rate of £183.50. We consider it likely that the price elasticity of demand for green fee rounds for members' guests will be more inelastic than elastic (i.e. members and their guests will be less sensitive to a change in price) and therefore nearer to -0.25 than -0.82. If Mr Trussler's approach were to take account of members' guests making up 37% of visitor numbers at a price elasticity of demand of -0.25 for example, the Tribunal believes that the price elasticity of total green fee visitor demand would be more like -0.6%.

85. Mr Trussler also argues that neither Frontier nor Professor Szymanski took account of the fact that the Club had suffered abnormally high course closures during the six months in 2010 compared to 2011 largely because of snow. Mr Trussler's analysis showed that in 2010 the club lost 24 playing days (between January and June out of a potential 187) compared to no playing days during the same period in 2011. Mr Trussler adjusted for the data using two approaches. In his first approach, Mr Trussler recalculated the price elasticity of demand at -1.81. However, this approach also appeared to us to suffer from having no data for members' guests and we consider his second, alternative, approach to be more robust.

86. Mr Trussler's alternative approach was to take the total number of green fee visitors for each quarter in 2010 and 2011 and revise them upwards for the number of days the courses were closed by assuming these days would have had the same number of visitors as on the days the courses were open.

87. This increases the price elasticity of demand from -0.25 to -0.81 as shown in the table below which is taken from Mr Trussler's report:

Illustrative estimate of the price elasticity of demand by visitors at the Berkshire Golf Club, adjusting 2010 visitor numbers to take into account that the course was closed for 38 days compared to 2 days in 2011.

	Total green fee visitors	Total green fee revenues	Average green fee	PED not adjusting for snow in 2010	Visitors if no course closures	Adjusted Price elasticity
2010	15,192	£864,166	£56.88		16,443	
2011	14,718	£940,850	£63.93		14,799	
Change	-3.1%	+8.9%	+12.4%	-0.25	-10.0%	-0.81

88. However, while Mr Trussler warns of the dangers of relying on only two points in time, emphasising that the example shown in the above table is "purely illustrative" and of the limitations of the data collected, he concludes that:

5 Professor Szymanski's estimate of a -0.5 price elasticity of demand for the Berkshire Golf Club is not robust and that there is no evidence to suggest that the price elasticity of demand for the Berkshire Golf Club is any different to the price elasticity of demand for the other three Golf Clubs analysed [ie -1.0].

10 89. When cross-examined about Mr Trussler's figures including the days when The Berkshire courses were closed in his calculations, Professor Szymanski said that it was possible that green fee players who were not able to play on the days when the courses were closed could have booked to play on another day (because of spare capacity in the winter months) and therefore were not lost. He also commented that Mr Trussler's estimate of price elasticity of demand was at club level and the price elasticity at the level of the market would be lower. As such he considered that the market estimate of -0.5 for a price elasticity of demand for higher quality clubs like The Berkshire was still reasonable.

15 90. In his evidence Mr Trussler said that he agreed with Professor Szymanski that The Berkshire can be considered to be in competition nationally with other top ranked UK courses. Having played golf himself "for more than 30 years" and been a member of a "fairly standard, run of the mill perfectly good members' course", Mr Trussler explained that comparing top quality courses like The Belfry or St Andrews or Royal
20 St Georges is like "comparing a Fiat 500 with a Ferrari". He went on to say:

25 "For a golfer like myself playing a round of golf is an enjoyable experience, but is absolutely not the same thing as standing in the same spot where Sandy Lyle hit his two iron onto the green in the Ryder Cup.
It is absolutely not the same experience. They are very different in terms of not only quality, but in terms of the whole experience and the whole reputation of the course."

30 91. However, while Mr Trussler accepted that there are some green fee visitors who "come from afar" to The Berkshire, the majority came from within a 30 minute drive "catchment" area. He agreed that there are eight or nine top quality courses within the catchment area of The Berkshire and, as such, it did have competition from clubs of equivalent quality. In these circumstances, he said, there was no evidence to suggest that the price elasticity of demand for The Berkshire should be different from Bridport, the Wilmslow and The Glen.

35 92. We accept that The Berkshire and other similar top rated golf courses are of a better quality, providing a green fee visitor with an experience which is highly differentiated from a lower ranked, more "average" course. While it is intuitively attractive to assume that the demand for such courses would be more inelastic, ie visitors would be less resistant to an increase in green fees because of their desire to
40 play there, we find it difficult to argue against Mr Trussler's adjustment of the Frontier figures for the high level of course closures in 2010 compared to 2011. Professor Szymanski's argument in the hearing, that the price elasticity of demand for the market should still be -0.5 when the price elasticity of demand at club level is demonstrated to be significantly higher, was not supported by any evidence, so that
45 we are unable to accept it.

93. While we have some reservation about Mr Trussler's precise recalculated price elasticity of demand figures for the reasons he, himself, gives, we do not see any reason why we should not accept that the price elasticity of demand for The Berkshire should be similar to, at -0.8, or the same as those of Bridport, the Wilmslow and The Glen at -1.0.

(3) The nature of competition in the green fee market in relation to pricing and to supply

94. Frontier was unable to provide any evidence on national green fee visitor numbers, but it quoted national statistics from the European Golf Association ("EGA") which suggest that the number of golf courses in England, Wales and Scotland rose from 1,983 in 1991 to a peak of 2,597 in 2007, an increase of 36% over that period, before falling to 2,561 in 2014, a decline of 5%. Also, between 2007 and 2014 the number of players fell by 220,000, a decline of 18% on the 2007 figure. We note that the Joint Report, which also gives the EGA as its source, states that in 2014 there were 2,551 golf clubs and 973,647 players.

95. After quoting these figures Frontier states that:

This suggests that the supply side for the market for golf in Great Britain is quite responsive to wider changes in the market for golf in general.

96. However, despite the overall decline in the number of golf courses over this period, new courses have opened in certain locations which suggest that there are regional variations in the golf course market. Evidence obtained by Frontier from England Golf surveys shows that the recent decline in the market has left many clubs with excess capacity and caused a rise in the proportion of clubs with membership vacancies from 87% in 2006 to 95% in 2014. Over the same period the proportion of clubs having a membership waiting list fell from 25% to 10% The *England Golf Club Membership Questionnaire Results Book 2014* records that:

Club memberships are in a precarious position, with a combination of fewer players taking up the game and a greater number of golfers reverting to independent, unaffiliated play. This is in response to constrictions in financial circumstances and to the amount of time available for recreation, which has resulted in a decline in the number of club members over the last two years. The widespread availability of discounted tee times and the desire to play a range of courses rather than one course regularly are other potential influences on the pattern.

97. Of the Clubs, only The Berkshire showed signs of nearing capacity especially between mid-March to mid-November. As its representative told Frontier:

"... the restriction on our capacity is the dining room ... we can get more people on the golf courses than we can in the dining room ... But equally, there is a balance, and the members have to have access to the golf courses as well and so it would be difficult to expand the business ... Although we are full almost all of the time during the summer months, pretty much from the middle of March until mid-November.

It's very difficult to find a day, apart from a Monday ... pretty much the other six days we're close to capacity."

Pricing

5 98. In the theoretical model of perfect competition, the market sets the price and the supplier would lose all its customers to competitors if it raised its price unilaterally. This is price-taking. However, prices do not have to be identical. Professor Szymanski said:

10 "... if there are small differences in quality, one would expect to see a small difference in prices in a sense to equalise the effective price per unit of quality that the consumer is paying ...

15 I think there are different market segments within this industry. But within each market segment, I think it's reasonable to believe that small differences in quality will be represented by small differences in price, but that would still amount, effectively, to price taking behaviour."

99. Professor Szymanski argues that competitor clubs within the 30 minute drive time 'catchment area' of each of the Clubs charge similar prices which he referred to as:

"... evidence of some kind of pricing parallelism, which might be thought of as price-taking behaviour."

20 100. Mr Trussler argues that the Clubs are not price-takers. Sunningdale and Wentworth are able to price significantly above The Berkshire because they are championship courses. The Berkshire, however, is able to sustain a premium of £50 above the Woking's green fee of £80.

25 "I have no doubt that The Berkshire, because it competes with Moor Park and Woking and the other golf courses, can't charge whatever they like without thinking about Moor Park and Woking, but that is very far from saying The Berkshire is a price taker and is in perfect competition with Moor Park and Woking....."

Mr Trussler continued:

30 "North Berwick commands a premium over The Glen. The Wilmslow, De Vere Leisure Club and Prestbury charge higher green fees than the other clubs in the Wilmslow's catchment area. ... it is entirely possible for a golf club to be in competition withother golf clubs, and even
35 feel like it's intense competition but that is very, very far from saying that they are in perfect competition with other golf clubs and that, as a consequence, they have no control over the prices they set and that their prices are always competed down to cost." [ie which would be what would happen in perfect competition.]

40 101. Professor Szymanski accepted that some clubs of very top quality - like The Berkshire, will have a "small amount" of market power. However, he argued that there are relatively few of these clubs in the UK and that price taking behaviour was still a reasonable approximation of the way these clubs operated.

102. The Tribunal notes that the pricing of green fees for non-members was listed as the very last topic in Frontier's 'topic guide for interviews' with the Clubs. There were a number of prompt questions, the specific answers to which, might have been helpful to us including "what factors influence green fees?" and "what costs are taken into account when setting green fees?" We have summarised Frontier's comments for each Club at paragraphs 36, 42, 48, and 53. We are, however, concerned that not enough time in the interviews may have been given to exploring more about how the Clubs set their green fees.

Supply

103. Professor Szymanski and Mr Trussler disagree about the nature of supply in the golf market; the way the clubs compete and the cost structure of the Clubs and in particular the marginal costs associated with any increase in green fee visitors. This disagreement has significant ramifications in relation to the costs to be used to calculate net profits and, therefore, the economic loss suffered by the Clubs from the imposition of VAT on green fees which we consider below.

104. Professor Szymanski is of the opinion that the conditions of a perfectly competitive market apply so that there is a supply curve for green fee golf. He argues that the price elasticity of supply is neither perfectly elastic nor perfectly inelastic so that a figure of +1.0 is assumed ie if green fees were to rise by 10% then the supply of rounds of green fee golf would increase by 10%.

105. He considers that the results from the Frontier interviews of representatives from all four Clubs showed that they were operating in a competitive market and that that market was sufficiently competitive, noting that there are enough competitor clubs within the catchment area of each of the Clubs, for the model of perfect competition to apply.

106. Professor Szymanski argues that the oligopoly models of Bertrand and Cournot are the wrong economic models to use in this case as they are applicable when there are few firms competing in a market and usually large differences in the scale of operation. He considered golf clubs to be individual businesses which did not show the type of growth or amalgamation that would be typical of markets for which these economic models are appropriate.

107. Also in support of his contention that the perfect competition model is the appropriate model to use, Professor Szymanski notes that green fee rounds of golf are sufficiently homogeneous. In evidence he said:

"... at the top end of the market I believe that there may be some significant quality differences in golf courses. But once you get down to rank 50 or 100, then one golf course is probably fairly similar to another. That's not to say they don't have differentiating characteristics ... So in the end it's about 18 holes of golf."

"... in any product or service you can think of, the assumption of strict exact homogeneity, exact identical products, would never exist."

5 “So there are different characteristics of golf courses, and I accept that, and I have said I agree with that. No doubt this would cause some people to sometimes go to one golf course and sometimes another. But are they sufficiently different, in relation to the market, that golf courses can charge different prices, without facing the threat of competition and without having to worry about how rivals compete with them? That is the key sense in which products are homogeneous.”

108. Further support for the perfect competition model is the “free” (ie unhampered) entry and exit into the market by way of new courses coming onto the market, the closure of clubs and the fact that factors of production or supply (except for land) are mobile, that is, they are easily transferable to other uses. At club level there is currently spare capacity at certain times of the week so that the Clubs are able to switch the supply of golf rounds between members and visiting non-members at specific times of day and on specific days of the week although, as we have noted above (at paragraph 37), The Berkshire, which has limited spare capacity, is more constrained in doing this.

109. Professor Szymanski also argues that a necessary condition of perfect competition is that both golf clubs and green fee visitors have sufficiently good information about the market in order for them to make respectively “perfect” selling or “perfect” buying choices, and that this is met by access to the internet and general market intelligence.

110. Mr Trussler does not accept that the perfect competition model is the appropriate model to use to describe the market for green fee golf. He gives several reasons why the supply of green fee golf is not perfectly competitive.

111. The number of competing golf clubs identified by Frontier within a 30 minute drive time catchment area of each of the four Clubs (see Figures 1-4 in the appendix) is not sufficiently large for the green fee golf market to be considered perfectly competitive. Mr Trussler argues that while

30 “the competing clubs may, in the view of the four Clubs interviewed, provide stiff competition, this is far from the textbook model of perfect competition which is predicated on a very large, and potentially infinite, number of buyers and sellers”.

112. Secondly, golf courses are not homogeneous but highly differentiated in terms of quality and of type. Mr Trussler said:

35 “... But even within the same quality bracketthere are significant differences in golf courses, and they include the course quality, so some courses are known to be of better quality than others and some green keepers do a better job than others. The features of the course: a links course is very, very different to a woodland course which is very, very different to a parkland course, and some golfers prefer some to others. They are very different experiences. The facilities, such as the quality of the clubhouse, the provision of driving ranges ... are important. It is absolutely not true that the condition of product

homogeneity is met. It is not even close to being met in the case of green fee golf. ”

113. Thirdly, there is not “free” entry and exit as demanded by the theoretical model of perfect competition. New golf clubs are not able to enter the market immediately or at least quickly. Professor Szymanski accepted that golf clubs could take “a year or two” to build but, as Mr Trussler pointed out, in reality it takes significantly longer to acquire the land, obtain planning permission, build the facility and for a golf course to mature. It also requires a significant capital outlay. Mr Trussler in his report refers to the cost of building a new course in Europe being between €1.5 and €5.6 million.

114. We note that this reference to “free” entry is at the level of the market. At individual club level the experts agree that most golf courses currently operate below full capacity for most of the time. However, although the Clubs have some spare capacity i.e. tee times that were not booked (although this is less so for The Berkshire during mid-March to mid-November), utilising these times would not, we understand from an economist’s viewpoint, be considered an increase in market supply for the purposes of “free” entry and exit. It is merely utilisation of a supply that already exists at club level.

115. Finally, Mr Trussler argues that while some of the factors like machinery, seed and fertiliser and green keepers are “mobile”, the main factor in supplying rounds of golf, land, is not.

(4) The marginal cost of supply

116. One of the key questions that the Tribunal has to address is the cost of each Club supplying an additional round of golf to a green fee visitor (“the marginal cost”). The green fee (per round) less this cost is the profit that the Club would have earned from each round played by a visitor. The economic loss element of the calculation of unjust enrichment is this profit for the number of additional green fee visitors who would have played if the green fee had been at the lower price had VAT not been imposed but were deterred from playing by the VAT-inclusive green fee.

117. In summary, Mr Hill argues that the marginal cost is equal to the green fee charged so that the economic profit earned on an additional round, and, therefore, the economic loss to the Clubs is relatively small. Mrs Brown contends that the Clubs’ marginal costs are substantially lower than the green fees charged so that the Clubs have suffered a significant economic loss by the incorrect imposition of VAT.

118. We have seen (at paragraph 67, above) that in the Joint Report the experts agree that in a perfectly competitive market, at equilibrium (where the downward sloping demand curve intersects the upward sloping supply curve) price equals marginal cost and firms generate zero economic profits (although there are accounting profits so that capital investors are rewarded). The experts also agree that in imperfect markets firms will set prices in excess of marginal costs to reflect their market power (ie they are price setters and not price takers as in perfect competition). Prices will be set closer to marginal cost the more competitive the market.

119. The experts also agree that in perfect competition, the threat of entry into the market (of new golf courses) can be sufficient to ensure that the price is set at the long run marginal cost and that economic theory distinguishes between short run and long run marginal costs.

5 120. In the short run all or some of the factors of production/supply are fixed and in the long run marginal cost is where all or almost all factors of production are potentially variable. Short run marginal cost is zero only if there is spare capacity on the golf course and we note that it is agreed that most UK golf courses operate at below capacity for most of time in the current economic climate.

10 121. Professor Szymanski, who assumes that competition in the green fee golf market is sufficiently intense for the market to be able to be considered as perfectly competitive, did not discuss marginal costs in any depth in his report although he did append to it the Frontier reports which considered costs, to a greater or lesser extent, of each of the Clubs. However, he provided more information in his oral evidence to
15 the Tribunal.

122. We understand from this that in the theoretical model of perfect competition marginal costs at a low level of additional output are small but will rise as output increases towards capacity. The marginal cost of supplying a round of golf to the very last green fee visitor will equal price (ie the green fee charged/paid) and until the very
20 last round of green fee golf is supplied the price is, therefore, more than the marginal cost. There is a decreasing surplus (a quasi-rent) on every additional round of golf which covers the fixed costs of entering the market.

123. Professor Szymanski accepted that in a market with excess capacity marginal costs in the short run could be very small or zero and cited airlines or a stadium which
25 wished to fill empty seats “on the day” as examples of this.

124. However, he did not accept that marginal costs could be zero in the long run saying that if this were true the costs of providing the product would be nil and no product or service was “costless”. Rather the long run marginal cost is likely to be close to the average cost of supplying the facilities to play a round of golf. In cross-
30 examination Professor Szymanski said that the long run marginal costs of an additional supply of green fee golf would comprise variable costs like hot water and a fresh towel for a shower, liability insurance cover, additional staff costs on the greens and in the clubhouse, “wear and tear” and a “congestion” cost.

125. In support of his view that there would be wear and tear costs, Professor
35 Szymanski referred to the Frontier interview with officials of The Glen. Asked what impact a 10-20% increase or decrease in visitors would have on the Club’s costs, its representative said:

“... next to nothing just a difference in wear and tear.”

126. Unfortunately, the interviewer did not ask supplementary questions to expand
40 on this. Professor Szymanski said that, in his opinion, an additional one to five visitors a day (as estimated by Mr Trussler - see paragraph 133, below) “could add up

to quite a lot of wear and tear over the year”. He argued that costs need to be considered in the context of how many extra players turn up at any one time and the capacity of the course and clubhouse available at that time. A concentration of visitors at any one time could result in additional course maintenance or clubhouse costs. In relation to congestion costs Professor Szymanski said that members suffer as their club becomes more crowded.

127. In their interview Bridport officials told Frontier:

“... if you have too many people on the course then the members get upset because obviously if you’ve got visitors that don’t play golf an awful lot, they can take a long time to get around a course and members get frustrated with them.”

128. Professor Szymanski referred to this interview comment, pointing out that congestion is not cost-free saying:

“A member might give up his/her membership.... and you could value that [cost] at the entire membership fee for the year ... I think it is hard to be precise ... about exactly what that cost is but it seems to me that it is there and it should not be ignored just because it is difficult to quantify.”

129. Professor Szymanski argues that the demand for golf was higher in the earlier years of the Clubs’ claim and excess capacity less, so that costs need to be considered over the whole period and not just the recent past. While we agree that this would be ideal, Frontier was able to collect little information about the earlier period that would assist us and – as far as we are aware – did not question the Clubs’ representatives about the operating practices of the Clubs in the years when market demand was higher and many clubs had membership waiting lists.

130. Mr Trussler contends that the Clubs operate in an imperfectly competitive market, so that there is no demonstrable supply curve from which to derive marginal costs. In order to calculate the loss of profits incurred by the Clubs from visitors being deterred from playing by the incorrectly imposed VAT on the green fee, the Tribunal needs to consider the actual costs incurred by the Clubs in providing an additional round of green fee golf to the number of visitors who would have played had VAT not been charged (“the relevant range”). He argues that this number is small in relation to the total number of green fee visitors who actually visited each of the Clubs and the number of rounds played by the additional visitors will, therefore, also be small in relation to the total number of rounds played by both visitors and members.

131. In his report Mr Trussler produced two tables using the most recent annual data from the Frontier reports for each of the Clubs and Professor Szymanski’s estimates of the amount of VAT passed on and of the price elasticity of demand, which we reproduce as Figures 5 and 6 in the appendix below.

132. The first (Figure 5) calculates the increase in daily visitor numbers if the green fee was reduced by Professor Szymanski’s estimate of the VAT passed on to visitors in the form of higher green fees. The second (Figure 6) is a calculation of the possible

increase in the total rounds of green fee golf played at each of the four Clubs assuming the number of additional visitors calculated in Figure 5.

133. Mr Trussler's calculations in Figure 5 (which were not disputed by Professor Szymanski) show that for Bridport, Wilmslow and The Glen, the number of visitors would have increased by 8.33% and this would represent an additional average number of visitors per day of 0.8, 0.8 and 2.6 respectively. The number of visitors would have increased by 5.56% at The Berkshire representing an additional 2.2 visitors or 1.1 per day on each of its two courses. However, if the green fee was reduced by an amount equivalent to all of the VAT (as opposed to the 50% assumed by Professor Szymanski) Mr Trussler calculates that the range of additional visitors per day would increase to between 1.4 to 4.6.

134. In order to understand the effect that the additional number of visitors might have on the costs of the Clubs it is necessary to consider the number of rounds being played. However, there were no figures for the number of rounds played by members. The 2013 accounts for each of the Clubs show the breakdown of revenue earned from members' subscriptions and visitor fees and the Frontier reports gave the 2013 breakdown of visitor rounds played. For illustrative purposes, taking the number of visitor rounds as equal to the number of visitors (although The Berkshire does quote a green fee for two rounds and other Clubs have green fee rates which would allow for more than one round of golf), Mr Trussler then made the assumption that the total number of rounds played was in proportion to the revenues earned from members and visitors. While this assumes a frequency of members playing rounds for which we have no evidence and also makes no allowance for any non-playing members, we accept that this was a reasonable assumption for Mr Trussler to make in order to assist the Tribunal.

135. Figure 6 shows that the number of additional visitors resulting from the removal of VAT from the green fee charged by the Clubs would have represented a 0.8% increase in the number of rounds played at the Wilmslow (where visitor revenues represent 10% of the total revenue), 1.3% at Bridport, 1.7% at The Berkshire and 4.0% at The Glen (where visitor revenues represent 48% of the total revenue).

136. In considering the actual costs of supplying a round of golf to this number of additional visitors Mr Trussler emphasised that the green fee golf market has an unusually high fixed cost structure and likened it to the book-making business. Evidence from the Frontier interviews appears to support his view that an additional round of golf would have only a small impact on the Club's costs. For example the club secretary of The Berkshire said:

"Our cost base does not really change depending on one visitor or a thousand visitors ... 90% of our cost base would be unaffected. Maybe 10% would have a small increase. For example you might need more hot water. You might need a little bit more towels. But other than that, no impact".

137. The Club Captain of The Glen told Frontier:

“We don’t have anything that’s really variable with the number of people that play the course..... you know apart from wear and tear, the door opens more often, the grass is cut the same number of times..... I can’t think of a cost that would make a difference to us....”

5 He did not think there would be any change in even part-time staff costs saying:

“... they just work a bit harder or a bit less.”

However, later in the interview the Club Captain stated:

10 “in terms of the green fee itself we’ve had a few years where we have taken into account the money that was spent on improving the facilities and ...there was a reluctance for quite a while to increase the green fee at all. ... The view we subsequently took was that if you spent all that money and improved on it [the course] and you’re continuing to spend on it, then you either needed to get proper recompense for it or
15 cut your cost dramatically and go back to something that met the green fee you were charging”

138. Mr Trussler accepted in evidence that the marginal cost of supplying each additional round of green fee golf would not be zero and there would be a small amount of cost incurred by the Clubs, for example, to cover expenditure such as hot water and a fresh towel for a shower, a card cost and liability insurance cover, but that
20 the figure would be significantly less than the average green fee charged by the Clubs. He believed that the additional costs would be “a matter of pence per visitor”. He also accepted that the costs of supplying a round of green fee golf had to be considered in the long run as well as the short run, but maintained that the golf club market had high and ‘lumpy’ fixed costs and, as there was existing spare capacity within it, these low
25 short run costs would also hold true for the long run.

139. In his analysis of VAT pass through and economic loss, Mr Trussler assumed marginal costs of £0, £2 and £5 for each Club. Although he did not support his choice of £2 and £5 with evidence from the Clubs’ accounts, we have assumed that, as his initial position was that the marginal cost was zero or close to zero, these were
30 plausible uplifts for ‘modelling’ purposes. The marginal costs of £2 and £5 as a percentage of the green fee exclusive of VAT for each Club are given below.

	The Berkshire	Bridport	Wilmslow	The Glen
<i>Average Green Fee (inc. VAT)</i>	£53.17	£16.60	£20.82	£22.17
<i>Average Green Fee (exc VAT)</i>	£47.26	£15.22	£19.08	£20.32
£2 as % average green fee (exc VAT)	4.2%	13.1%	10.5%	9.8%
£5 as % average green fee (exc VAT)	10.6%	32.9%	26.2%	24.6%

140. Mr Trussler agreed that it may be appropriate in theory to include an opportunity cost (or congestion cost in Professor Szymanski's terminology) that is in some way capturing the inconvenience to members of extra visitors turning up at their club, but he did not know how this could be measured in practice or quantified in relation to the Clubs. However, as previously noted, both experts agreed that the golf courses currently operate at below full capacity most of the time and, in Mr Trussler's opinion:

10 "... there is space to accommodate a small number of extra golfers, or even in several cases, a very large number of extra golfers per day without any hassle factor for members"

141. Mr Trussler maintains that the small numbers of extra visitors per day could represent only a single tee time and all players should repair their own divots, pitch marks and rake bunkers immediately after use. In any event, golf clubs are also able to minimise any potential disruption by visitors by reserving the popular times for playing golf exclusively for their members.

142. We agree with Mr Trussler that the costs of supplying an additional round of golf should be considered in the context of the number of extra visitors that would have visited the Clubs had they not been deterred by the VAT which was incorrectly imposed on the green fee. Professor Szymanski accepted that the number of additional players each day would be in single figures. We, therefore, accept Mr Trussler's calculation of one to five additional visitors per day whilst, at the same time, take account of Professor Szymanski's view that this number might not be spread out evenly over a year.

143. We do not agree with Professor Szymanski's assertion that the costs of supplying an additional round of green fee golf is equal to the green fee charged. He accepted that, as the Clubs' representatives themselves explained, the variable costs of supplying, say, a towel, hot water and liability insurance cover were small, but he was unable to quantify the cost of "wear and tear" on the course and clubhouse or of "congestion" which he put forward as the other components of marginal cost only in his oral evidence. He did not expand on the argument that there is a "quasi rent" in a marginal cost to represent a return on capital investment, which he had advanced in his report.

144. While we consider his "wear and tear" argument to have some merit in a business which has high fixed costs, we are unable to consider this further in the absence of any more evidence. However, we fail to see how a "congestion" cost could arise when the Clubs were reporting that they currently had spare capacity most of the time (and something with which Professor Szymanski agreed in the Joint Report), although it may be that before the fall in demand after 2007, and at a time when golf clubs had membership waiting lists, a "congestion cost" is a factor that we would have needed to consider in assessing marginal costs. While we accept that it would have been preferable to have considered all issues with a longer run of yearly data, this evidence was just not available.

145. In the circumstances, we considered whether it was appropriate to seek further submissions from the parties in relation to “wear and tear” costs but decided not to do so given the fact that Mr Hill chose not to pursue this matter with Professor Szymanski during his examination in chief. Not only was it accepted that it was for HMRC to establish unjust enrichment as a defence to the claims of the Clubs but, having been made aware of the Clubs’ case and been provided with Mr Trussler’s report (with its emphasis on the marginal costs of supply) some six months before the hearing, we considered that HMRC had been given ample opportunity to adduce evidence to counter the arguments advanced on behalf of the Clubs in this regard.
146. As we have noted, Mr Trussler did not provide any evidence for choosing a marginal cost of £2 and £5 to assess unjust enrichment. We, therefore, looked at the Clubs’ costs in each of their 2013 accounts and did two very ‘rough and ready’ calculations in order to ascertain whether we could agree that the costs of supplying an additional round of green fee golf were in the order of Mr Trussler’s figures.
147. In our first calculation, we took The Berkshire’s comment that variable costs might be 10% of its cost base (see paragraph 136, above) and applied Mr Trussler’s assumptions about the total number of rounds played at each Club to 10% of its total expenditure. We note that the club secretary said that not all of these costs might vary with an increase in visitor numbers (within the relevant range), so that we consider our assumptions to be conservative. Our second calculation took 10% of the course and clubhouse costs (where these were available) and 100% of depreciation as a proxy for “wear and tear” and/or return on capital.
148. These calculations, which are appended to the decision as Figure 7, show that Mr Trussler’s figures of £2 or £5 per additional round of golf are not unreasonable at least for Bridport, Wilmslow and The Glen. The calculations for The Berkshire showed that the marginal cost might be of the order of £5 to £9. We note that £2-5 for an additional round of green fee golf represents a relatively small proportion of the green fee exclusive of VAT for each Club (see table in paragraph 139). This means that, on Mr Trussler’s argument, the Clubs are making a significant profit on each additional round of green fee golf which they are using to cross-subsidise membership fees and/or to build reserves.

(5) The calculation of pass through of VAT and economic loss

149. It is not disputed that for the purposes of the present case that the economic loss is the amount of VAT that the Clubs absorbed plus the lost profits that would have been made, less any associated costs, had VAT not been imposed on green fees and deterred some potential visitors from playing.
150. Mr Trussler argues that the perfect competition model used by Professor Szymanski overstates the VAT passed on to green fee visitors and, therefore, understates the economic loss made by the Clubs. In all four models of imperfect competition that he used, there was less pass on of VAT in the form of higher prices the lower the marginal cost; the more differentiated the products are and the fewer competitors there are in the market.

151. Professor Szymanski stated that in a perfectly competitive market where there are quantifiable price elasticities of demand and supply, the percentage of tax passed through to the consumer is defined as :

5 $E_s/(E_s-E_d)$ where E_s is price elasticity of supply and E_d is price elasticity of demand.

152. This calculation is, of course, sensitive to the assumptions made about the relative price elasticities of demand and supply. If demand is inelastic (E_d is 0) and supply is neither inelastic nor elastic ($E_s = +1$) then all of the tax is passed onto green fee visitors and none is absorbed by the Clubs. If demand is neither inelastic nor
10 elastic ($E_d = -1$) and price elasticity of supply remains at +1, 50% of VAT is passed on to green fee visitors and 50% absorbed by the Clubs. If demand is closer to being elastic ($E_d = -2$) then 33% of VAT is passed on to green fee visitors and 67% is absorbed by the Clubs.

153. For Bridport, the Wilmslow and The Glen where Professor Szymanski's
15 evidence was that the price elasticity of demand was -1.0 and that the price elasticity of supply was +1.0 (i.e. neither demand nor supply were elastic or inelastic), the pass through of VAT to consumers was calculated (by Professor Szymanski) as being 50%. Therefore the three Clubs absorbed 50% of the VAT charged. From an algebraic formula Professor Szymanski calculated that the lost net profits element of economic
20 loss would be 3%-4% of VAT at rates between 15% and 20%, thereby giving an economic loss of 53-54% of the VAT paid.

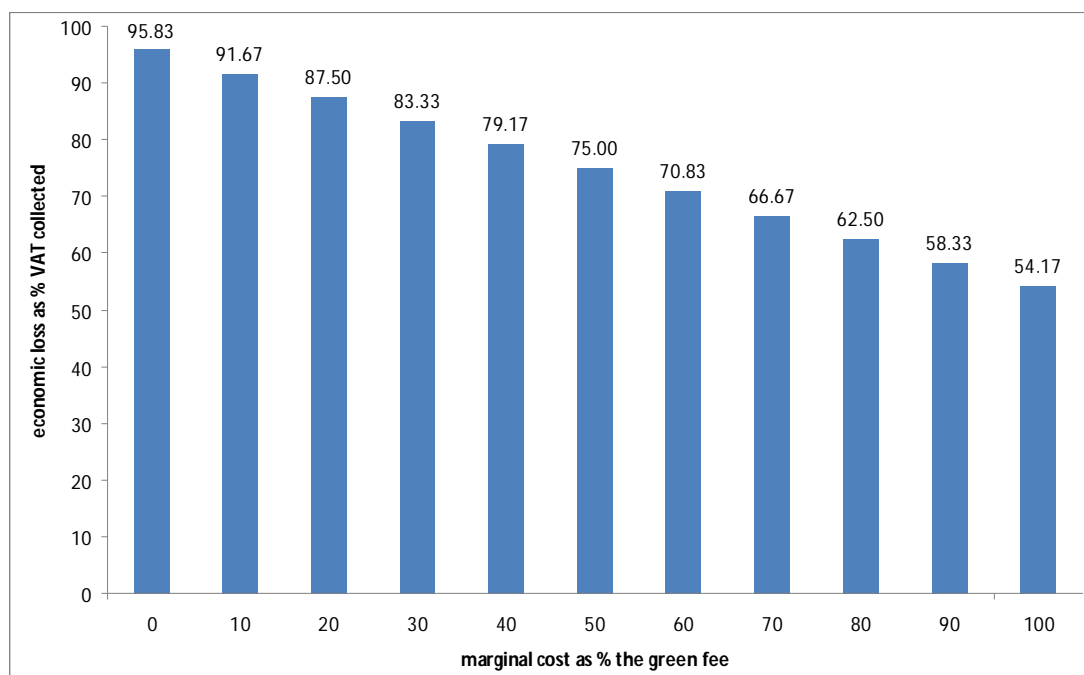
154. For The Berkshire where Professor Szymanski assumed a price elasticity of demand of -0.5 (and price elasticity of supply of +1.0), he calculated that 67% of VAT had been passed through to green fee visitors, so that The Berkshire absorbed
25 33% of the VAT. The lost net profits would be in the order of 2% of VAT paid thereby giving an economic loss of 35% of the VAT paid.

155. Professor Szymanski said that although the Clubs stated during the Frontier interviews that they did not take VAT into account when setting green fee prices, there was some evidence that VAT had been passed onto customers from comments
30 made by a few of the interviewees. He also believed there was sufficient evidence obtained by Frontier to show that The Berkshire had passed all of the liability from the increase in the VAT rate from 8% to 15% in July 1979 onto green fee visitors.

156. In addition, Professor Szymanski drew on academic work that he had undertaken to argue that in the UK football league the introduction of VAT in April
35 1973 on match ticket prices had been passed on in full to consumers (a football club's paying supporters) by some clubs at the outset and by almost all of the clubs at the start of, or during, the 1973-74 season. He asserted that, if a football stadium had spare capacity, the cost of admitting an additional supporter (i.e. the marginal cost) would be nil until the stadium was at full capacity. This, he contended, was counter to
40 Mr Trussler's argument that marginal costs in the green fee golf market are zero, or close to zero, and that the membership clubs had absorbed all or most of the VAT.

157. However, Mr Trussler disagreed with Professor Szymanski's conclusions on the football market. He maintained that, because the average match attendance at the 92 league clubs was circa 12,500, a price elasticity of -1.0 would imply 1,250 additional supporters for each match. At this level of increased demand, football clubs would incur additional costs for example of more stewards, turnstile staff and extra policing and this cannot be equated with the 1-5 additional green fee visitors, and their associated costs, who would turn up at a membership golf club each day. Mr Trussler also argued that, as football match tickets did not incur purchase tax (which VAT replaced), the league clubs would have needed to have increased ticket prices to cover both annual inflation and the imposition of VAT by around 20-23% for Professor Szymanski's assertion to be correct and his own analysis showed that, on average, the price rise was only about 11-12%. In the circumstances we agree with Mrs Brown that Professor Szymanski's football example cannot really assist us and we have decided to place no weight on it.
158. In relation to the equation used by Professor Szymanski to calculate the pass through of VAT and the economic loss Mr Trussler states that this will only hold for perfectly competitive markets where there is a quantifiable supply curve and the average green fee after VAT is assumed to be equal to the cost of supplying an additional round of green fee golf (the marginal cost). In Mr Trussler's view, even if Professor Szymanski's price elasticities of demand and the amount of VAT passed on (and therefore the amount of VAT absorbed by the Clubs) is assumed to be correct for each of the Clubs including The Berkshire, reducing the cost of supplying an additional round of green fee golf to £2 – £5 will have a significant effect on the calculation of economic loss, because the estimate of lost net profits is substantially increased.
159. Mr Trussler produced a series of tables to assist the Tribunal in his report using data from Frontier's analysis of Bridport and we reproduce two as Figures 8 and 9 in the appendix below.
160. Figure 8 shows that for Bridport the increase in the net profit that would have been made by the Club (i.e. the economic loss) is 54.17% of VAT when the marginal cost of providing an additional green fee round is £13.83, which was the actual 2013 green fee after deducting VAT ie what the marginal cost would be if it was held that Bridport was operating in a perfectly competitive market. This is Professor Szymanski's position in a tabular form.
161. Figure 9 shows that if the marginal cost is reduced from 100% of the green fee (exc. VAT) at Bridport of £13.83 to 20% – in this instance to £2.77 – the figure for economic loss rises from 54.17% to 87.50% of the VAT collected (Professor Szymanski's other assumptions remaining the same).
162. Mr Trussler illustrated, by way of a bar chart, which we reproduce below, the effect of a series of "step" changes in marginal cost as a percentage of the average green fee on the economic loss of Bridport as a percentage of VAT. If marginal costs were 100% of the Club's green fee (excluding VAT) the economic loss would be 54.17% (Professor Szymanski's position) and at marginal costs of 10% of the green

fee the economic loss would be 91.67% of VAT collected. If marginal costs were zero, or close to zero, the economic loss would be 95.83%.



163. Mr Trussler calculated the economic loss for each of the other Clubs assuming a
5 marginal cost of £2 for green fee golf. The economic loss as a percentage of VAT
collected increased from Professor Szymanski's estimate of 54.17% to 89.81% for
Bridport, to 91.03% for the Wilmslow and 91.32% for The Glen. Applying the same
method to The Berkshire, the economic loss as a percentage of VAT collected
increased from Professor Szymanski's estimate of 35.19% to 61.71% before the
10 adjustment for the course closures during 2010. Once this had been taken into account
the VAT absorbed by The Berkshire was increased to 45%, and, while Mr Trussler
did not calculate the lost net profits element, we believe the figure for economic loss
would be 78%.

164. We can see from the Table in paragraph 139, above, that a marginal cost of £5
15 of green fee golf (all the other assumptions of Professor Szymanski remaining the
same) would have been between 25% and 33% of the average green fee (exc. VAT)
for Bridport, the Wilmslow and The Glen in 2013. According to Mr Trussler's bar
chart this would create an economic loss of between 80 and 85% of the VAT
collected for these three Clubs. The Berkshire's economic loss would be much higher,
20 at just over 91%.

165. Mr Trussler also calculated the percentage of VAT absorbed by the Clubs using
the algebraic formulae of the Cournot economic model for differentiated products
assuming the actual average green fee in 2013, the stated number of competitors in
the Frontier report, a product homogeneity factor of 0.5 and marginal costs of £2 from
25 which we are able to compare with Mr Trussler's calculations at the same marginal
cost using Professor Szymanski's model of perfect competition.

166. The percentages of VAT absorbed by Bridport, the Wilmslow and The Glen in the Cournot model are all around 90%, but The Berkshire figure is significantly higher, at 96%. It can be seen that these figures are similar to the figures for economic loss that Mr Trussler calculated using the “perfect competition” tables in paragraph 162 above, for all the Clubs except The Berkshire. Mr Trussler’s Cournot calculations were not discussed at the hearing, so that we are unaware of whether the difference in The Berkshire’s figure is of material significance to the issues we have to address but we consider it unlikely on the basis that Mr Trussler was not cross-examined on his calculations. Even with a marginal green fee cost of £5 in his Cournot calculations, Mr Trussler argues that the VAT absorbed by the Clubs is significantly higher than that suggested by Professor Szymanski’s “perfect competition” model calculations which assumed that the marginal cost is equal to the green fee.

167. The calculations reinforce the fact that the key issue for the Tribunal to consider in deciding the appropriate level of unjust enrichment is not the choice of economic model to be used *per se* but the parties’ submissions in relation to what are the costs of an additional round of green fee golf supplied by each Club in relation to the green fee charged for the number of visitors who would have turned up to play if VAT had not been incorrectly imposed on the green fees.

168. Mr Trussler disagrees with Professor Szymanski that there was some evidence that the Clubs passed on VAT to green fee visitors. Mr Trussler said that he found no statistical evidence of any relationship between green fees and the VAT rate in the last 35 years. All the Clubs said that VAT rates played no part in setting the green fees and he cited quotes from the Frontier interview transcripts for all four Clubs to show this. He also disagreed with Frontier’s analysis which said that The Berkshire had passed on all of the VAT increase from 8% to 15% in June 1979. Mr Trussler argues that Frontier did not take account of the high rates of inflation in this period. Between 1978 and 1979 inflation was 13.4%. The increases in The Berkshire’s society rates of 8% and casual visitor rates of 11% mean that there was no real (i.e. inflation-adjusted) increase in rates. The rates for members’ guests did increase by significantly more than inflation, at 25%, but Frontier did not provide any information about the date of the last rate increase to establish that it was not reflecting an inflation “catch-up” from earlier years. Finally Mr Trussler contends that Professor Szymanski cannot argue that, because Bridport passed on VAT in relation to golf balls and catering, which have different cost structures, that such a policy would be applicable to the green fees at Bridport or to other clubs.

169. We consider Mr Trussler’s analysis to be more robust on this specific issue and do not accept that there was any evidence that The Berkshire had passed on the 1979 VAT increase to its green fee visitors.

Summary and Conclusion

170. It is common ground between Professor Szymanski, HMRC’s expert, and Mr Trussler, the Appellants’ expert, that the Clubs have suffered an economic loss through the incorrect imposition of VAT on green fees. The economic loss comprises the VAT absorbed by the Clubs which could or was not passed on to the green fee

visitors and the net profit on rounds of green fee golf that would have been played had some potential visitors not been deterred by the increased price due to the imposition of the VAT. However, the experts part company as to the extent of that loss and how it should be calculated.

5 171. Both experts approached the question with the assistance of a theoretical economic model. Professor Szymanski argues that the model of ‘perfect competition’ sufficiently approximates the green fee market in the UK. Mr Trussler argues that the market is far from being as perfect as this theoretical model demands and that a model of an oligopolistic (imperfect) market is the more appropriate model to apply to the
10 evidence collected by Frontier. While the parties invited the Tribunal to draw its own conclusions from their expert evidence, it is not open to us to question whether the approach adopted by the parties is the right one.

172. One of the key issues in this case is the make-up of the cost of an additional round of green fee golf (the ‘marginal cost’) and its relation to the green fee charged,
15 from which is derived the Club’s net profit on each green fee round of golf. Professor Szymanski argues that in perfect competition the marginal cost is equal to price (‘the green fee’) but which would allow for some element of capital return. Mr Trussler states that in an imperfect market the marginal cost must be calculated from the actual costs that would be incurred by each Club for what would be a relatively small
20 number of additional green fee visitors. He argues that this cost is significantly below the green fee charged.

173. Having carefully considered the experts’ written and oral evidence, there were some aspects of it that, with the benefit of hindsight, we would like to have seen explored more. Mr Trussler, for example, did not include a cost to cover existing or
25 future capital investment in what, as he himself argues, is a high fixed cost business. There was also no exploration in the examination in chief of the “quasi-rents” in relation to the fixed costs of entering the market which was advanced by Professor Szymanski in his report. We also felt that Professor Szymanski, when cross-examined by Mrs Brown, gave somewhat “on the hoof” responses to her questions about the
30 “wear and tear” and “congestion” cost components which he had advanced were important elements in the make-up of marginal costs only in the hearing. We would have expected these issues to have been more fully addressed in his final report and in his oral evidence especially given the weight attached to marginal costs not only in Mr Trussler’s report but also in Mrs Brown’s Skeleton argument and the significant
35 difference of opinion that there is between the experts.

174. However, for the reasons given in paragraph 145, above, we decided against seeking further submissions from the parties and have applied the observation of Moses J in *Marks and Spencer v Customs and Excise Commissioners* (see paragraph 29, above) that:

40 “... if, after considering all the evidence, there is uncertainty or absence of detail, that should not be held against the trader.”

175. On balance, we are not persuaded that the theoretical model of perfect competition is the appropriate economic model to use to explain the green fee golf

market in the UK. While there is evidence that the Clubs benchmark their green fees against selected competitors so that the bar charts for three of the four Clubs (Bridport, the Wilmslow and The Glen) produced by Frontier show that there was a similarity of the Clubs' (selected) green fee rates with at least the main competitors of those three Clubs, we do not believe that this demonstrates that the Clubs are price-takers and that the market is perfectly competitive in the way that this economic model demands. Also, Professor Szymanski asserted that many, but not all, of the necessary conditions of a perfectly competitive market hold true for the green fee market, but we considered that he provided little demonstrable evidence to support this.

176. We do not feel that HMRC made its case that we should assume that, for the purposes of calculating the economic loss to the Clubs of incorrectly imposing VAT, the cost of the Clubs supplying an additional round of green fee golf (and allowing for a return on capital) was equal to the green fee. We preferred Mr Trussler's argument that the green fee market, while competitive, was not a 'perfectly competitive' but an oligopolistic market and, as such, the Tribunal had to consider the actual costs incurred by the Clubs in supplying additional rounds of green fee golf to the number of visitors that would have played had they not been deterred by the imposition of VAT increasing the green fee. Mr Trussler statistically demonstrated that this would be only 1.4-4.6 additional players per day for each Club. Professor Szymanski accepted that the number would be small, albeit he said there might be some concentration of visitors which would, or could, have an added effect on the Club's costs.

177. Although Mr Trussler argued that the Clubs' (marginal) cost of supplying a round of green fee golf to such a small number of additional visitors would be "a matter of pence" in the hearing, he assumed figures of £2 and £5 in the statistical analysis in his report. These figures were not corroborated but our review of the Clubs' most recent audited accounts (2013) suggest that they are not unreasonable. We considered Mr Trussler's calculations of the pass through of VAT and of the economic loss incurred by the Clubs, which were presented in a tabular form for the Tribunal, to be robust. We accept Mr Trussler's figures that, at a marginal cost of £2, the four Clubs would have suffered an economic loss of between 90% (Bridport) and 94% (The Berkshire) of the VAT collected and, at a marginal cost of £5, the economic loss would be between 82% and 91%. We are acutely aware of the potential problems of using only very recent data to assess the level of economic loss for claims going back many years especially when the market conditions are reported to have been very different. We are, however, limited by the statistical information collected by Frontier and the experts' analysis of it.

178. On the basis of the evidence before us, we consider that, as they accept, the Clubs will be unjustly enriched if the whole of their claims were to be repaid.

179. Having regard to all the circumstances of the case and for the reasons stated above, we conclude a restriction of 10% should be applied to each of the Clubs' claims to take account of the fact that they would have incurred some costs in providing rounds of green fee golf to the additional number of visitors who would

have turned up to play had the green fees been lower by the amount of VAT incorrectly imposed.

OTHER ISSUES

180. As previously stated, the Other Issues arising in this case are:

- 5 (1) Whether supplies of green fee golf by the Clubs which are on-supplied to individuals by tour operators are exempt or subject to VAT at the standard rate.
- 10 (2) Whether, if the customer of the Club is a body corporate, there is a distinction between a “corporate day” package (which all parties accept is taxable) and the supply of access to play golf.
- 15 (3) Which categories of course maintenance costs are properly treated as residual in each of the following circumstances:
 - (a) The Club provides advertising services from locations on the golf course but has no corporate day income;
 - 20 (b) The Club has neither corporate day income nor course advertising income; and
 - 25 (c) The Club has taxable income from the hire of other golfing equipment, including but not limited to golf buggies, trolleys or clubs. However, we should mention that, other than golf buggies, the clubs no longer pursue the argument that the hire of golfing equipment has a direct and immediate link with the cost of course maintenance.
- 30 (4) Whether the link between course maintenance costs and taxable tee advertising, corporate day or rental income is sufficiently direct and immediate to give rise to at least partial input tax and whether this depends on the category of cost incurred and is the Tribunal able to identify, on the evidence before it, which categories do give rise to a sufficiently direct and immediate link.

181. In relation to these issues it is convenient to set out the facts before considering the relevant law (both Community and domestic) and its application to the Other Issues in the order in which they were addressed in the hearing. First, the categories which can be treated as residual or have a direct and immediate link with a taxable supply and then to supplies to corporate bodies and tour operators.

Evidence and Facts

- 35 182. As we have already noted (at paragraph 16, above) the evidence of Bryan Williamson, the current Finance Convenor of The Glen, Ian Farquharson Finance Convener of The Glen from 2010 to 2014, its Captain from April 2013 to February 2015 and currently a member of its finance committee, Peter Foord, the secretary of the Berkshire and Andrew Robinson, Honorary Treasurer of the Wilmslow is not
- 40 disputed.

183. Given the issues that arise in this case, it is convenient to consider their evidence in relation to the costs of course maintenance and what this includes, tee advertising; buggy hire; the provision of corporate days; and supplies of access to the greens to tour operators.

5 *Course Maintenance*

184. Mr Williamson, in his witness statement, explains that the Glen employs five full time green keeping staff under the management of the Course Manager who has a written course maintenance programme which he follows. Referring to the maintenance programme and the 2014-15 winter maintenance programme Mr
10 Williamson says:

15 “From these documents you can see that the greens are mown daily in the summer months and twice weekly in the winter months, Tees, aprons, fairways and semi-rough are mown twice weekly in the summer and monthly in the winter. Heavy rough is cut and scarified twice yearly at the start and end of summer. We also move the holes on the greens twice weekly in the summer and once weekly in the winter. Bunkers are raked 4 to 5 times weekly throughout the year, and generally tidied up twice weekly in the summer months. In addition to the grass cutting and bunker maintenance work there is more
20 substantial work carried out on a periodic basis, such as drainage work, tining and seeding of the greens and tees, and forestry management undertaken annually.”

185. The costs of carrying out this work include the salaries of the course staff (clubhouse staff costs are recorded separately in the Club’s accounts), the lease of the
25 land for the course from the local authority, water charges for irrigation and supply to the green keepers’ sheds (known as the “Bothy”), heating and lighting for the Bothy, machine and equipment maintenance and finance leasing interest (in respect of larger equipment subject to hire purchase agreements), and course supplies, equipment and maintenance costs.

30 186. Other than payroll the course supplies, equipment and maintenance is the Club’s largest expense which, in 2013 amounted to £26,132. This can be further broken down as follows:

- (1) £842.15 leasing costs – irrigation (finance of irrigation capital equipment);
- 35 (2) £1,131.00 course furniture – Safety (health and safety signage on course);
- (3) £1,999.48 course furniture (flags, markers, pins and hole cups);
- (4) £85.00 course supplies and equipment (toilet rolls for on course facilities);
- 40 (5) £1,289.03 pathway material (maintenance of pathways);

- (6) £2,389.72 shed essentials (green-keepers Bothy, machinery storage and workshop maintenance;
- (7) £5,656.74 chemicals (fungicides, pesticides, herbicides, insecticides, marking dyes);
- 5 (8) £3,783.10 fertilizer (course health management);
- (9) £1,245.00 seed (course repairs throughout as necessary);
- (10) £4,062.69 top dressing (medium fine sand for surface levelling, drainage for Greens and Tees);
- 10 (11) £731.83 protective clothing (health and safety clothing for green keeping staff);
- (12) £2,491.75 professional STRI Advice (independent consultancy for agronomic advice on course condition);
- (13) £225.00 Health and Safety consultant (independent consultancy for health and safety advice on course condition); and
- 15 (14) £200.00 course improvements (additional maintenance over and above planned works).

187. Mr Williamson analysed these costs to identify whether they were general overheads of the whole course or if any related to a specific area of the course and, if so, whether the area was linked or adjacent to the clubhouse. Having done so, with the exception of two items – the toilet rolls for on course facilities and “course furniture”, flags, markers, pins and hole cups – he considered all to be general costs used over the whole course including those areas which need to be maintained not only for playing golf but also to keep the clubhouse an attractive place to visit.

188. In the case of The Berkshire, its secretary, Peter Foord, explained that the Club, in addition to its two courses, has a clubhouse and a number of properties (including his own bungalow and the Chef’s house). It employs 50 full-time equivalent members of staff, 20 of whom work on the courses.

189. The Club has a policy document which sets out in general terms the course management programme which is put into effect by the Course Manager. This is summarised and explained by Mr Foord in the following terms:

“In summer the green keepers rake the bunkers and mow the grass on the greens and tees daily. In winter months this is done twice weekly instead of daily, due to slower grass growth. The fairways are cut twice a week in the summer months.

On a monthly basis we undertake pencil-tining of the greens (putting small holes in turf around the course to aerate the grass) and we also overseed (sow additional grass seed on the existing grass).

Twice a year we have a “maintenance week” or fortnight, during which time we carry out more substantial works, for example “slit” and “core” tining of the green and tees, maintenance of paths and drainage works.

During the winter months, between November and March when the grass is not growing we carry out forestry work and work to maintain the heather on the course. This is to make full utilisation of our staff.

5 Outside the bi-annual maintenance weeks, on any given day the course manager decides what work needs to be undertaken, and he will direct his staff accordingly. By and large, unscheduled work is the result of weather or disease: big storms mean we have to remove broken branches from trees or the ground, repair bunkers and paths and clear drainage. In recent years we have had issues with disease, and have had to repeatedly spray the greens or tees to keep them in good condition. Generally, about two thirds of our green staff's time is taken up with routine tasks such as raking the bunkers and cutting the fairways.

10 Although our course staff generally don't undertake any work on the clubhouse, some of them do work on the gardens and hedges surrounding the clubhouse. In addition, much of the clubhouse is surrounded by the courses, or by paths leading onto or from the courses. Our course staff keep and maintain the course up to the curtilage of the clubhouse in many areas."

15 190. Mr Foord also explains that The Berkshire keeps detailed accounts which distinguish the clubhouse and course costs with each further broken down into a list of nominal codes. Included within the course costs are machinery costs, workshop, staff costs including training, tools, irrigation, sheds maintenance, spraying costs, fertilisers, fungicides, seed and wetting agent.

25 191. Andrew Robinson, the Honorary Treasurer of the Wilmslow which employs 13 full-time members of staff, explains that while a general manager oversees all the activities of the golf club it is the Head Green-Keeper who has responsibility for dealing with the course. He is assisted by the green-keepers and:

30 "... a couple of additional casual workers usually employed for between six and seven weeks of the year during the busiest periods."

192. The course management programme at the Wilmslow includes the daily mowing of "the lawn of the course" and the collecting and cleaning of golf balls from the practice range. The bunkers are raked and maintained on a weekly basis as is the relocating and maintenance of holes and tees, although this will be done more regularly during times of heavy use such as after competitions. Once a month tining is carried out on the greens, fairways and surrounds, the greens and tees are top-dressed (spreading fertiliser and root materials to encourage growth) and fairways scarified.

193. Jobs undertaken on an annual basis include the pruning of trees, the unblocking of land drains and major maintenance works on tees, greens, bunkers, hedges and pathways on the course (external contractors are engaged in respect of the car park pathways). Also, in times of particularly bad weather the course may become flooded which may require tees and holes to be moved to high ground on the course.

194. As with the other clubs the Wilmslow splits its running costs into those incurred for the clubhouse and those incurred for the course although there may be some

overlap between the two eg maintaining machinery or supplies such as weed killer to maintain the course but which is also used on the area around the clubhouse. However, some costs are clearly only attributable to one or the other eg sand for the bunkers.

5 195. In his witness statement Mr Robinson lists the main running costs of the course and indicates whether these are attributable to the course as a whole or a particular part.

10 196. Those that are attributable to the whole course comprise of employment costs; machinery upkeep & expenses; roads, car parks and paths; chemical disposal; consultancy fees; fencing and gates; paint for course sheds; hand tools; towels for green keepers; industrial clothing for green keepers; drainage; fuel for course machinery; weed killer; and sundries. However, the cost of bunker maintenance; replacing trees and shrubs; top dressing; seeding; tine blades; woodland maintenance; bunker development; irrigation; and rakes and flags is attributable only to the
15 fairways. In addition to these there is the cost of maintaining the practice ground.

Tee Advertising

197. The Glen began to offer tee advertising in the summer of 2012, and is the only one of the Clubs to do this. However, as Mr Farquharson explains in his witness statement, the Club, which earned just under £3,000 from this in 2013 and around
20 £5,000 in 2014, refers to tee advertising as “tee sponsorship”.

198. Initially sponsorship was offered on two tees but the Club has found that the more advertising the Club had the “more attractive it became” to other potential advertisers. Mr Farquharson considers it likely that eventually there will be advertising on all tees but to do so, it is “vital”, he says, that the whole course and
25 clubhouse is kept in good condition as sponsors want to be associated with a “memorable and high quality experience”. A number of other clubs local to The Glen do not have, and are unable to sell, tee advertising and Mr Farquharson believes that this is mainly because their courses are not in as good a condition as The Glen’s.

199. He explained that sponsors choose a particular hole at which they wish to
30 advertise. In most clubs this would be the first and last hole although the “signature hole” of The Glen is the 13th, a par three with a stunning view out to sea over the Bass Rock, which Mr Farquharson understands is one of the most photographed holes in Scotland. Indeed he can recall occasions when sponsors have taken photographs of their advertisements showing their locations and surrounding views. He recalls that
35 when The Glen started to offer sponsorship packages it was the first hole that initially attracted the advertising. Greene King, which supply the Club’s bar, took up sponsorship of the 18th hole and The Glen’s accountants sponsored the 13th.

200. The sponsorship package offered by The Glen is structured as a three year deal under which the sponsor obtains the right to signage on the tee, a link on the club’s
40 website and normally six tee times a year (which would equate to a maximum of 24 people). The sponsor is asked to pay between £750-£1,000 a year, with the payment

for the first year covering the cost of erecting the signage by the green-keeping staff and subsequent payments being used as a contribution to the Club's running costs including course maintenance.

Buggy Hire

5 201. The hire of golf buggies at The Glen is addressed by Mr Farquharson in his witness statement.

202. He explains that The Glen first started offering the hire of golf buggies in 2009 and currently has a fleet of ten buggies which are available for hire. These are generally used between April and November but not during the winter months due to
10 poor weather conditions.

203. The buggies are electric vehicles with relatively smooth tyres that are not suitable for driving over rough, slippery or excessively steep terrain but can be used on the fairways and the semi-rough which are regularly maintained and kept well-drained. Mr Farquharson explained that gravel paths have been constructed where the
15 ground is too steep for the buggies as the alternative of a tarmac path would be too expensive. However, these need regular repair from the wear and tear caused by the buggies being driven over them.

204. The Glen's accounts for the year ended 20 November 2013 show that the Club generates a surplus from the hire of buggies.

20 205. The "Buggy Policy" of the Wilmslow prohibits the use of golf buggies on tees, greens or the slopes leading up to them, heather areas and within two metres of any bunkers, ditches or ponds or slopes leading to them, except when using the designated bridges.

Corporate Days

25 206. There is a dispute between the parties as to what is meant by the expression "corporate day package". Although we consider this issue below the following definition was advanced on behalf of the Clubs:

30 "a package supplied by a club, which issues a formal tax invoice, to a corporate who wishes to hold an event which includes green fees and one or more of catering, the right to place advertising material in the clubhouse/course, exclusive use of the club by way of block tee times."

This definition has been adopted by Mr Farquharson, in his witness statement, who explains that The Glen is situated relatively close to a number of the Scotland's premier golf clubs and, as such, hosts a very limited number of corporate days. In fact
35 the only specific example he could remember during his time at The Glen was an event hosted by the Club's accountants for their staff for which they were allowed to block book tee times.

207. Although he is unable to identify any other specific examples of green fees paid by corporate bodies, he said:

5 “The Club has approximately 800 members. Of those members, a number will undoubtedly run their own businesses, or be members of professional service firms, or be senior managers within their employers. I imagine it is quite likely that some of them bring either clients or prospective clients to the Club and that the green fees are paid by the business or employer, however, this is treated no differently to any green fee.”

10 He said that the same applied if the group of clients or prospective clients spend time in the bar or clubhouse after playing, with the business footing the cost. No special arrangements are made by the Club in relation to these payments and the group will use the Club’s facilities in exactly the same way as any other group of individuals who chose to play together.

15 208. When asked by Frontier about companies bringing their customers or clients Mr Farquharson said that when it came to corporate entertainment:

20 “KPMG would probably – if they ever had the funds to do it, invite people to Gleneagles or St Andrews or one of the known courses if you like, rather than take people to The Glen, because however good it is, it does not have the same cachet.”

25 Mr Foord, when asked by Frontier about corporate packages at The Berkshire, said that they have very few corporate days, probably only “five or six” a year but if they are willing to pay it would involve exclusive use of the course and practice areas, and that the dress code and club rules, such as the prohibition on wearing caps or using mobile phones in the clubhouse, would be waived “if you’re a corporate day [client] and you pay a certain amount of money”. Mr Foord described how those attending a corporate day were looked after and by way of example told the interviewers that a leading professional had attended a corporate day at The Berkshire in 2013 and had given a free golf clinic. He said that the Club would:

30 “... make sure anything they want is absolutely done for them [including the provision of free golf balls] ... which we set up in nice pyramids for them to use”

He added the Club also provides score cards and does the scoring for a corporate client “if they want us to” and:

35 “... if they want to park a car on the thirteenth tee, then they are able to do those sort of things as well.”

Tour Operators

209. When interviewed by Frontier Mr Farquharson said that a number of tour operators used The Glen for their clients.

40 210. He explained that the Club gave a discount to tour operators which had recently been increased as:

“... we felt we weren’t getting our fair share [of the tour operators market].”

211. He went on to say that although the Club had better relations with some tour operators than others he did not know whether their attempts to court tour operators
5 “has paid [off]” but that it was only a minimal cost for The Glen to deal with tour operators who then charge their clients. Although receipts from tour operators currently provide only a “modest” proportion of The Glen’s income they would like it to be more and see tour operators as their “marketing arm”.

Law

10 212. For input tax to be deductible on goods and services, there must be a “direct and immediate” link between the inputs and taxable output transactions (*BLP Group Plc v Customs and Excise Commissioners* [1995] STC 424 (“*BLP*”) at [19]; *Customs and Excise Commissioners v Midland Bank* [2000] 1 WLR 2080 (“*Midland Bank*”) at [20]; and Case C-408/98 *Abbey National v Customs and Excise Commissioners*
15 [2001] STC 297 (“*Abbey National*”) at [25]).

213. There must also be a “sufficient” link between the inputs and taxable output transactions which need not necessarily be the closest link between them (*Customs and Excise Commissioners v Southern Primary Housing Ltd* [2003] EWCA Civ 1662 (“*Southern Primary*”); and *Dial-a-Phone Ltd v Customs and Excise Commissioners*
20 [2004] EWCA Civ 603).

214. Whether there is a direct and immediate link is essentially a question of fact. As the CJEU explained at [25] of its judgment in *Midland Bank*:

25 “In view of the diversity of commercial and professional transactions, it is impossible to give a more appropriate reply as to the method of determining in every case the necessary relationship which must exist between the input and output transactions in order for input VAT to become deductible. It is for the national courts to apply the ‘direct and immediate link’ test to the facts of each case before them and to take account of all the circumstances surrounding the transactions at issue.”

30 215. The “direct and immediate link” test is to be determined on the basis of an objective criterion, without taking account of the ultimate aim or the wider purpose of the economic activities of the taxable person seeking to deduct VAT, provided that those activities are themselves subject to VAT (*BLP* at [19] and [28]; *Midland Bank* at [20]; and *Abbey National* at [25]).

35 216. The expenditure must be a cost component of the output transactions (*BLP* at [21]; *Midland Bank* at [21] and [27]-[31]; and *Abbey National* at [27] and [28]).

217. However, a “but for” test is not sufficient (*Southern Primary* at [32]).

218. As Carnwath LJ (as he then was) observed in *HMRC v Mayflower Theatre Trust Ltd* [2006] EWCA Civ 116: at [9] – [11]

5 “9. The main principles derived from these cases are not controversial. They were helpfully summarised in Miss Whipple's first skeleton for the Trust dated 1st August 2006 (subsequently adopted by Mr David Milne QC). I will refer to this as "the Trust's skeleton".) I extract (with minor adaptations) the following points:

- (i) Input tax is directly attributable to a given output if it has a "direct and immediate link" with that output (referred to as "*the BLP test*").
- 10 (ii) That test has been formulated in different ways over the years, for example: whether the input is a "cost component" of the output; or whether the input is "essential" to the particular output. Such formulations are the same in substance as the "direct and immediate link" test.
- 15 (iii) The application of the *BLP* test is a matter of objective analysis as to how particular inputs are used and is not dependent upon establishing what is the ultimate aim pursued by the taxable person. It requires more than mere commercial links between transactions, or a "but for" approach.
- 20 (iv) The test is not one of identifying what is the transaction with which the input has the most direct and immediate link, but whether there is a sufficiently direct and immediate link with a taxable economic activity.
- (v) The test is one of mixed fact and law, and is therefore amenable to review in the higher courts, albeit the test is fact sensitive.

25 10. Point (v) needs to be read in the light of what was said by the House of Lords in *Beynon* (per Lord Hoffmann):

30 “The courts have not treated VAT classification in the same way as some questions of classification (for example, whether a contract is of service or for services) which, notwithstanding that there are no facts in dispute, are deemed to be questions of fact so as to exclude on appeal on a question of law: see the discussion in *Moyna v Secretary of State for Works and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929, 1935, paras 22-25. On the other hand, as Lord Hope of Craighead said in the *British Telecommunications Plc* case, at p 1386, the question is one of fact and degree, taking account of all the circumstances. In such cases it is customary for an appellate court to show some circumspection before interfering with the decision of the tribunal merely because it would have put the case on the other side of the line.” (para 27)

11. To that list I would add two further points, relied on by [counsel for HMRC], again uncontroversial in principle:

- 45 (vi) It may be necessary to determine whether, for tax purposes, a number of supplies are to be treated as elements in some over-arching single supply. If so, that supply should not be artificially split:

5 “The criterion is whether there is a single supply from an economic point of view. The answer will be found by ascertaining the essential features of the transaction under which the taxable person is operating when supplying the consumer, regarded as a typical consumer.” (*College of Estate Management* para 12, per Lord Walker)

(vii) A transaction which is exempt from VAT will "break the chain" of attribution. In the words of the Advocate-General (Jacobs) in *Abbey National* (para 35):

10 “.. the 'chain-breaking' effect which is an inherent feature of an exempt transaction will always prevent VAT incurred on supplies used for such a transaction from being deductible from VAT to be paid on a subsequent output supply of which the exempt transaction forms a cost component. The need for a 'direct and immediate link' thus does not refer exclusively to the very next link in the chain but serves to exclude situations where the chain has been broken by an exempt supply.”

20 219. In that case it was accepted that the Mayflower Theatre Trust was within the terms of the cultural exemption from VAT under the relevant Directive and that the supply of tickets for performances should have been treated as exempt from VAT. Although the VAT charged on these supplies had been repaid, the Trust claimed it was entitled to a further repayment representing a proportion of input tax it could have deducted in respect of the consideration paid to production companies. It contended

25 that the consideration was not exclusively attributable to the exempt supply of theatre tickets but also in part to taxable supplies including the sale of programmes which contained details of its productions, eg information about the show, cast members, director, writer and other information specific to the production.

30 220. For the Theatre it was argued that the programme uses the production and that there was therefore a direct and immediate link between them. However, HMRC contended that the production costs were not direct cost components of the programmes; the mere fact that they contained information about a performance did not create a direct and immediate link as what was being “used” was the commercial opportunity which arose out of the existence of an audience that had paid for the right

35 to see the performance. The Tribunal, accepting HMRC’s argument, found that, as patrons could choose whether to purchase a programme, the prior purchase of a ticket would break any link with the consideration the Theatre paid to the production company because of the exempt nature of the supply of the ticket.

40 221. However, the Court of Appeal disagreed with this analysis. Carnwath LJ said, at [42 iv]:

45 “The tribunal seems to have misunderstood the "breaking the chain" rule. That would only come into play if the two transactions were links in the same chain, in the sense that one was "a cost component" of the other (see point (viii) in para 11 above). However, the ticket sales and the programme sales are not linked in that way; they are separate transactions. The mere fact that one precedes the other in time, as Miss

5 Hall accepts, is not enough. The question is, not whether they are links in the same chain, but whether each of them has a sufficiently direct link with the production supplies to satisfy the *BLP* test. The misapplication of the "breaking the chain" rule was another error of law, which entitles us to re-open the tribunal's conclusion."

He continued, at [43]:

10 "...the only reasonable view is that there was a direct and immediate link between the production services and the programmes. It is true that the production companies were not directly responsible for the programmes, other than the provision of information. But the productions for which they were responsible, and which provided the subject-matter of the contracts, also provided the subject-matter of the programmes. To that extent, they were as much part of the raw material used in preparing the programmes, as the paper and ink from
15 which they were physically made. That in my view is an objective link, sufficiently close to satisfy the test."

222. At [47] of its decision in *North Of England Zoological Society v HMRC* [2015] UKFTT 287 (TC) the Tribunal (Judge Cannan and Miss Stott FCA), after summarising the principles that emerge from the authorities, decided that there was a
20 sufficient direct and immediate link between the animal related costs and supplies of catering, merchandise and books to justify apportionment of input tax on the animal related costs to those taxable supplies, as well as to other taxable supplies and the exempt supply of admission charges of Chester Zoo.

Corporate Days

25 223. Although the Clubs and HMRC agree that the provision by a golf club of a "corporate day" is a taxable supply, they advance different reasons as to why this is the case.

224. In essence, Mr Hill, for HMRC, submits that a corporate day package is taxable because the true beneficiary of the supply of access to the golf course is the corporate
30 body and not the golfers whereas Mrs Brown, on behalf of the Clubs, contends that such a package is taxable because it will include items such as refreshments, formal catering, the ability to place advertisements and exclusivity of the course in addition to green fees, which, she says, lose their identity as a separate element and become a part of a bundle of features and acts supplied.

35 225. The CJEU in *Levob Verzekeringen & OV Bank* [2006] STC 766 ("*Levob*") stated:

40 19. According to the Court's case-law, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of services (see, to that effect, Case C-231/94

Faaborg-Gelting Linien [1996] ECR I-2395, paragraphs 12 to 14, and *CPP*, paragraphs 28 and 29).

5 20. Taking into account, firstly, that it follows from Article 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which
10 comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply (see, by analogy, *CPP*, paragraph 29).

15 21. In that regard, the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded, by contrast, as ancillary supplies which share the tax treatment of the principal supply (*CPP*, cited above, paragraph 30, and Case C-34/99 *Primback* [2001] ECR I-3833, paragraph 45).

20 22. The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

25 226. In *Auto Lease Holland BV v Bundesamt für Finanzen* [2003] EUECJ C-185/01 (“*Auto Lease*”), a vehicle leasing company had offered lessees the option of entering into a fuel management agreement with it under which the lessee was given a pass which allowed him to fill up his motor vehicle with fuel and from time to time to purchase oil products, in the name and at the expense of the leasing company on payment each month in advance of one twelfth of the likely annual petrol costs and full settlement, according to actual consumption, at the end of the year. The question
30 considered by the CJEU was essentially whether the supply of the fuel was made to the leasing company and then onto the lessee or a direct supply to the lessee.

227. In its judgment the Court stated:

35 “33. Consequently, in order to answer the question referred, it is necessary to determine to whom, whether the lessor or the lessee, the oil companies transferred, in the main proceedings, that right actually to dispose of the fuel as owner.

40 34. It is common ground that the lessee is empowered to dispose of the fuel as if he were the owner of that property. He obtains the fuel directly at filling stations and *Auto Lease* does not at any time have the right to decide in what way the fuel must be used or to what end.

45 35. The argument to the effect that the fuel is supplied to *Auto Lease*, since the lessee purchases the fuel in the name and at the expense of that company, which advances the cost of that property, cannot be accepted. As the Commission rightly contends, the supplies were effected at *Auto Lease*'s expense only ostensibly. The monthly payments made to *Auto Lease* constitute only an advance. The actual

consumption, established at the end of the year, is the financial responsibility of the lessee who, consequently, wholly bears the costs of the supply of fuel.

5 36. Accordingly, the fuel management agreement is not a contract for the supply of fuel, but rather a contract to finance its purchase. Auto Lease does not purchase the fuel in order subsequently to resell it to the lessee; the lessee purchases the fuel, having a free choice as to its quality and quantity, as well as the time of purchase. Auto Lease acts, in fact, as a supplier of credit vis-à-vis the lessee.”

10 228. The relevant legal principles governing the approach to the question as to whether a service, paid for by the taxpayer, is supplied to that taxpayer were considered more recently by Gloster LJ in *Airtours Holidays Transport Limited v HMRC* [2014] EWCA Civ 1033 (“*Airtours*”) where she said, at [37]:

15 “The following propositions as to the correct approach to apply to the determination of the question whether a service paid for by the taxpayer is supplied to the taxpayer can be derived from various cases decided in this area, including the recent Supreme Court decisions of *LMUK (SC)* and *WHA (SC)*; the judgment of the CJEU in *LMUK (CJEU)* and, in addition, the Court of Appeal's and House of Lords' judgments in *Redrow*:

20 (i) "Consideration of economic realities is a fundamental criterion for the application of the common system of VAT" as regards the identification of the person to whom services are supplied: see e.g. per Lord Reed in *LMUK(SC)* at [56] and [66]; *LMUK (CJEU)* at [39]; and *HMRC v Newey (trading as Ocean Finance (Case C-653/11))* [2013] STC to 432 at [42] (“*Newey*”).

25 (ii) Decisions about the application of the VAT system are highly dependent upon the factual situations involved. Thus a small modification of the facts can render the legal solution in one case inapplicable to another: see e.g. per Lord Reed in *LMUK(SC)* at [68] and in *WHA (SC)* at [26].

30 (iii) The case law of the CJEU indicates that, when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction or combination of transactions takes place: see per Lord Reed in *LMUK(SC)* at [38] and in *WHA (SC)* at [26]. In cases where a scheme operates through a construct of contractual relationships, it is necessary to look at the matter as a whole in order to determine its economic reality: see per Lord Walker in *LMUK(SC)* at [114]-[115] and per Lord Reed in *WHA (SC)* at [26]. Thus the relevant contracts have to be understood in the wider context of the totality of the arrangements between the various participants.

35 (iv) The terms of any contract between the parties, whilst an important factor to be taken into account in deciding whether a supply of services has been made, are not necessarily determinative of whether as a matter of "economic reality" taxable supplies are being made as between any particular participants in the arrangements. However, the contractual position is generally the most useful starting point for the

VAT analysis: see per Lord Reed in *WHA (SC)* at [27]. That may be particularly so where certain contractual terms do not wholly reflect the economic and commercial reality of the transactions: see per the CJEU in *Newey* at [43]-[44].

(v) There may, as a matter of analysis, be two or more distinct supplies within the same transaction: see per Lord Hope at 412F-413A and Lord Millett at 418B-419H in *Redrow*; per Lord Millett in *CCE v Plantiflor Ltd* [2002] UKHL 33; [2002] 1 WLR 2287 at [67]; per Chadwick LJ in the Court of Appeal in *LMUK* [2007] EWCA Civ 165 at [38] and [43]; and per Lord Hope in *LMUK(SC)* at [103]-[108]. Moreover, as Lord Millett said in *Plantiflor* [50]: "a single course of conduct by one party may constitute two or more supplies to different persons." It is useful to set out Lord Millett's analysis in *Redrow* at 418B-419H, notwithstanding that his approach, and that of Lord Hope in the same case, were to some extent qualified in the subsequent decisions of the Supreme Court in *LMUK(SC)* and *WHA (SC)*):

"Once the taxpayer has identified the payment the question to be asked is: did he obtain anything - anything at all - used or to be used for the purposes of his business in return for that payment? This will normally consist of the supply of goods or services to the taxpayer. **But it may equally well consist of the right to have goods delivered or services rendered to a third party. The grant of such a right is itself a supply of services.**

In the present case the taxpayer did not merely derive a benefit from the services which the agents supplied to the householders and for which it paid. It chose the agents and instructed them. **In return for the payment of their fees it obtained a contractual right to have the householders' homes valued and marketed, to monitor the agents' performance and maintain pressure for a quick sale, and to override any alteration in the agents' instructions which the householders might be minded to give.** Everything which the agents did was done at the taxpayer's request and in accordance with its instructions and, in the events which happened, at its expense. The doing of those acts constituted a supply of services to the taxpayer.

The services obtained by the taxpayer are different. They consist of the right to have the householder's home valued and marketed in accordance with the taxpayer's instructions. Unless the householder sells his home and completes the purchase of a Redrow home, however, the taxpayer is not liable for the agent's fees and pays no input tax, so there is nothing in respect of which a claim to deduction may be made. What must await events is not the identity of the party to whom the services are rendered, for different services are rendered to each; but which of the parties is liable to pay for the services

rendered to him and so bear the burden of the tax in respect of which a claim to deduction may arise.

Conclusion

5 It is sufficient that the taxpayer obtained something of value in return for the payment of the agents' fees in those cases where it became liable to pay them, and that what it obtained was obtained for the purposes of the taxpayer's business. Both those conditions are satisfied in the present case. It is not necessary that there should be "a direct and
10 immediate link" between the services supplied by the agent and the sale of a particular Redrow home, although if it were necessary then this condition too would be satisfied on the facts of the present case. From the taxpayer's standpoint, which is what matters, the agent's
15 fees incurred in the sale of a prospective purchaser's own home are not part of the taxpayer's general overhead costs but a necessary cost of and exclusively attributable to the sale of a Redrow home to that same purchaser...." [Emphasis supplied.]

20 Lord Hope, who agreed with Lord Millett (as did Lords Steyn, Goff and Hutton) said:

“The word "services" is given such a wide meaning for the purposes of value added tax that it is capable of embracing everything which a taxable person does in the
25 course or furtherance of a business carried on by him which is done for a consideration. The name or description which one might apply to the service is immaterial, because the concept does not call for that kind of analysis. The service is that which is done in return for the consideration. As one moves down the chain of
30 supply, each taxable person receives a service when another taxable person does something for him in the course or furtherance of a business carried on by that other person for which he takes a consideration in return. Questions such as who benefits from the service or who is
35 the consumer of it are not helpful. The answers are likely to differ according to the interest which various people may have in the transaction. The matter has to be looked at from the standpoint of the person who is claiming the deduction by way of input tax. Was something being done
40 for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which has attracted Value Added Tax? The fact that someone else--in this case, the prospective purchaser--also received a service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction.”

(vi) However, the mere fact that the taxpayer has paid for the service does not necessarily mean that it has been supplied to him. Lord Reed made that clear in LMUK(SC) at [66]-[67], when confirming, contrary to HMRC's submissions, that, notwithstanding the subsequent decision in LMUK (CJEU), Redrow had been correctly decided, albeit that the reasoning of Lord Millett and Lord Hope in that case required some qualification:

“66. I would at the same time stress that the speeches in Redrow should not be interpreted in a manner which would conflict with the principle, stated by the Court of Justice in the present case, that consideration of economic realities is a fundamental criterion for the application of VAT. Previous House of Lords authority had emphasised the importance of recognising the substance and reality of the matter (*Customs and Excise Commissioners v Professional Footballers' Association (Enterprises) Ltd* [1993] 1 WLR 153, 157; [1993] STC 86, 90), and the judgments in Redrow cannot have been intended to suggest otherwise. On the contrary, the emphasis placed upon the fact that the estate agents were instructed and paid by Redrow, and had no authority to go beyond Redrow's instructions, and upon the fact that the object of the scheme was to promote Redrow's sales, indicates that the House had the economic reality of the scheme clearly in mind. When, therefore, Lord Hope posed the question, "Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration ...?", and Lord Millett asked, "Did he obtain anything – anything at all – used or to be used for the purposes of his business in return for that payment?", those questions should be understood as being concerned with a realistic appreciation of the transactions in question.

67. Reflecting the point just made, it is also necessary to bear in mind that consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part. The speeches in Redrow should not be understood as excluding that possibility. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot be excluded a priori. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply.”

Lord Hope expressed a similar view at [110]:

5 “110. I acknowledge, however, that some of the reasoning
in *Redrow* needs to be adjusted in the light of later
authority. I would not wish to alter what I said at [1999] 1
WLR 408, 412H-413A: was something being done for the
person claiming the deduction for which, in the course or
furtherance of a business carried on by him, he has had to
pay a consideration which has attracted value added tax?
10 But I think that Lord Millett went too far at p 418 G when
he said that the question to be asked is whether the
taxpayer obtained “anything – anything at all” used or to
be used for the purposes of his business in return for that
payment. Payment for the mere discharge of an obligation
owed to a third party will not, as he may be taken to have
15 suggested, give rise to the right to claim a deduction. A
case where the taxpayer pays for a service which consists
of the supply of goods or services to a third party requires
a more careful and sensitive analysis, having regard to the
economic realities of the transaction when looked at as a
20 whole. It may lead to the conclusion that it was solely
third party consideration, or it may not.”

Lord Walker agreed with both Lord Hope and Lord Reed. Lord
Carnwath and Lord Wilson dissented on the grounds that the decision
of the CJEU was determinative of the appeal.”

25 229. In a reference, by the Chancery Division of the High Court, the CJEU in
Canterbury Hockey Club and Canterbury Ladies Hockey Club v HMRC [2008] STC
3351 (“*Canterbury*”) gave the following response to the question whether, for the
purpose of the sporting exemption of Article 13A(1)(m) of the Sixth VAT Directive)
whether the term “persons” in the context of “persons taking part in sport” included
30 corporate persons and unincorporated associations, or whether it was limited to
individuals, in the sense of natural persons or human beings:

35 “17. The terms used to specify the exemptions under Article 13 of the
Sixth Directive are to be interpreted strictly, since they constitute
exceptions to the general principle that VAT is to be levied on all
supplies of services for consideration. However, that requirement of
strict interpretation does not mean that the terms used to specify those
exemptions should be construed in such a way as to deprive them of
their intended effect (*Temco Europe*, paragraph 17, and *Horizon
College*, paragraph 16). They must be interpreted in the light of the
40 context in which they are used and the scheme of the Sixth Directive,
having particular regard to the underlying purpose of the exemption in
question (see, to that effect, *Temco Europe*, paragraph 18, and Case C-
428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I-1527,
paragraph 28).

45 18. ...

19. As regards sport and physical education, as activities in the public
interest, the exemption under Article 13A(1)(m) of the Sixth Directive
is intended to encourage those types of activities but is not a general

exemption of all supplies of services linked to them (see Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 39).

20. ...

5 21. First, the services closely linked to sport or physical education must be supplied by an organisation covered by Article 13A(1)(m) of the Sixth Directive. Thus, for the services in question to be eligible for exemption under that provision, it is essential that those services be supplied by a non-profit-making organisation. As is clear from the
10 order for reference, that requirement may be treated as satisfied in the main proceedings.

15 22. Second, the services supplied by such organisations are eligible for exemption, as transactions in the public interest, provided that they are closely linked to sport or physical education and are supplied to persons taking part in sport or physical education. Moreover, it follows from the first indent of Article 13A(2)(b) of the Sixth Directive that supplies of services covered by Article 13A(1)(m) may be exempted only if they are essential to the transaction exempted, namely sport or physical recreation.

20 23. Thus the exemption of a transaction is to be determined, particularly, on the basis of the nature of the service supplied and its relationship with sport or physical education.

25 24. In that context, it must be examined whether the argument, advanced by the United Kingdom and Greek Governments and based on the wording of Article 13A(1)(m) of the Sixth Directive, that natural persons alone are capable of participating in sport, and that, consequently, only services supplied directly to such persons may be exempted, affects the reply to be given to the first question referred for a preliminary ruling.

30 25. The Commission of the European Communities submits, in that regard, that the provision is to be interpreted not literally, but so as to ensure the effective application of the exemption for which it provides, on the basis of the supply of services in question and that, therefore, regard must be had not only to the formal, legal recipient of that supply, but also to its material recipient or effective beneficiary.
35

40 26. In that regard, whilst it is true that the term 'persons' is, on its own, wide enough to include not only natural persons, but also unincorporated associations and corporate persons, in normal linguistic usage only natural persons take part in sport even if this is done in groups of persons.

45 27. However, Article 13A(1)(m) of the Sixth Directive is not intended to confer the benefit of the exemption under that provision only on certain types of sport but covers sport in general, which also includes sports necessarily practised by individuals in groups of persons or practised within organisational and administrative structures put in place by unincorporated associations or corporate persons, such as sports clubs, provided that the requirements set forth in paragraphs 21 and 22 of the present judgment are fulfilled.

5 28. Sport within such a structure generally entails that, for practical, organisational or administrative reasons, the individual does not himself organise the services which are essential to participation in the sport, but that the sports club to which he belongs organises and puts those services in place, as, for example, the provision of a pitch or referee necessary for participation in every team sport. In such situations, it is, first, between the sports club and the service supplier and, second, between the sports club and its members that the services are supplied and the legal relationships formed.

10 29. Thus, if the words 'services ... supplied ... to persons taking part in sport' in Article 13A(1)(m) of the Sixth Directive were interpreted as meaning that they require that the services in question be directly supplied to natural persons taking part in sport within an organisational structure put in place by a sports club, the exemption provided for by that provision would depend on the existence of a legal relationship between the service supplier and the persons taking part in sport within such a structure. Such an interpretation would mean that a large number of supplies of services essential to sport would be automatically and inevitably excluded from the benefit of that exemption, irrespective of the question whether those services were directly linked to persons taking part in sport and who was the true beneficiary of those services. Such a result would, as the Commission correctly maintains, run counter to the purpose of the exemption provided for by that provision which is to extend the benefit of that exemption to services supplied to individuals taking part in sport.

30. It follows, besides, from that interpretation that the exemption for transactions effected by undertakings or organisations mentioned in Article 13A(1)(m) of the Sixth Directive would not benefit certain persons who participate in sport solely because they participate in it within a structure managed by a club. That interpretation would not be consistent with the principle of fiscal neutrality, inherent in the common system of VAT, in compliance with which the exemptions provided for in Article 13 of the Sixth Directive must be applied (see, to that effect, Case C-283/95 *Fischer* [1998] ECR I-3369, paragraph 27). In fact, that principle precludes, in particular, economic operators who effect the same transactions being treated differently in respect of the levying of VAT (see, to that effect, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20). It follows that that principle would be disregarded if the possibility of invoking the benefit of the exemption under Article 13A(1)(m) of the Sixth Directive depended on the organisational structure particular to the sporting activity practised.

45 31. In order to ensure the effective application of the exemption under Article 13A(1)(m) of the Sixth Directive, that provision must be interpreted as meaning that services supplied in connection with, among others, sports practised in groups of persons or within organisational structures put in place by sports clubs are, generally, eligible to benefit from the exemption under that provision. It follows that, to determine whether supplies of services are exempt, the identity of the material recipients of those services and the legal form under which they benefit from them are irrelevant.

5 32. However, to be eligible for that exemption, the services must, in accordance with Article 13A(1)(m) and the first indent of Article 13A(2)(b) of the Sixth Directive, be supplied by a non-profit-making organisation and they must be closely linked and essential to sport, since the true beneficiaries of those services are the persons taking part in sport. By contrast, supplies of services which do not meet those criteria, particularly those linked to sports clubs and to their operation such as, for example, advice about marketing and obtaining sponsors, cannot benefit from that exemption.

10 33. Finally, it is important to point out that, under the second indent of Article 13A(2)(b) of the Sixth Directive, services are not to be granted exemption under Article 13A(1)(m) if their basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.

15 34. In the main proceedings, it is for the national court to determine, having regard to all the circumstances in which the transaction in question takes place in order to identify its characteristic features (see Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraph 12, and Case C-150/99 *Stockholm Lindöpark* [1991] ECR I-493, paragraph 26), whether the services supplied by England Hockey to the Hockey Clubs are closely linked and essential to sport, whether the true beneficiaries of those services are persons taking part in sport, and whether or not those services are intended, basically, to obtain additional income for England Hockey by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.

20 35. Therefore, the reply to the first question referred must be that Article 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that, in the context of persons taking part in sport, it includes services supplied to corporate persons and to unincorporated associations, provided that which it is for the national court to establish those services are closely linked and essential to sport, that they are supplied by non-profit-making organisations and that their true beneficiaries are persons taking part in sport.”

Tour Operators

230. Article 2 of the Value Added Tax (Tour Operators) Order 1987 provides:

This Order shall apply to any supply of goods or services by a tour operator where the supply is for the benefit of travellers

40 Article 3 of the same Order defines a “designated travel service” as a supply of goods or services acquired for the purposes of a business and “supplied for the benefit of a traveller without material alteration or further processing.”

Discussion of the Parties' Submissions and our Conclusions

231. It is clear from the authorities that in order for input tax to be recoverable it must have a direct and immediate link and be a cost component of a taxable supply of the business.

- 5 232. In the present case it is therefore necessary to consider whether, having regard to all the circumstances, there is a sufficient, direct and immediate link between the costs of maintaining the golf courses and the taxable supplies of tee advertising and buggy hire, and whether the golf course maintenance is a cost component of these supplies and whether the supplies by the Clubs of Corporate days and to tour
10 operators are exempt or subject to VAT at the standard rate.

Tee advertising

233. It is not disputed that the provision of tee advertising is a taxable supply made by the Clubs and although we, and the parties, refer to this supply as tee advertising it is, the supply of space by the Clubs on the tees for businesses to advertise their
15 products and/or services.

234. Mrs Brown, referring to the evidence of Mr Farquharson of The Glen that the price of tee advertising is set to ensure that there is a contribution to course maintenance, contends that maintenance of the golf course is a cost component of tee advertising. Also, that it is clear from the Glen's accounts that tee advertising is
20 additional income which does not contribute to either the club bar or shop. She points to the link between attractiveness of the course and willingness to advertise and argues that while maintenance is for the good of the course as a whole it is also good for the tees on which advertisements are placed and says that it is clear from Mr Farquharson's evidence that sponsors advertise as a consequence of the location,
25 maintenance and reputation of the course.

235. Although the value of advertising is quite small when compared to the green fee income, Mrs Brown contends that this does not negate the link between it and course maintenance submitting that there is no intervening supply between the two as the supply of golf is clearly a separate and parallel supply and not part of the supply of
30 advertising. The only link between the two supplies is that the recipients of the supply of advertising expect there will be golfers on the course to see the advertisements.

236. Mr Hill, relying on *Midland Bank*, submits that course maintenance is not a cost component of tee advertising as it is not necessary for a course to be maintained to erect advertising boards. He contends that the link between course maintenance and
35 tee advertising is a "but for" link which is not enough as the advertising does not utilise the goods and services acquired, ie the maintenance, save for the costs of maintaining the advertising board and cutting the grass back in the area directly around the board so that it can be seen by the players. He is critical of Mrs Brown's approach and contends that it is wrong to consider how the income from advertising is
40 used. As for the "reputational link" argued by the Clubs that advertisers will only book tee advertising if the course is well-maintained, he points out that advertisers will also be concerned about maintenance of the clubhouse and car park etc which, if

we accept Mrs Brown’s argument, could transform some inputs that HMRC treat as fully deductible into residual inputs.

237. We accept Mr Hill’s argument regarding the use of income from advertising as it considers the link to course maintenance the wrong way round and note that he is
5 clearly right when he says that a “but for” link is insufficient. However, is the argument advanced by Mrs Brown in relation to tee advertising reliant on a “but for” link or are there two separate supplies as she contends?

238. The argument that the only connection between course maintenance and tee advertising is that the supply of tee advertising is a consequence of the prior supply of
10 golf to the exempt membership and green fee visitors (who, having paid for access to the course, would see the adverts) initially appears attractive. However, there are clear similarities between it and HMRC’s argument that there was no direct link between the programmes and productions in *Mayflower Theatre*. In both that case and this there is a commercial opportunity being used – to sell programmes/advertising – that
15 has arisen out of the existence of a group of visitors which had paid for the right to see the performance/play golf.

239. In the *Mayflower Theatre* case the Court of Appeal found that the Tribunal, in accepting HMRC’s argument, had “misunderstood the ‘breaking the chain’ rule”. In that case there were two separate supplies, the exempt supply of theatre tickets and
20 the zero rated supply of programmes and in the present case there is the exempt supply of membership and green fee golf and a taxable supply of tee advertising.

240. While there is clearly a direct and immediate link between course maintenance and the provision of golf it is necessary to consider whether there is such a link between course maintenance and the supply of tee advertising, recognising that there
25 can be a direct and immediate link to more than one supply – the production in *Mayflower Theatre* to exempt ticket sales **and** zero rated programmes and costs of maintaining and keeping animals in Chester Zoo with the exempt admission charge **and** taxable catering and retail supplies in *North of England Zoological Society*.

241. The unchallenged evidence of Mr Farquharson of The Glen was that, in order to
30 attract tee advertising or, as he called it, sponsorship, it was “vital” that the whole course is kept in a good condition. Indeed his evidence was that a number of The Glen’s neighbouring clubs are not able to sell tee advertising mainly because the courses were not in as good a condition. On the basis of this evidence it must follow that without proper course maintenance there would be no tee advertising and, like the
35 link between the productions and programmes in *Mayflower Theatre*, we find that there is a direct and immediate link between tee advertising and course maintenance in the present case.

242. Having found that there is in principle a direct and immediate link between course maintenance and tee advertising, it is necessary to address the issue raised by
40 Mr Hill, namely how to determine which items of course maintenance comprise the necessary “link” between the maintenance of the course and the advertising.

243. Mr Hill referred to the claim for “Sheds Maintenance” as a course maintenance cost by The Berkshire in the evidence of Peter Foord; Bryan Williamson’s evidence that The Glen claims protective clothing for green-keeping staff as a course maintenance cost; and the evidence of Andrew Robinson that the Wilmslow claims towels for green-keepers as part of its course maintenance costs. However, the evidence of Mr Foord, Mr Williamson and Mr Robinson on what are factual issues was not challenged and therefore if these items (and others) are required in order to maintain the courses then there will be a direct and immediate link, even if as an overhead, between these costs and course maintenance.

10 *Buggy hire*

244. As with tee advertising the hiring of golf buggies is a taxable supply.

245. Mrs Brown refers to Mr Farquharson’s unchallenged evidence about buggies being used on the course at The Glen and contends that this establishes a link between the need to maintain the course in the way that facilitates the use of buggies and their provision for hire by the Club. She also emphasises that buggy hire is self-financing with any surplus contributing to the cost of course maintenance and that, as with tee advertising, the costs of course maintenance forms a component of the pricing for buggy hire. As such she submits that there is a direct and immediate link.

246. Mr Hill contends that course maintenance is not a cost component of buggy hire as it does not utilise the goods and services acquired in terms of course maintenance. He argues that third party suppliers hire out golf buggies without incurring the costs of maintaining a golf course and submits that if there is a direct and immediate link between course maintenance and buggy hire why is there not a direct and immediate link between course maintenance and all of output supplies.

247. He makes the same point as he did with regard to tee advertising, that if the Tribunal finds that there is a direct and immediate link, it needs to consider which course maintenance costs have such a direct and immediate link, as it is clear from the evidence of Mr Farquharson that buggies cannot be used on all areas of the course such as the rough at The Glen and they have limited use at the Wilmslow as can be seen from its buggy policy (to which we have referred above). In addition, Mr Hill says that some course maintenance costs clearly do not have any connection to buggy hire costs and provides examples, such as the cost of irrigation which is required to maintain healthy grass for playing golf, the cost of weedkiller/pesticides at The Berkshire and the cost of replacing trees and shrubs at the Wilmslow.

248. While we accept that third parties do indeed hire out golf buggies without the incurring the costs of maintaining a golf course, this is not a relevant argument here. The issue in this case is whether there is a direct and immediate link between the costs of course maintenance, and the taxable supply of the hiring out of its own fleet of golf buggies by the Club. As with tee advertising, buggy hire could be seen as a consequence of the prior supply of golf by the Club and, as such, may appear to be a “but for” rather than a direct and immediate link. However, as is apparent from *Mayflower Theatre* there would only be a break in the chain if the two transactions,

the supplies of golf and buggy hire, were links in the same chain. But like the programmes in *Mayflower Theatre* the hiring of a golf buggy is not part of the same chain as the right to play golf. They are separate supplies, one taxable the other exempt.

5 249. Although we accept Mr Hill's observation that golf buggies cannot be used on
all areas of the courses, eg the rough at the Glen, it is clear that, in the absence of any
construction and maintenance of tracks suitable for buggies, they could not be used at
all and it is because the courses are maintained that those who use golf buggies are
able to enjoy the amenity of the courses as a whole. As such, given the unchallenged
10 evidence of Mr Farquharson regarding the use and hire of buggies, especially the
constructions of gravel paths for buggies to use where the ground would otherwise be
too steep for them, we find that there is direct and immediate link to course
maintenance which is not restricted.

15 250. It is a question of fact as to which costs are attributable to course maintenance
and, as with tee advertising, there was unchallenged evidence in this regard.
Therefore, the items to which Mr Willaimson, Mr Foord and Mr Robinson refer in
paragraphs 187, 190 and respectively are required in order to maintain the courses.

Corporate Days

20 251. We have already observed, that although the parties agree that the supply of a
corporate day package by a golf club is a taxable supply, they disagree as to why this
is the case.

252. Mr Hill says it is because the supply is to a corporate body, which is the true
beneficiary of access to the golf course, rather than the golfers who actually play.

25 253. Mrs Brown contends that the reason is because it is a package supplied by a
Club which issues a formal tax invoice to a corporate body holding an event that
includes rounds of green fee golf and one or more additional elements such as
catering, the right to place advertising material in the clubhouse or on the course and
exclusive use of the club by way of block tee times. She submits that this is not a
supply of golf but of an entertainment package, of which golf is but an element.
30 However, because it is so closely linked to the other elements also supplied, as in
Levob, there is a single indivisible supply which, although it includes a green fee,
would be artificial to split.

254. Mrs Brown contrasts this with the position where, for example, a corporate
body has paid for a round of golf for an employee and client (which Mr Hill contends
35 is still a taxable supply as the corporate body rather than golfers is the beneficiary of
that supply). Relying on *Airtours* and the doctrine of fiscal neutrality, she contends
that just because a corporate body has paid for a service it does not necessarily follow
that it is the recipient of the supply.

40 255. We were referred to *Rank Group plc v HMRC* [2012] STC 23 ("*Rank*"), where
the CJEU stated at [55]:

5 “According to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-481/98 *Commission v France* [2001] ECR I-3369, paragraph 22; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraphs 41 and 54; Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 47, and Case C-41/09 *Commission v Netherlands* [2011] ECR I-0000, paragraph 66).”

10 256. Mrs Brown argues that in the present case the same services are supplied (ie green fee golf to a visitor) irrespective of whether the fee is paid by a corporate body or by an individual. She refers to Mr Farquharson’s evidence (see above), that he would “struggle” to know if a green fee was paid by a corporate body as the players concerned would be treated no differently from any other green fee player, in support of her argument and submits, that from a fiscal neutrality perspective, similar services
15 must be taxed in the same way.

257. Also, relying on *Canterbury* (see above at paragraph 229 especially at [31]), Mrs Brown contends that the exemption is not limited to sports practised in groups of persons or within organisational structures and that it is necessary to ascertain who plays the sport and receives access to the facilities rather than focus on who pays the
20 green fee. In the case of green fees paid by a corporate body, Mrs Brown submits that the recipient is not a corporate body that pays a green fee but a golfer who receives exactly the same facilities as if he had paid the green fees as an individual. In such circumstances to tax the supply that is paid for by a corporate body but apply the exemption to all the other supplies is a clear breach of fiscal neutrality.

25 258. However, as we have noted, Mr Hill contends that a corporate body is the material recipient and beneficiary of a corporate day package of access to a golf course. He argues that the legal transaction is between the golf club and the corporate body for which the purpose of the transaction is to promote, or market, its business.

30 259. Relying on *Auto Lease* he submits that it was critical in that case that it was the driver who decided to pull in at a particular petrol station and how much to fill the tank and insofar as the vehicle could use different fuels or different engine oils and it was the driver who decided what quality to purchase. He compares *Auto Lease* to the present case where it is the corporate body, not the invited golfers who participate in the day, that decides where and when to hold the event, which course to hire, its
35 timing, the format of golf to be played and every other aspect of the day and cites the evidence of Mr Farquharson regarding KPMG taking their clients to Gleneagles instead of The Glen, “if they had the funds to do it”, as an example of this.

40 260. Mr Hill submits that the case advanced by Mrs Brown on behalf of the Clubs would lead to a perverse result in terms of the VAT analysis, given their argument that green fees when supplied on their own, whoever they are provided to, are always exempt. As, on that basis, it would be sufficient for a corporate day package to be standard-rated as an “entertainment package” if the Club supplied both green fees and one other service, such as catering, to the corporate body.

261. Although he accepts that in such a situation there may be a single supply, Mr Hill submits that in most cases it would be difficult to argue that the catering was “predominant” over the golf, such that the single supply of a round of golf together with a meal was taxable, for example, at a club such as The Berkshire, where a weekend round in 2014 cost £175 per person. However, he concedes that the position may be different if it were the meal rather than the golf which was of decisive importance, eg, if the Club had hired a Michelin starred chef for a gala dinner after the corporate golf day.

262. While there are undoubtedly some corporate day packages, such as those described by Peter Foord at The Berkshire, where banners are put up; cars parked on the tee; exclusive use given to corporate guests for whom clubhouse rules are relaxed and which have a “celebrity” professional in attendance, that meet the criteria advanced on behalf of the Clubs, we agree with Mr Hill that, in many cases involving a corporate body, there is, in essence, only a supply of green fee golf that is made to corporate bodies albeit sometimes with the addition of ancillary supplies such as catering. It is, therefore, necessary to consider whether this supply of golf is exempt as Mrs Brown contends.

263. The evidence of Mr Farquharson, that the same services are supplied where green fees are paid by a corporate body and the golfers concerned are not treated any differently from an individual who has paid his or her own green fee, is not disputed. Neither is his evidence that he would “struggle” to identify green fees paid for by a corporate body. However, it would seem that this is because of the services provided and not from any difficulty in determining whether green fees were paid by an individual or a company, which, although it may involve some extra administrative procedures, should nevertheless be possible, for example, by ascertaining whether a corporate or personal credit card is used.

264. With regard to Mrs Brown’s *Canterbury* argument, clearly as the CJEU decision in *HMRC v Bridport and West Dorset Golf Club* confirms, the Clubs are “organisations” that meet the conditions for the exemption to apply. Also, in that case the CJEU rejected the arguments of the United Kingdom and Greek Governments that the exemption was limited to natural persons as only they are capable of participating in sport.

265. However, as Mr Hill submits there is a difference between a corporate package, by which we mean a supply to a corporate body, and the example at [28] of *Canterbury* where:

“... for practical, organisational or administrative reasons, the individual does not himself organise the services which are essential to participation in the sport, but that the sports club to which he belongs organises and puts those services in place, as, for example, the provision of a pitch or referee necessary for participation in every team sport. In such situations, it is, first, between the sports club and the service supplier and, second, between the sports club and its members that the services are supplied and the legal relationships formed.”

This is because, as Mr Hill submits, there is no onward supply by the corporate body to the golfer and no legal relationship between the corporate body and the golfer, who is only able to play as the invited guest of the corporate body, for provision of access to the golf course or any of the other services provided.

- 5 266. We therefore agree with Mr Hill that a corporate package is a taxable standard rated supply because the corporate body is the true recipient of the supply from the Club concerned.

Tour operators

- 10 267. Mrs Brown and Mr Hill both advanced essentially the same argument in respect of tour operators that they had in relation to corporate days.

268. Mrs Brown contends that the effective beneficiary or true recipient is the individual who plays a round of golf and not the tour operator. Accordingly, the tour operator is not the beneficiary but a conduit of the supply.

- 15 269. Mr Hill says that it is the tour operator who chooses the golf course and is the recipient of the supply. Again referring to *Canterbury* at [28] he contends that while in that case it was necessary for individual players on both teams to organise a referee and pitch it is not necessary to use a tour operator to obtain the right to play golf as a green fee player.

- 20 270. However, he accepts that where a tour operator is acting as an agent and invoices the green fees directly to a golfer the green fees are exempt.

- 25 271. Given the similarity between the position of a tour operator and a corporate body in our view it follows that, with the exception of where a tour operator or travel agent is acting as agent and invoices the green fees directly to the golfer, a supply to a tour operator is a taxable standard rated supply because it and not the golfer is the true recipient of the supply from the Club.

Summary of Conclusions

- 30 272. Although we accept, as indeed they do themselves, that the Clubs will be unjustly enriched if the whole of their claim were to be repaid we conclude, for the reasons summarised in paragraphs 170 to 179, that a 10% restriction should be applied and that 90% of the claims should be repaid.

273. With regard to the Other Issues (as stated in the order in the direction of 16 May 2015):

- 35 (1) Other than in the case of tour operators or travel agents acting as agents and invoicing green fees directly to a golfer, supplies of green fee golf by the Clubs which are on-supplied to individuals by tour operators are subject to VAT at the standard rate.

(2) Where the customer of the Clubs is a body corporate, there is no distinction between a “corporate day” package, a supply to the body corporate, and the supply through a corporate body of access to play golf, with such a supply being subject to VAT at the standard rate.

5 (3) Course maintenance costs are properly treated as residual where the club has corporate day income, provides advertising services from locations on the golf course and has taxable income from the hire of golf buggies.

Right to apply for Permission to Appeal

10 274. 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
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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JOHN BROOKS

TRIBUNAL JUDGE
RELEASE DATE: 07/12/2015

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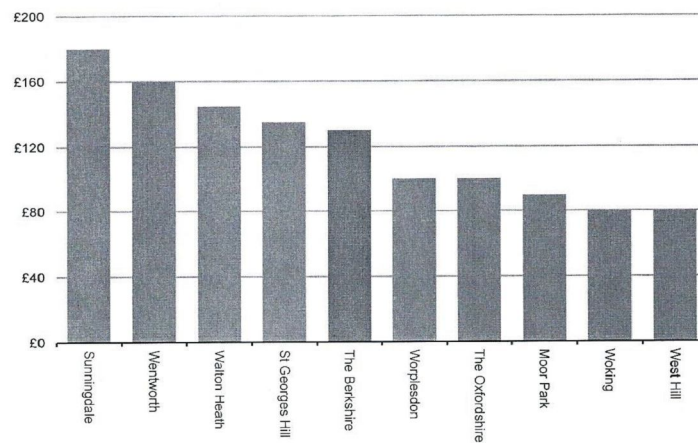
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APPENDIX

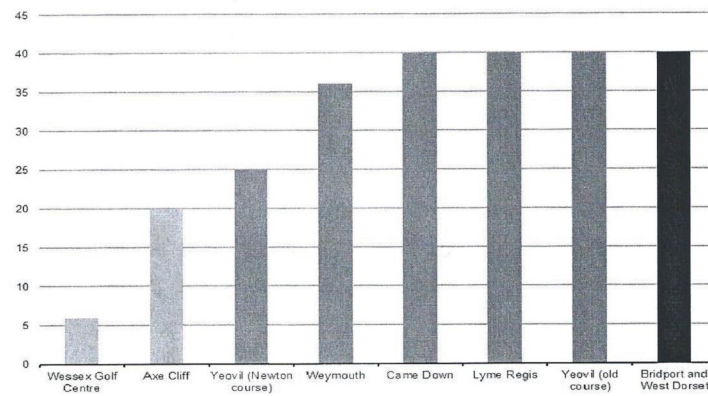
Figures 1-4 Frontier analysis of the Clubs' green fees with identified competitors
Frontier compared like-for-like casual visitor rates as best they could from golf course websites. Rates are summer weekday.

Figure 1 – The Berkshire



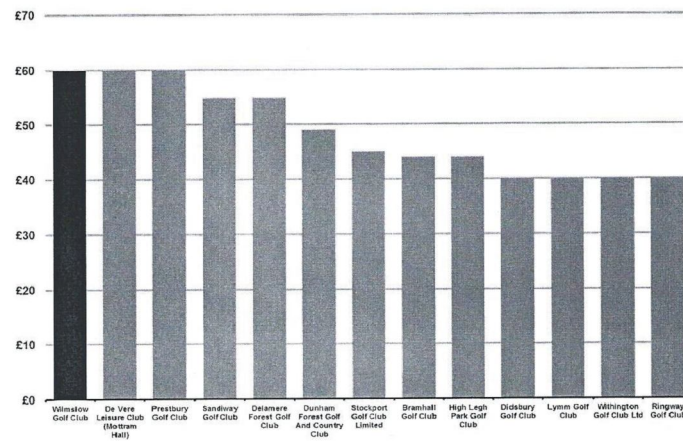
Source: Frontier analysis based on individual golf course websites. Summer season weekday Green Fees.
Notes - For Wentworth the value used is for the 'East' course. For Sunningdale - the 'New' course.

Figure 2 – Bridport



Source: Frontier analysis
Wessex Golf Club and Axe Cliff are not considered to be key competitors by the Club officials.

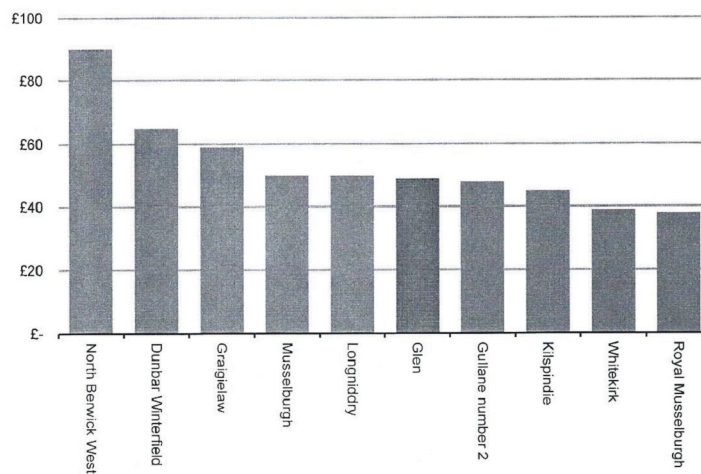
Figure 3 – Wilmslow



Source: Frontier analysis

Note: For clubs that only charge Green Fees for a day of golf and not separately for a round of golf (e.g. Prestbury), the Green Fee corresponds to the one charged for a day of golf. Rates are summer and weekday where applicable.

Figure 4 – The Glen



Source: Frontier analysis of "Golf Club Green Fees 2013" and course websites.

Figure 5 – Calculation of the increase in daily visitor numbers if the green fees were reduced by Professor Szymanski's estimate of the VAT passed on to visitors in the form of higher green fees

	The Berkshire	Bridport	Wilmslow	The Glen
(a) Green fee revenue (2013)	£772,006	£54,952	£70,543	£248,695
(b) No. of green fee visitors (2013)	14,519	3,310	3,389	11,218
(c) Average green fee incl VAT	£53.17	£16.60	£20.82	£22.17
(d) VAT rate (nominal)	20.0%	20%	20.0%	20.0%
(e) VAT rate as % final price	16.7%	16.7%	16.7%	16.7%
(f) VAT burden	£8.86	£2.77	£3.47	£3.69
(g) % of VAT Prof Szymanski assumes is passed on as higher prices	67%	50%	50%	50%
(h) Hypothetical average green fee if VAT removed	£47.26	£15.22	£19.08	£20.32
(i) % change in price	-11.11%	-8.33%	-8.33%	-8.33%
(j) Price elasticity of demand assumed by Prof Szymanski	-0.5	-1.0	-1.0	-1.0%
(k) % change in green fee visitors	5.56%	8.33%	8.33%	8.33%
(l) No. of green fee visitors after removal of VAT	15,326	3,586	3,671	12,153
(m) Additional visitors per year	807	276	282	935
(n) Average no. of additional visitors per day	2.2	0.8	0.8	2.6
(o) No. of courses	2	1	1	1
(p) Average no. of additional visitors per course per day	1.1	0.8	0.8	2.6

Source: Mr Trussler's analysis using data from Frontier's appendices.

5

Figure 6 – Calculation of the possible increase in the total rounds of golf played at each Club if the green fees were reduced by Professor Szymanski's estimate of the VAT passed on to visitors in the form of higher green fees

	The Berkshire	Bridport	Wilmslow	The Glen
(a) subscriptions	1,784,753	308,801	626,086	264,792
(b) Green fees	772,006	54,952	70,543	248,695
(c) No. of green fee visitors (2013)	14,519	3,310	3,389	11,218
(d) Member rounds assuming ratio of revenues reflects relative usage of course	33,566	18,600	30,078	11,944
(e) Total rounds of golf	48,085	21,910	33,467	23,162
(f) Member rounds after removal of VAT	33,566	18,600	30,078	11,944
(g) Increase in green fee visitors after removal of VAT	807	276	282	935
(h) No. of green fee visitors after removal of VAT	15,326	3,586	3,671	12,153
(i) Total rounds of golf after removal of VAT	48,891	22,186	33,750	24,097
(j) Change in total rounds of golf	1.7%	1.3%	0.8%	4.0%

Source: Mr Trussler's analysis using data from Frontier's appendices.

15

Figure 7 – The Tribunal's calculations to test Mr Trussler's assumptions of a marginal cost of a round of green fee golf of £2 & £3

	The Berkshire	Bridport	Wilmslow	The Glen
Green Fees 2013 £	772,006	54,952	70,543	248,695
No of visitors 2013	14,519	3,310	3,389	11,218
Average Green Fee (inc VAT)	£53.17	£16.60	£20.82	£22.17
Average Green Fee (exc VAT)	£47.26	£15.22	£19.08	£20.32
Total rounds of golf (estimated by Mr Trussler)	48,085	21,910	33,467	23,162
scenario 1				
assumption: 10% of total costs are variable				
2013 Total expenditure (inc depreciation and interest)	2,760,997	486,950	754,131	595,053
cost if 10% was variable	276,100	48,695	75,413	59,505
cost per round	5.74	2.22	2.25	2.57
% of average green fee (exc. VAT)	12.1%	14.6%	11.8%	12.6%
scenario 2				
assumption: 10% of course and club house costs are variable plus 100% of course and club house depreciation				
course costs	829,258		263,511	230,091
clubhouse costs	752,852		171,634	80,532
	1,582,110		435,145	310,623
cost if 10% variable	158,211		43,515	31,062
cost per round	3.29		1.30	1.34
depreciation of course and clubhouse	286,490		82,375	84,166
cost per round	5.96		2.46	3.63
total assumed costs	444,701		125,890	115,228
cost per round (12/4)	9.25		5.75	3.44
% of average green fee (exc. VAT)	19.6%		30.1%	16.9%
Notes				
1. Bridport 2013 accounts do not break down expenditure in the same way to allow a comparison				
2. The Clubs have different 2013 year ends, although all end-September or later.				

Source: Audited Accounts and data from Mr Trussler's reports

Figure 8 – Calculation of the economic loss to Bridport by combining Professor Szymanski's assumptions from the perfect competition model with actual club data for 2013

	With VAT in place	When VAT removed	
(a) Green fee (price)	£16.60	£15.22	1
(b) VAT	20.0%	0.0%	2
(c) VAT as % of retail price	16.7%	0.0%	(c) = (b)/(1 + (b))
(d) VAT per green fee visitor	£2.77	£0.00	(d) = (a) x (c)
(e) VAT assumed to be passed on (%)	50%	50%	Prof Szymanski assumption
(f) VAT assumed to be passed on	£1.38	£0.00	(f) = (d) x (e)
(g) Price per green fee visitor after VAT	£13.83	£15.22	(g) = (a) – (d)
(h) % price change		-8.3%	The % change in row (a)
(i) Assumed price elasticity of demand		-1.0	Prof Szymanski assumption
(j) % change sales volumes		8.3%	(j) = (h) x (i)
(k) Sales volumes (ie number of green fee visitors)	3,310	3,586	3
(l) Change in green fee visitors		276	4
(m) Total revenues from green fee visitors after VAT	£45,793	£54,570	(m) = (g) x (k)
(n) Change in revenues from visitors		£8,777	5
(o) Marginal cost of providing one round of golf to one additional green fee visitor		£13.83	6
(p) Extra costs associated with additional visitors		£3,816	(p) = (l) x (o)
(q) Revenues less costs from additional visitors		£4,961	(q) = (n) – (p)
(r) Total VAT collected on green fees	£9,159		(r) = (d) x (k)
(s) Change in profit as % of VAT		54.17%	(s) = (g) + (r)

1 – Left Column = total green fee revenues divided by total green fee visitors in 2013; right column = (a) minus (f).

2 – Actual nominal rate of VAT in 2013

5 3 – Left Column = total green fee visitors in 2013; right column = left column x [1 + (j)]

4 – The difference between the RH and LH columns in (k)

5 – The difference between the RH and LH columns in (m)

6 – In perfect competition marginal costs are precisely equal to the green fee after VAT

Source: Mr Trussler's analysis using data from Frontier's appendices

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Figure 9 – Calculation of the economic loss to Bridport assuming that the marginal cost is 20% of the green fee (£2.77); retaining all of Professor Szymanski's assumptions and using with actual club data for 2013

	With VAT in place	When VAT removed	
(a) Green fee (price)	£16.60	£15.22	1
(b) VAT	20.0%	0.0%	2
(c) VAT as % of retail price	16.7%	0.0%	(c) = (b)/(1 + (b))
(d) VAT per green fee visitor	£2.77	£0.00	(d) = (a) x (c)
(e) VAT assumed to be passed on (%)	50%	50%	Prof Szymanski assumption
(f) VAT assumed to be passed on	£1.38	£0.00	(f) = (d) x (e)
(g) Price per green fee visitor after VAT	£13.83	£15.22	(g) = (a) – (d)
(h) % price change		-8.3%	The % change in row (a)
(i) Assumed price elasticity of demand		-1.0	Prof Szymanski assumption
(j) % change sales volumes		8.3%	(j) = (h) x (i)
(k) Sales volumes (ie number of green fee visitors)	3,310	3,586	3
(l) Change in green fee visitors		276	4
(m) Total revenues from green fee visitors after VAT	£45,793	£54,570	(m) = (g) x (k)
(n) Change in revenues from visitors		£8,777	5
(o) Marginal cost of providing one round of golf to one additional green fee visitor		£2.77	6
(p) Extra costs associated with additional visitors		£763	(p) = (l) x (o)
(q) Revenues less costs from additional visitors		£8,014	(q) = (n) – (p)
(r) Total VAT collected on green fees	£9,159		(r) = (d) x (k)
(s) Change in profit as % of VAT		87.50%	(s) = (g) + (r)

1 – Left Column = total green fee revenues divided by total green fee visitors in 2013; right column = (a) minus (f).

5

2 – Actual nominal rate of VAT in 2013

3 – Left Column = total green fee visitors in 2013; right column = left column x [1 + (j)]

4 – The difference between the RH and LH columns in (k)

5 – The difference between the RH and LH columns in (m)

6 – In perfect competition marginal costs are precisely equal to the green fee after VAT

10 Source: Mr Trussler's analysis using data from Frontier's appendices

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