



TC06268

**Appeal numbers: TC/2015/06826
TC/2016/02833**

VAT – single or multiple supplies – whether subscriptions paid by members of the Harley Owners Group are consideration for a supply of membership or for multiple supplies comprised of the individual benefits conferred – held multiple, not single, supplies

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HARLEY-DAVIDSON EUROPE LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE SARAH FALK

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on
16, 17 and 18 October 2017**

**Andrew Hitchmough QC and Edward Waldegrave, instructed by RSM UK Tax
and Accounting Limited, for the Appellant**

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

DECISION

1. The appellant (“HDE”) is a UK subsidiary of Harley-Davidson, Inc., a US corporation which is the holding company of the Harley-Davidson group. Harley-Davidson is a well-known US motorcycle manufacturer. HDE sells new Harley-Davidson motorcycles in Europe through a network of distributors and dealers.
2. These appeals relate to the Harley Owners Group (“HOG”). HOG is not a distinct legal entity, club or society in the conventional sense. Instead, HOG’s activities in Europe, Middle East and Africa (“EMEA”) are run as a business unit of HDE. Other companies within the Harley Davidson group operate HOG in other parts of the world.
3. As described further below, owners of Harley-Davidson motorcycles and individuals sponsored by them may subscribe to HOG. They are generally referred to as “members” of HOG and I will use that expression in this decision.
4. These appeals relate to the VAT treatment of supplies made by HDE to members of HOG in consideration for membership subscriptions. HMRC’s position is that HDE makes a single standard rated supply of membership, and that the range of benefits provided are the means by which the members enjoy, or better enjoy, that membership. HDE’s position is that it makes a number of distinct supplies to each member, the tax treatment of each of which must be determined separately.
5. The difference is potentially significant. Under HMRC’s approach VAT is chargeable at the standard rate on all membership subscriptions, whether paid by members in or outside the EU. HDE contends that no VAT is chargeable on subscriptions by non-EU members, on the basis that those supplies should be treated as zero rated supplies of goods and/or supplies of services that are outside the scope of VAT (with a right of recovery of input tax). For EU members HDE claims that a substantial proportion of the fee should be regarded as being paid for zero rated supplies, in the form of printed matter, with the remainder being consideration for standard rated supplies.
6. There are two appeals before the Tribunal. The first (appeal number TC/2015/06826) relates to supplies made by HDE to members of HOG who are based in the EU. The second (appeal number TC/2016/02833) relates to supplies made by HDE to members of HOG who are based outside the EU.
7. The parties have agreed that this decision should be a decision in principle only, and that the only question I should decide is whether there is a single supply on the basis that HMRC contend or multiple supplies. Accordingly, any question of allocation of consideration between different supplies does not arise at this stage, and nor does the question of how any single supply should be taxed. The parties also framed their arguments before me largely on the basis that the sole issue to determine is whether there is a single supply on HMRC’s approach, namely on the grounds that

the supply of membership constitutes the “principal” service and other elements are “ancillary”, rather than on any other basis.

The procedural history

8. Historically, HDE accounted for VAT on all its memberships subscriptions, both
5 in respect of members located in the UK and those elsewhere in the EU and the rest of
EMEA. In January 2014 HDE made a claim to HMRC under s 80 Value Added Tax
Act 1994 (“VATA”) for overpaid output tax in respect of membership fees paid by
non-EU members of HOG, on the basis that it makes multiple supplies which are not
chargeable to VAT, rather than single standard rated supplies. This claim was for
10 about £330,000, and covered the period from 1 January 2010 to 31 December 2013.
HMRC agreed to this claim in May 2014.

9. In January 2015 HDE made a further claim, this time that it had overpaid output
tax of around £540,000 in respect of membership fees paid by EU members of HOG
during the period 1 January 2011 to 30 November 2014, again on the basis that it had
15 made multiple rather than single supplies, and on the basis that the supply of printed
matter should be zero rated. This claim was refused and HMRC’s decision was
confirmed following a review. HDE appealed to the Tribunal in November 2015.

10. In February 2016 HMRC informed HDE that in their view the VAT repaid in
respect of non-EU members should not have been repaid. An assessment was issued
20 in respect of this VAT in April 2016, which led to the second appeal to the Tribunal in
May 2016. The two appeals were subsequently consolidated.

Evidence

11. There was a single witness, Ms Vicki Claridge. Ms Claridge is the consumer
experience finance manager for HDE. She has a background in chartered accountancy
25 and worked for a number of companies before joining HDE in 2011. Her role at HDE
involves working in both the finance and marketing teams. The HOG business unit
falls within the marketing function and Ms Claridge has overall responsibility for the
financial aspects of the operation of HOG. I found Ms Claridge to be a
straightforward witness and I accept her evidence on matters of fact.

12. Documentary evidence included documents produced for members of HOG,
30 website extracts and website related information, correspondence between the parties,
the results of a survey conducted in November 2012 of some US members of HOG,
and extracts from certain marketing books which refer to HOG. A sample
“membership pack” was also exhibited to Ms Claridge’s witness statement. This
35 comprised a sample quarterly magazine (Issue 1 for 2016) and a leather wallet
containing items including patches and pins, a membership card, a 2017 UK and
Ireland events guide and the 2016 versions of the HOG touring map and membership
guide (all described further below). The documents bundle also included the 2015
version of the membership guide.

Findings of fact

13. From the Harley Davidson group's perspective (including that of HDE) HOG is fundamentally part of its marketing strategy and contributes to wider marketing efforts. This is intended to be achieved in two main ways. First, HOG is designed to strengthen the relationship that owners of Harley-Davidson motorcycles have both with the Harley Davidson group and, through the "Chapter" system referred to below, with local dealerships. The idea is to encourage owners to purchase more Harley-Davidson products, including both accessories and new motorcycles. The group considers that members of HOG demonstrate more loyalty to the Harley-Davidson brand than non-members when it comes to purchasing a new motorcycle. Secondly, HOG is intended to give owners a "reason to ride", that is to encourage them to use their bikes and provide them with more opportunities to do so. Owners who use their motorcycles more frequently have been found to be more likely to purchase new Harley-Davidson parts, accessories and merchandise.
14. There are two ways in which an individual can become a full member of HOG. First, all purchasers of new Harley-Davidson motorcycles are automatically enrolled in HOG for one year, with no possibility of opting out. No separate charge is made in respect of this. Secondly, any owner of a Harley-Davidson motorcycle can pay to join HOG (referred to as an "independent" member). This would be relevant to an owner of a second-hand Harley-Davidson motorcycle, as well as to someone who has initially chosen not to continue their membership after the first year but later wishes to re-join. Either annual or life membership is available.
15. It is also possible to be an associate member. Associate members do not need to own a Harley-Davidson motorcycle but they need to be sponsored by a full member. Associate membership is designed for "pillion passengers", such as spouses or partners, and confers a more limited range of benefits.

The membership benefits

16. The following subheadings contain descriptions of what members receive in exchange for their subscriptions. I have described physical items first.
- (a) *Magazine*
17. Members receive an attractively produced quarterly hard copy magazine, described as "The magazine of the HOG experience". The sample I saw included features on trips that members had undertaken, information on new models, details of forthcoming events and information about membership benefits. Advertisements are included from commercial partners. Different language editions are produced for different regions. The magazine is only distributed to full members.
18. The sample magazine provided had relatively limited space devoted specifically to motorcycle products, although this varies between issues: greater space will be devoted in the event of a significant new product launch. However, it is clearly not a "technical" motorcycle magazine. Its general focus is on the experience of owning and riding a Harley-Davidson, and on HOG members and their motorcycle-related

activities. Ms Claridge accepted in evidence that one of the purposes of the magazine was to tell members about the benefits available as a HOG member, but said that it was also the aim of the magazine to encourage members to ride, and therefore to encourage the purchase of further Harley-Davidson products. In my view the content of the magazine fully supports this.

(b) Patches and pins

19. Annual members receive a HOG “patch” for each year of membership, showing the HOG logo, winged design and the year. This is designed to be sewn on to a motorcycle jacket. Life members receive a special “life” patch. Members may purchase additional patches, which some choose to do either because they have more than one jacket or because they wish to keep a complete set of pristine patches at home, effectively as collectors’ items. Various special patches are also available for members, for example for long-standing members. A separate “Ladies of Harley” patch is provided to female members.

20. The pins are small metal badges showing the HOG logo. These are also designed to be worn on motorcycle jackets. Again there are various types. Pins showing the relevant year are provided to annual members each year (including a Ladies of Harley version for female members), and life members receive special pins. As with patches, additional pins can be purchased by members.

21. Special patches and pins are available under HOG’s “mileage programme”. These are rewards for members who have completed certain distances on their motorcycles, the first awards being available for those who have travelled 1,000 miles, and then above that in certain thresholds up to 200,000 miles, and in 50,000 mile increments above that. Special medallions are awarded for each 100,000 mile achievement. Members must have their odometer readings certified by a dealer to claim the awards.

22. Under the “safer rider skills programme” HOG members who demonstrate that they have attended an accredited motorcycle safety rider training course are also entitled to a special patch and pin. These courses are provided by third parties and HOG members pay their own fees to attend.

23. Members of HOG are able to submit photographs, for example of rallies or trips, which may be selected for publication in the magazine. A member who has a photograph selected for publication receives a “HOG staff photographer” pin.

24. All entrants to the ABCs of Touring (described below) also received a special patch and pin.

(c) Touring map

25. An annual map is supplied which shows the locations of Harley-Davidson dealerships across Europe, together with major roads. This is in a fold out format designed to be carried easily when on the road. Following feedback from members it replaced a more bulky touring handbook which was produced in previous years.

(d) Membership card

26. Each HOG member receives a credit card sized membership card which carries their name and the membership expiry date. They are issued on an annual basis, except in the case of life members. It is necessary to show the membership card to access some of the benefits described below, such as Museum entry, joining a Chapter and any benefits available at events. In relation to Chapter membership dealers can alternatively check with HDE whether the individual in question is a HOG member.

(e) Membership guide

27. This document is produced on an annual basis and describes in detail all the benefits available. It includes pull-out sections relating to the mileage programme and ABCs of Touring, and provides details of authorised tours together with an events calendar. It has a “frequently asked questions” section relating to various aspects of membership and also includes information on how to renew membership.

(f) Event details

28. For some areas, including the UK and Ireland, a small hard copy events calendar is included. This largely comprises events organised by Chapters (as to which see below).

(g) Leather folder

29. New members receive a good quality leather folder, embossed with the HOG logo, which contains the physical items described above, other than the magazine.

(h) Chapter membership

30. Each HOG member is entitled to join a local “Chapter”. Chapters can be organised by any authorised Harley-Davidson dealer, and they are encouraged to do so by HDE as a means of promoting business. Chapter meetings generally take place at the dealership in question.

31. Chapters are the responsibility of the relevant dealer. Dealers may choose to require Chapter members to pay for membership, but only to cover costs rather than to make a profit. Chapters will often produce their own merchandise, including patches.

32. HOG membership gives HOG members the right to join a Chapter but they are not automatically enrolled. Only about 30% of members actually join a Chapter.

33. Unlike HOG, Chapters are governed by rules and have officers, including directors, a treasurer and a secretary (these roles may be held by the dealership). They may undertake a number of different activities, such as group events and charity work. They are a means for individuals to meet and socialise with each other, although the extent of activity varies significantly between individual Chapters.

34. HDE requires dealers to sign up to a “Chapter Charter” setting out rules which must be followed, and approves applications from dealers to establish Chapters. The rules are essentially intended to ensure that the Harley-Davidson brands (including but not limited to the HOG brand) are protected and promoted, for example by stating that Chapters should be family-oriented, non-political and non-religious.

35. The Charter recites that HOG was established to offer motorcycling benefits and services to Harley-Davidson enthusiasts and to develop a close relationship between the rider, dealership and Harley-Davidson Motor Company. The purpose of Chapters is stated to be to promote Harley-Davidson motorcycling activities for HOG members by conducting Chapter activities and encouraging participation in other HOG events, and to develop a closer relationship between the rider and dealership.

36. Among other things the Charter provides that HOG members may apply to join a Chapter and that expiry of HOG membership terminates Chapter membership. The dealer may also terminate membership if the dealer determines that the member’s conduct is undesirable or contrary to the dealer’s standards or vision, in which case the member and HOG must be notified in writing.

37. The Charter also provides that Chapter events are the sole responsibility of the Chapter and dealership, but that there should be a minimum of four closed riding events per year (open to Chapter members and one guest per member). Open events and members only events are also contemplated. There must also be a minimum of four communications per calendar year, with information on activities.

38. Ms Claridge’s evidence, which I accept, was that whilst the Charter requires Chapter members to be members of HOG, in practice this is not always insisted upon by Chapters. She said that the purpose of the Chapters was to encourage people into the dealerships. This is clearly correct from the dealers’ and HDE’s perspectives.

39. As already mentioned, only about 30% of HOG members join a Chapter. It is unclear what proportion of paying members are Chapter members, but Ms Claridge confirmed that Chapter members are more likely than other members to be life members (see further below on membership numbers).

30 (i) *HOG.com*

40. HOG members are able to log on to a special website for HOG members. It is not an interactive site: it is not possible for members to communicate directly with one another on this site, or to search for other members. HOG members need to register by creating a “profile” before they can access the site. Only about 36% of EMEA HOG members have profiles.

41. Among other things HOG.com enables HOG members to access an electronic archive of the hard copy magazines. HOG members can also use the site to obtain certain information, such as details of their local Chapter, forthcoming events and membership benefits, although in each case that information is also available elsewhere.

42. HOG.com includes an area for use by Chapters, and an area for members to submit stories and photos. Ms Claridge was unfamiliar with both of these and it was unclear to what extent these areas of the site are used.

(j) HOGeuropegallery.com

- 5 43. This is an online photo and video gallery which is accessible by anyone, but only HOG members can submit pictures. Some limited interaction is available on this site, because members can comment on photos, but there is no direct communication between members.

(k) E-magazine

- 10 44. Members who have created a profile on HOG.com, and have provided a correct email address, receive a monthly e-magazine. This contains similar information to the quarterly magazine, together with some additional material.

(l) ABCs of Touring

- 15 45. HOG members may participate in an annual programme with this name. The idea is that a participating member rides to a town or place the name of which begins with “A”, and to somewhere beginning with “B” and so on. Participants take photos to record their journey, which must show their motorcycle, an official sign for the place in question and a recent edition of the magazine, and send their entries to the Customer Care Centre (referred to below). Points are awarded and there are various prizes for the highest number of points. For example, there are points for each city or town and each country or province, and additional points for an official HOG rally or a photo at a Harley-Davidson dealership. The prizes include gift vouchers redeemable at Harley-Davidson dealerships and physical items such as a bandana.

(m) Museum entry

- 25 46. As from December 2015 HOG members are entitled to free entry to the Harley-Davidson Museum in Milwaukee, Wisconsin.

(n) Events

- 30 47. HDE runs a limited number of events. The 2015 membership guide included in the bundle listed 21 HOG events in the EMEA region, of which two were in the UK. No events are run exclusively for HOG members. However, some events run by HDE have a special area (a “HOG zone”) available to full members. Refreshments may be provided. In practice HDE allows anyone accompanying a full member to go into these areas with the member.
- 35 48. The three main annual events organised by HDE are two events in continental Europe (the Euro Festival and European Bike Week) and a HOG rally which moves location each year. Currently HOG members can obtain discounted entry for one of

these, the Euro Festival. The European Bike week is the most popular, with an estimated 85,000 bikes.

49. Chapters also run events, and these are far more numerous: the sample UK and Ireland 2017 events guide I saw showed 19 events of which all but one appeared to be Chapter events. These events were clearly open to non-Chapter members, but Chapters also organise events exclusively for their own members.

(o) Other

50. A number of other benefits are listed in the 2015 membership guide. Discounts are available from some third party organisations on presentation of a membership card, in particular at Best Western hotels, Hard Rock Cafe outlets and (more recently) Eurocamp. Insurance discounts may also be available to full members. HDE do not collect data on the extent to which these benefits are used, but there was some limited documentary evidence indicating that the use of the Best Western discount was probably fairly insignificant. The value of the insurance discounts vary. I got the impression that they are not generally significant (5% in the UK and Ireland), Finland being the notable exception where the insurance saving can outweigh the cost of the membership subscription. Discounts may also be available to cardholders at certain events (including the Euro Festival referred to above).

51. For UK members HOG membership brings with it affiliated membership of the British Motorcyclists Federation. The 2015 membership guide describes how this allows members to take advantage of “preferred pricing” on certain items such as ferries and accommodation, and to obtain discounted tickets for BMF events.

52. Other “benefits” listed do not appear to be true benefits, at least in a financial sense. For example, the list in the membership guide includes reference to Harley-Davidson Authorized Tours, which appears to be no more than a means to connect members with third-party tour providers, but with no discount being provided for members. Similarly, a motorcycle shipping service is referred to, but again I understood that this has to be paid for at commercial rates and is not exclusive to HOG members. It is unclear whether HOG members qualify for any discounts. The same applies to motorcycle rentals. Additional HOG branded merchandise is also available, but this needs to be purchased and (apart from patches and pins) is also available to non-members.

53. A similar point applies to roadside assistance. In EMEA this is provided free for 12 months to purchasers of new Harley-Davidson motorcycles (who are also benefiting from free membership of HOG during that period). Thereafter, roadside assistance needs to be paid for and, whilst it is marketed as being available exclusively to HOG members, it has to be paid for at commercial rates. Non-members could also sign up for it because the third party provider cannot determine whether the individual in question is a HOG member. (The position on roadside assistance is different for HOG members in the United States, where it is provided as a real benefit.)

54. HDE provides the services of a Customer Care Centre. This primarily deals with membership subscriptions, renewals and associated matters such as changes in personal details and other membership related queries. It can be used to book HOG events (but not Chapter events) and to help members access some benefits, including services offered by third parties. Information supplied to HMRC indicated that there were around 57,000 contacts with the Customer Care Centre by EMEA based members in 2015. Ms Claridge's evidence, which I accept, was that the Centre is primarily used to take payments for membership and to deal with members' queries, particularly where members do not receive the individual benefits they are expecting, such as membership packs, magazines or patches and pins.

Pricing

55. Most members become or continue as members on an annual basis. Leaving to one side the first free year for owners of new motorcycles (which is not directly the subject of these appeals) the annual subscription rates in 2016 were £55 (or €75) for full members and £30 (€40) for associate members. The equivalent sterling figures between 2011 and 2015 were £53 and £29 respectively. Life membership can be obtained at a cost of 10 times the equivalent annual membership.

56. Beyond the arrangements for associate members there is no option for members to forego any benefits in return for a reduced subscription, and no option to buy individual benefits separately. Equally, there is no additional charge for the use of any particular benefit beyond any limit. Although at one point the print magazine had displayed a cover price (of £5 in 2011) Ms Claridge was unclear why this had been the case and did not believe that it had been available for purchase separately. Ms Claridge explained that HDE's CRM (Customer Relationship Management) system had not historically enabled HDE to break membership lists down in a way that would allow differential treatment. That was now changing so it would be possible to consider, for example, allowing members to choose to take particular benefits only.

Membership numbers

57. HDE has in the region of 30,000 life members of HOG. Figures produced for HMRC show that in 2015 it had a total of around 115,000 HOG members (including life members). Around 35,000 annual full memberships were purchased for that year from HDE and around 5,000 associate memberships. Therefore there were roughly 70,000 paying members. The balance of around 45,000 comprised new motorcycle owners who benefitted from one year's free membership. The figures produced for 2010 to 2014 inclusive were broadly comparable.

58. The vast majority of full members originally joined automatically through the purchase of a new motorcycle. Only about 12% joined independently. At present only about 16% of those who join automatically and were not previously HOG members choose to renew their membership after the first year, although of those that do choose to do so the majority go on to renew for subsequent years. Around 18% of new owners are already HOG members, who benefit from free membership for the first year of ownership of their new motorcycle.

59. As already mentioned, only about 30% of HOG members join a Chapter, equating to around 35,000 out of 115,000. On these figures the maximum proportion of paying members who join a Chapter would be roughly 50%, being half of the 70,000 total of paying members. However, this unrealistically disregards any Chapter membership by non-paying members. The true proportion of paying HOG members who join a Chapter must be less than 50%.

The relative significance of benefits: the November 2012 survey

60. Ms Claridge's evidence, which I accept, was that the individual benefits may generally be used independently of each other, and can be regarded as distinct. Different members will have different views as to the relative significance of individual benefits, and some will regard certain benefits as much more important than others. For example, some members will regard the patches and pins as highly significant (for many motorcycle riders they are an important part of motorcycle culture), whereas others will not share this view. Some will regard the ability to join a Chapter as very important (and possibly the main reason for being a member of HOG) but, given that only a minority of HOG members join a Chapter, this is clearly not a view shared by the majority. Similarly, some would describe a visit to the Harley-Davidson Museum as a "pilgrimage".

61. The Harley-Davidson group conducted an online survey of US based HOG members in November 2012, with the objective of assessing members' satisfaction with HOG and the benefits it provides. It is clear that the results of this survey need to be used with caution. Not only does it relate to US members (and therefore not directly to HDE at all) but it was also a survey conducted among what is referred to as the "H-D Advisory Panel", which the survey report describes as comprising the most loyal Harley-Davidson owners, who were participating in the Panel without monetary incentive. They were also participating online, which will have further narrowed down the class of participants.

62. The survey included a question asking respondents how important to them particular benefits were. Just under 5000 individuals answered this question in a way that demonstrated that certain benefits are valued much more than others. In particular, 89% identified the magazine as being very or somewhat important, 84% placed the (now discontinued) touring handbook in these categories. 62% regarded the membership patches as very or somewhat important, and 54% put the ability to join a Chapter in these categories. Specifically in relation to the magazines, 91% said they read all or most of the hard copy magazine, and around 44% said they read the electronic newsletter.

63. Ms Claridge said that the most common query to the Customer Care Centre about missing benefits was about non-receipt of the hard copy magazine. Her assessment of the relative significance of benefits was that the tangible items were the most important, in particular the magazine, patches and pins, map, membership card and membership guide. For some the opportunity to join a Chapter, and discounts on or access to events and rallies, is also important, but her assessment was that members

would not join without the tangible benefits. For the type of individuals involved, these physical items are the most important. I accept this.

HOG as a “community”/pride of membership

64. Although HOG is clearly not a members’ club or community in the conventional sense, it is fair to say that it is marketed as if it were one. The members’ login describes it as “The World’s Greatest Motorcycle Riding Club”. The sample print magazine I saw refers to the “passion and camaraderie HOG members share for Harley-Davidson” as being “a big part of what makes Harley-Davidson so successful”, and also to the “unique global family you are part of as a member of the Harley Owners Group”, with more than 100,000 members in EMEA being an “an unimaginably large network of friends and relationships” as well as a “colossal number of events, ride-outs, rallies and road trips”. The 2015 membership guide and a document designed to encourage new members refers to HOG in terms of sharing “a taste for adventure, rebellion, attitude and freedom”. The latter document refers to joining a “family”.

65. Ms Claridge agreed that Harley-Davidson owners do not regard their motorcycle simply as a means of transport: they appreciate the look, the feel, the heritage and the values that the Harley-Davidson brand represents. It is an iconic brand. Ms Claridge also agreed that the HOG brand is aligned with the Harley-Davidson brand and espouses similar values. Ms Claridge confirmed that for some, but not all, members there was goodwill or pride of membership attached to being a member of HOG. She accepted that, for those who opted for it, Chapter membership has an important community aspect. However, in her view any camaraderie related to HOG came not from membership as such but from the benefits available, including joining a Chapter, attending events and wearing patches and pins.

66. In relation to the magazine, Ms Claridge accepted that it did seek to demonstrate an atmosphere of camaraderie and fun, but I understood her to say that this was essentially from a shared love of Harley-Davidson motorcycles, and the opportunity to use them for touring, rather than simply from HOG membership. She also accepted that whilst it was correct to say that the magazine promoted a sense of community or “family” among HOG members, that is how Harley-Davidson markets its products: it is selling a lifestyle which emphasises the bonds and camaraderie between Harley-Davidson owners. These concepts are one of the main ways in which Harley-Davidson has developed its own brand.

67. My overall assessment of Ms Claridge’s evidence is that Harley-Davidson markets its products on the basis of lifestyle and participation in a community, and seeks to distinguish itself from other manufacturers on that basis. References to “family” and similar concepts that suggest a sense of community are not limited to bonds or ties created by HOG. Ms Claridge’s view, with which I agree, is that the most significant connection or “community” is ownership and use of Harley-Davidson motorcycles, and the camaraderie that can entail. I find that, consistent with its marketing aims, HOG supports this by seeking to increase customer loyalty further, not only through the use of a consistent theme under which HOG, like Harley-

Davidson ownership, is itself promoted as a community, but also through the provision of tangible benefits which are attractive to Harley-Davidson customers, which encourage them to use their bikes and which also demonstrate their connection with the Harley-Davidson brand and therefore the “community” represented by that brand. My conclusion, and inference, from the evidence is that the community or camaraderie created by HOG is subsidiary to, and dependent upon, the community created by the Harley-Davidson brand.

68. Put another way, HOG would be meaningless without the motorcycles. The biggest connection between members is through the ownership and use of Harley-Davidson motorcycles, rather than through membership of HOG as such. Additional direct connections are clearly created between the HOG members who choose to join a Chapter. Those connections can be significant but this is relevant only to a minority of members. For others, use of some of the benefits, such as finding out about and attending events and rallies, reading the magazine, wearing patches and pins and so on, may help create connections between members in a more indirect way, but my assessment is that the principal connection is through the motorcycles. To state what I think should be obvious but perhaps risks getting lost in the debate, a HOG patch demonstrates first and foremost that the wearer owns a Harley-Davidson, rather than that he or she is a member of a club or has a particular status in another respect.

20 *The marketing literature*

69. The documentary evidence included extracts from various marketing books. These included a book entitled “*Satisfaction: How Every Great Company Listens to the Voice of the Customer*”, by Chris Denove and James Power, which has a specific section on HOG, describing it as the “granddaddy of all community-building efforts”. It states that Harley-Davidson set out to create a community around its brand by forming HOG, and that HOG is a “conduit” to the Harley experience, mainly by fostering gatherings which bring Harley lovers together, but also creating new revenue streams for clothing, merchandise and so on. I would note that this book is clearly written from a US perspective and that it draws no distinction between the Harley-Davidson group and the Chapter arrangements.

70. Another book extract was from “*Gamechangers*” by Peter Fisk. This describes how Harley-Davidson faced extinction in 1983 but is now one of the world’s most valuable brands, not just because of the bikes but because of the “brand community”, a group of “fanatical consumers with common attitudes and passions”. The creation of HOG was at the heart of a new business model in which the brand redefined itself around its “community strategy”.

71. In her book *Harley-Davidson Motor Company*, Missy Scott described the purposes of HOG as including bringing thousands of owners back into the “company loop” and reaffirming its commitment to customer satisfaction, building up camaraderie among owners by encouraging the feeling of belonging (which was attractive to new buyers), and improving the image of the Harley-Davidson motorcycle through HOG-sponsored events and rallies.

72. I did not find any of the extracts I was referred to particularly illuminating. My overall impression was that there was nothing that was inconsistent with Ms Claridge's evidence and with my assessment of it, but that references to HOG were too lacking in specificity to be of much assistance.

5 The relevant legal principles in outline

73. The distinction between single composite supplies and multiple supplies has been considered on a number of occasions in recent years, and has been the subject of a number of decisions by the Court of Justice of the European Union (the CJEU). In summary, the starting point is that every supply should normally be regarded as
10 distinct. However, a supply which comprises a single supply from an economic point of view (viewed from the perspective of a typical consumer) should not be artificially split (*Card Protection Plan Limited v HM Customs and Excise* (Case C-349/96) [1999] STC 270 ("CPP") at [29]). Specifically, the CJEU has recognised that there can be a single composite supply in the following circumstances:

15 (1) where one or more elements constitute a principal supply and another element or elements are ancillary supplies; elements must be regarded as ancillary where they do not constitute for customers an end in themselves but a means of better enjoying the principal supply (*CPP* at [30]);

20 (2) where two or more elements supplied are so closely linked that they form, objectively, a single indivisible economic supply that it would be artificial to split (*Levob Verzekeringen and OV Bank v Staatssecretaris van Financien* (Case C-41/04) [2006] STC 766 ("Levob") at [22]).

74. These principles have been summarised in a number of CJEU cases, including in the recent case of *Stock '94 Szolgáltató Zrt. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* (Case C-208/15), [2016] All ER (D) 68
25 (Dec) ("Stock 94") at [27], and in *Finanzamt Frankfurt am Main V-Hochst v Deutsche Bank AG* (Case C-44/11), [2012] STC 1951 ("Deutsche Bank") at [18] to [21], *Mesto Zamberk v Finanční reditelství v Hradci Králové* (Case C-18/12) [2014] STC 1703 ("Mesto") at [28] and *Purple Parking Ltd & another v HMRC* (Case C-117/11) [2012]
30 STC 1680 ("Purple Parking") at [26] to [29].

75. Although it does not reflect the most recent case law, there is a useful summary of relevant principles in the Upper Tribunal decision in *Honourable Society of the Middle Temple v HMRC* [2013] UKUT 0250 (TCC), [2013] STC 1998, at paragraph [60], which it is worth setting out by way of background:

35 "The key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies may be summarised as follows:

40 (1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.

(2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of

view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.

(3) There is no absolute rule and all the circumstances must be considered in every transaction.

5 (4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.

10 (5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.

(6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

15 (7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

20 (9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

25 (10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

30 (11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality.”

35 76. I would add to this, as Mr Hill suggested, that it is important to take account of the economic objective or purpose of the transaction, and the interests of recipients of the supplies. This is particularly clear from *Stock 94*, paragraphs [29], [34] and [35] (discussed further below). In addition, the fact that a single price is charged is relevant (the corollary of the point noted in *Middle Temple* at point (11) above), although it is necessary to go behind the price to consider how it reflects the interests of parties
40 (*Purple Parking* at [34] and [35]).

Submissions

HMRC's submissions

77. Mr Hill, for HMRC, submitted that there is a single supply of membership, and that the range of benefits provided are the means by which the members enjoy, or better enjoy, their membership. Members are purchasing independent membership of a community of fellow Harley-Davidson riders, owners and enthusiasts.

78. The CJEU has made it clear that it is necessary to concentrate on the economic purpose or economic objective of the transaction and to assess the substance of the supply or supplies, taking account of commercial reality and looking at whether there is a single supply from the perspective of a typical consumer. A genuine ability to choose whether or not to be supplied with a particular element is important but not decisive, and the fact that a single price is charged is also relevant. It does not offend fiscal neutrality that the tax treatment of a single supply is different from the tax treatment of the individual elements supplied separately (*Purple Parking* at [38] and [39] and *Middle Temple* at [60(12)]).

79. In this case, membership is supplied as a single package and at a single price which does not vary with the extent of use of the various elements. None of the benefits can be purchased individually or foregone and it is irrelevant that some members may attach different values to different elements or use some benefits more than, or to the exclusion of, others. As a matter of law there can be a principal supply of membership itself rather than the benefits of membership: see *Tumble Tots (UK) Ltd v HMRC* [2007] STC 1171.

80. On the facts, what HOG members want is the status of membership, because it provides the “key to the door” (that is access, or a right of access) to interacting with other Harley-Davidson owners, including joining a Chapter, taking part in events and rallies (using the website and other information supplied to find out about these events), contributing to and reading other members’ contributions in the print and e-magazines, sharing photos on the HOGEuropegallery.com website and wearing HOG patches and pins to demonstrate membership. Members do not just want the individual benefits: they want the cachet, status or goodwill from being associated with the Harley-Davidson brand and lifestyle represented both by Harley-Davidson and HOG. This is clear from the very strong emphasis HDE puts on lifestyle and community when marketing HOG.

81. In particular, the membership card simply allows membership to be better enjoyed by opening the door to various discounts and opportunities. The website, membership and events guide and e-magazine enable membership to be better enjoyed by telling the member what benefits are available and what events he or she can take part in. The pins and patches are the badge or uniform: their purpose is to enable members to identify with the brand and declare their membership of HOG. The magazine is designed to be used in combination with the other elements, and its focus is on getting the best out of membership of HOG rather than on the technical aspects of the motorcycles. The focus is on HOG as a community.

82. Although Mr Hill's primary argument was that there was a single supply of membership with the individual benefits being ancillary, he submitted that if any of the individual elements were found not to be ancillary then they were also part of a single supply on the alternative basis described in *Levob*. He also developed an argument at the hearing that there was either a single supply of membership or that the principal supply comprised a number of (principal rather than ancillary) elements, as recognised in *CPP* at [30] and discussed by Lord Rodgers in *College of Estate Management v Customs and Excise* [2005] STC 1597 at paragraph [10]. The benefits available fell into three categories: (a) benefits which tell members about other benefits (including the membership guide and parts of the magazine), (b) minor "add-on" benefits and (c) benefits that are a means of instilling a sense of community and can be regarded as principal elements of a single supply, even if that supply cannot be described as a supply of membership. Category (c), which includes the option to join a Chapter, access to benefits such as the photo gallery and the ability to access a HOG zone at events, patches and pins and parts of the magazine not falling within category (a), are those focused on creating or enhancing a sense of community. The consumer's objective is to purchase an association with that community and identify with the brand. Categories (a) and (b) are both ancillary, because they are a means of enjoying other benefits or are minor add-ons.

20 *The appellant's submissions*

83. Mr Hitchmough, for the appellant, submitted that HDE makes a number of distinct supplies to each HOG member, the VAT treatment of each of which must be ascertained separately. It could not be said to make a single principal supply of "membership" to which the benefits were all ancillary. HMRC's reliance on *Tumble Tots* was a misplaced attempt at fact matching. The benefits were discrete and it was artificial to tax them as a single package. No single benefit stood out as the principal supply. HMRC's approach of treating what was supplied as "membership" also effectively conjured up a taxable supply from thin air in relation to non-EU members of HOG.

84. Mr Hitchmough submitted that HMRC's argument that what was being supplied was membership of a community was at odds with the evidence. HOG is a marketing device and not a community of members. Unlike the Chapters, HOG provides no direct means of communication between members and no involvement in the running of the organisation. It runs no events exclusively for HOG members. The contract between HOG and the member should be distinguished from membership of an actual club which gives defined rights of membership in that club. The facts could be compared to *Commissioners of Customs and Excise v The Automobile Association* [1974] STC 192 where the Court of Appeal rejected Customs' argument that there was a single supply to AA members of the grant of membership. No one was paying for the "husk of membership" without regard to the individual benefits, and the subscription was paid for the package of benefits and needed to be apportioned accordingly. Even if (and contrary to the evidence) a HOG member's overall objective is affiliation, then membership was not the mechanism by which this objective is secured. It is instead secured by means of the individual benefits (to a varying extent as between different members), in the same way as a rugby club

supporter might show affiliation to the club by purchasing a branded shirt. What was supplied was the means of achieving any desired status or cachet, rather than that status itself. Similarly, in *Tumble Tots* what parents really wanted was class attendance for their child, rather than membership.

- 5 85. Mr Hitchmough’s skeleton argument also covered submissions on the alternative
test of whether there was a single supply, namely whether the various benefits of
membership are so closely linked that they form a single indivisible economic supply
that it would be artificial to split. Although this was not pursued at the hearing, it is
worth recording his argument that this was not the case because the individual
10 benefits provided are entirely capable of being enjoyed independently, and are so
enjoyed. The fact that members regard some benefits as much more important than
others shows that they are capable of being regarded as separate.

Discussion

- 15 86. I have concluded that HMRC’s argument that there is a single supply is not
correct. I will first refer to a number of the cases and then seek to explain my reasons.

The case law

87. It makes sense to start with *Tumble Tots*. That case related to the VAT treatment
of a fee of £19 paid by parents to the franchisor of a well-known activity programme
for pre-school children. Participating children attended structured physical play
20 sessions run by a local franchisee. Ignoring an initial trial session, children could not
attend without the fee having been paid. Parents also had to pay attendance fees to the
franchisee. HMRC maintained that the £19 was paid for a single supply of
membership. In the High Court, Briggs J agreed with the VAT Tribunal that although
the £19 did not secure a contractual right to attend classes, it was an essential part of
25 what the parents had to do to secure the child’s attendance. The “membership of the
club” received in exchange for the fee conferred a status or a “key to the door”
(paragraphs [21], [23] and [27]). Other parts of the consideration provided by Tumble
Tots were ancillary, including a membership card, a DVD and a CD, accident
insurance covering attendance at sessions, a gym bag and regular magazines and
30 newsletters. In particular, the High Court concluded that the Tribunal was entitled to
find that the magazine was not more than ancillary. The central focus was on the
provision of educational and recreational benefits to the child, rather than anything
capable of being enjoyed only by the parent, and the peripheral nature of the
magazine to the package was apparent from the evidence: it was not an end in itself
35 (paragraph [32]). As the Tribunal put it at paragraph [128] of its decision ((2006)
VAT Decision 19530), this was a case akin to *CPP* where “there is a clear single
objective for the typical consumer and the extras which come with the principal
supply are not what the consumer really wants”. They were “add-ons or unnecessary
extras” which the typical consumer did not see as the “main objective” (paragraph
40 [130]).

88. The one area where Briggs J disagreed with the Tribunal related to a T-shirt
included in package, which the Tribunal regarded as a separate principal supply,

because like membership it operated as an admission card and instilled a sense of belonging. Rather than finding that it was ancillary, Briggs J applied the economic indissolubility test described in *Levob* to conclude at [36] that it would be artificial to split the provision of the T-shirt from provision of membership of the Tumble Tots' club.

89. One of the cases considered in *Tumble Tots* was the earlier *Automobile Association* case. In referring to it I am mindful of the need to exercise caution in referring to cases which predate the most significant European case law on this subject (see Briggs J's decision in *Tumble Tots* at [9] and [10], referring to comments made by Lord Hoffmann in *Dr Beynon and Partners v Customs and Excise* [2005] STC 55 about the significance of *CPP* as a restatement of principle). Nevertheless, it contains a useful analysis of concepts to be considered in relation to "membership", and as Briggs J confirmed there is nothing wrong in considering the case to the extent that nothing in the subsequent case law compels a different approach.

90. At the time of the *Automobile Association* case, the AA was an unincorporated association controlled by a committee and governed by rules. Anyone who wanted to join had to fill in an application form to be admitted to membership, on terms that they would be subject to the rules. On the face of the rules there was power to enable the committee to deny any of the normal benefits of membership. Customs maintained that what was supplied was a single service of permitting the individual to join the association and become a member. The AA argued that the services supplied were not simply the "bare husk of membership" but also the individual benefits, including the handbook, a magazine, and of course break down services. In the High Court, Lord Widgery (with whom both Melford Stevenson J and Bridge J agreed) concluded at page 198 that it was impossible to contend on the facts that all the member gets for his subscription is the privilege of being the member, which he considered gave no cachet or status in itself. No one would pay simply for the husk of membership without regard to the individual benefits which would follow. Accordingly, the VAT Tribunal's conclusion that as a matter of substance and reality the subscription was paid for the package of individual benefits, was a perfectly sensible one (page 199f).

91. I should next refer to *Levob*. That case related to a contract under which the supplier agreed to provide the taxpayer with software which the supplier would customise to enable the taxpayer to use it in its business. The customisation was significant. Separate prices were stipulated for each aspect. The CJEU concluded that it was not realistically possible to take the view that what had been purchased was pre-existing software which as it stood was of no use to the customer, and only subsequently the customisation. The objective close link between the two was such that there was a single economic transaction (paragraphs [24] and [25]). In classifying the supply it was necessary to identify its predominant elements. In this case the customisation was so extensive that it was neither minor nor ancillary; it predominated, such that there was a single supply of services (paragraphs [27] to [29]).

92. *Purple Parking* related to the provision of “off-airport” parking by two businesses, under which customers left their cars at car parks located some distance from the airport and were transferred by bus to the terminal. Customers paid a single price calculated by reference to the number of days that their vehicles were parked. The transport costs accounted for around 33% and 80% respectively of the total costs of the two operators. The CJEU found that there was a single complex supply in which the parking element was predominant (paragraph [33]). The pricing was clearly significant. Not only was a single price charged but the price was exclusively calculated on the basis of the period for which the vehicle was parked, rather than on the number of passengers (and therefore the extent of use of the transport). This reflected the interests of the parties concerned. What the customer was seeking was secure parking at an advantageous price, and the transport service was the inevitable consequence of the fact that the car park was located away from the airport (paragraphs [34] and [35]). This conclusion was not precluded by considerations of fiscal neutrality, because a complex supply of services consisting of several elements is not automatically similar to the supply of those elements separately (paragraph [39]).

93. *Mesto* related to the entrance fee charged for access to an aquatic park, which included a swimming pool divided into lanes and equipped with diving boards, a paddling pool, water slides, a massage pool and other facilities including a natural river for swimming, a beach volleyball court and areas for table tennis. One of the questions referred to the CJEU was whether the access granted could constitute a supply of services closely linked to sport, and thus exempt. The question referred was therefore one of characterisation rather than whether there were single or multiple supplies. However, in answering the question the CJEU considered the principles that apply in the latter case. In particular, the court emphasised at [27] the need to have regard to all the circumstances in which the transaction takes place. The court explained that the categorisation of a single complex supply requires identification of its predominant elements, and that this must be determined from the point of view of the typical consumer, “having regard... to the qualitative and not merely quantitative importance” of the different elements (paragraphs [29] and [30]). The CJEU went on to say that whilst it was for the national court to decide whether there was a single supply falling within the exemption, it was for the CJEU to provide guidance. It was necessary to examine whether the facilities in the park form a whole so that access to the whole constitutes a single supply that it would be artificial to split. The fact that the only type of ticket available was one that gave access to all the facilities, without any distinction according to what was actually used or the extent of use, was a “strong indication of the existence of a single complex supply” (paragraph [32]). The further question as to whether such a single supply fell within the exemption needed to be determined:

“... from the point of view of the typical consumer, who must be determined on the basis of a group of objective factors. In the course of that overall assessment, it is necessary to take account, in particular, of the design of the aquatic park at issue resulting from its objective characteristics, namely the different type of facilities offered, their

fitting out, their number and their size compared to the park as a whole.” (paragraph [33])

94. The CJEU went on to explain that this included taking account, for example, of whether the aquatic areas lend themselves to swimming of a sporting nature or to recreational use. The fact that the intention of some visitors does not relate to the predominant elements of the supply does not call that determination into question. Taking account of the intention of each visitor individually would be contrary to the objectives of the VAT system of ensuring legal certainty and ensuring the straightforward application of the exemptions. The focus is on the “objective character” of the transaction (paragraphs [34] to [36]).

95. The most recent CJEU decision on the subject that I was referred to is *Stock 94*. Unlike *Mesto* the focus of this case was whether there was a single “principal” supply, or more than one supply. The case related to supplies made by Stock 94 to Hungarian farmers, involving the grant of a loan which the farmer uses to purchase from Stock 94 resources (current assets) needed for production, such as seeds. The produce is subsequently sold either to Stock 94, or to the market through Stock 94 as an intermediary. It is worth setting out in full the CJEU’s summary of the principles to apply in determining whether there is a single or multiple supplies, at paragraphs [26] to [30]:

“26 In that regard, it must be recalled that, for VAT purposes, every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive (judgment of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie*, C-42/14, EU:C:2015:229, paragraph 30 and the case-law cited).

27 Nevertheless, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent. There is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. That is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied (judgment of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie*, C-42/14, EU:C:2015:229, paragraph 31 and the case-law cited).

28 In order to determine whether the services supplied constitute independent services or a single service it is necessary to examine the characteristic elements of the transaction concerned (judgments of 17 January 2013, *BGŻ Leasing*, C-224/11, EU:C:2013:15, paragraph 32, and of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie*, C-42/14, EU:C:2015:229, paragraph 32).

29 In that regard, it should be noted, first, that, in order to determine whether a transaction that comprises several supplies constitutes a single transaction for the purposes of VAT, the Court takes into account the economic objective of that transaction (see, to that effect, judgments of 19 November 2009, *Don Bosco Onroerend Goed*, C-461/08, EU:C:2009:722, paragraph 39; of 28 October 2010, *Axa UK*, C-175/09, EU:C:2010:646, paragraph 23; and of 27 September 2012, *Field Fisher Waterhouse*, C-392/11, EU:C:2012:597, paragraph 23). In its analysis, the Court also takes into account the interests of the recipients of the supplies (see, to that effect, judgment of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie*, C-42/14, EU:C:2015:229, paragraph 35).

30 Second, it is important to recall that, in the context of the cooperation established by Article 267 TFEU, it is for the national courts to determine whether the taxable person makes a single supply in a particular case and to make all definitive findings of fact in that regard. However, it is for the Court to provide the national courts with all the guidance as to the interpretation of European Union law which may be of assistance in adjudicating on the case pending before them (judgment of 17 January 2013, *BGŻ Leasing*, C-224/11, EU:C:2013:15, paragraph 33 and the case-law cited)."

96. The CJEU went on to find at paragraphs [31] to [35] that the grant of the loans, which the farmers could only use to purchase current assets from Stock 94, was not a supply with an independent interest from the point of view of the farmers. Stock 94 was also not authorised to grant loans without their being intended for that use. Both the loan and the delivery of the assets pursued the same economic objective. The supply of the current assets constituted the principal supply, since it enabled farmers to pursue their agricultural production activity. The loan was not an end in itself. Specifically, the court said the following at [34] and [35] :

30 "34 ... the delivery of the current assets and the loan pursue the same economic objective, namely, in essence, the creation of financial and logistical support for farmers, enabling them to carry on agricultural production activity. In that regard, it should be recalled that, according to the general conditions governing the integrated cooperation at issue in the main proceedings, as they are set out in brief in the order for reference, Stock '94 undertook to support the production activity of the integrated producers and to finance the purchase of the current assets necessary for that purpose.

35 35 In such circumstances, the supply of those current assets constitutes, for the integrated producers, the principal supply within the integrated cooperation, inasmuch as the farmers will be able to pursue their agricultural activity because of those assets. Thus, for those farmers, obtaining a loan to acquire those assets is not an end in itself, but merely a means for them to acquire the current assets necessary for their agricultural production."

The court's conclusion on this issue at paragraph [39] was as follows:

5 “... an integrated agricultural cooperation providing that an economic operator delivers goods to a farmer and grants him a loan intended for purchasing those goods constitutes a single transaction for the purposes of that directive, in which the supply of the goods is the principal supply. The taxable amount of that single transaction is made up of both the price of those goods and the interest paid on the loans granted to the farmers...”

10 97. Finally, I should refer to the recent Upper Tribunal decision in *Metropolitan International Schools Ltd v HMRC* [2017] UKUT 0431 (TCC), which was released following the hearing of this case. *Metropolitan International* was a decision primarily concerned with the correct characterisation of what both parties were seeking to maintain was a single supply, either as a supply of books (as the FTT had held) or as a supply of educational services (as HMRC maintained). However, the
15 Upper Tribunal considered a number of the authorities on single and multiple supplies and noted the close relationship between the “number of supplies” point and the question of characterisation. (The decision does not refer to *Stock 94*, which may not have been cited.) The Upper Tribunal found that, in the light of the CJEU decision in *Mesto*, the primary test for determining the character of a supply was to determine its “predominant” element, and noted at [64] that it was not easy to imagine
20 circumstances where the principal/ancillary test would generate a different answer. The Tribunal also discussed a submission by Counsel for HMRC that it was necessary to capture the consumer’s aim in purchasing the goods or services in question, based on the economic realities, which the Tribunal referred to as the “overarching” supply test, and accepted at [76] to [78] that this was a point that should be taken into
25 account. The Tribunal noted at [67] that this concept was derived largely from UK tax cases, including the House of Lords decision in *College of Estate Management*.

Reasons for my conclusion

30 98. The starting point for determining whether there are single or multiple supplies is that supplies must normally be regarded as distinct and independent. However, supplies that comprise a single supply from an “economic point of view” (*CPP* at [29], described in *Stock 94* at [27] as supplies that are “not independent”) should not be artificially split. The test is an objective one. It is necessary to consider the characteristic elements of the transaction (*Stock 94* at [28]): in essence, what is acquired? In doing this the focus is on the typical consumer rather than any individual
35 consumer, and on their economic objective (*Stock 94* at [29]).

99. The “principal/ancillary” test is effectively one category of case where there can be found to be a single supply. It does not cover all situations. Another category is where the two elements are so closely linked that they form, objectively, a single, indivisible economic supply. However, since the underlying principles (summarised
40 in the preceding paragraph) are the same for each category it is clearly appropriate when considering one category to pay close attention to case law which considers the other.

100. HMRC’s primary argument was that there was a single principal supply of membership. All the other elements were not ends in themselves but means of better

5 enjoying that principal supply. In my view this is simply not borne out by the evidence. Ms Claridge gave clear evidence, which was not effectively challenged, that members join HOG for the individual benefits and not simply for the status of membership. In particular, my conclusion from the evidence is that the “typical” member of HOG, at least in EMEA, is someone who places real value on tangible items, would not join if sufficiently attractive tangible items were not provided and complains if they are not received. This makes complete sense given that membership is drawn from owners of Harley-Davidson motorcycles and people closely connected with them, who clearly value possession of certain types of physical item, and in particular items associated with the Harley-Davidson brand. In reality, I think it would be more accurate to describe membership of HOG as enabling members to better enjoy their motorcycles, rather than to enhance their membership of HOG.

101. Mr Hill stressed the cachet or status from being associated with the Harley-Davidson brand through HOG, and the focus placed on community in marketing HOG. He submitted that what members wanted was the status of membership, which in this case was not a “bare husk” (as in the *Automobile Association* case) but was the “key to the door” akin to *Tumble Tots*. Clearly there is an analogy between the facts of *Tumble Tots* and the ability of HOG members to join a Chapter. For some members this will be important, but what I need to consider is the perspective of the “typical consumer”. Only a minority of paying HOG members join a Chapter. Significant other benefits are provided which can clearly be, and obviously are, enjoyed by the majority of members independently of Chapter membership. I do not think it realistic to regard this aspect as the determining characteristic.

102. Mr Hill also relied on other benefits as demonstrating that what was provided was a status, including the ability to take part in events and rallies, to access and use the relevant websites and the ability to own and wear the patches and pins. However, as discussed at [67] and [68] above my conclusion from the evidence is that the key status is provided by ownership of a Harley-Davidson motorcycle. Membership of HOG will clearly make it easier to find out about events and rallies, but no HOG events are exclusive to HOG members. I do not think that the typical HOG member would regard the ability to go into a HOG zone at an event as particularly attractive by itself. I also infer that usage of the websites is relatively limited, bearing in mind that only 36% of members have the necessary profile to use HOG.com. The patches and pins are valued as physical items.

103. In my view Mr Hill’s focus on “community” confuses the marketing message with what is being supplied to the consumer. Whilst I appreciate that marketing is clearly relevant in determining the nature of a supply, and whether there is more than one supply, it cannot be determinative. Although like *Automobile Association* it predates the most significant European case law, and so should be approached with caution, an analogy can be drawn with *Bophuthatswana National Commercial Corp Ltd v Customs and Excise* [1993] STC 702. In that case the Court of Appeal found that a variety of services provided by the appellant could not be viewed as a single service by applying a “blanket label” of “services of the sort ordinarily provided by a diplomatic mission”. Nolan LJ said at page 708 that it was necessary to analyse the

individual supplies as a preliminary to deciding whether any of them were ancillary or incidental, as well as to determining how the consideration should be apportioned.

104. It is also important to bear in mind that the test is one of, essentially, economic objective. The question is what is (really) being acquired, rather than what motivates individual consumers to make the purchase. Clearly it is possible for a supply to comprise the conferring of a status, and this was the case in *Tumble Tots*. As that case shows, there is also no need to have a membership club in the conventional sense for a supply to amount to the provision of the status of “member”. It can be achieved by a simple contractual arrangement between the individual and the provider. However, the key point in *Tumble Tots* was that what the typical parent was seeking to secure was the ability of their child to attend classes. The extras provided were not really what the parent was after. In contrast, in this case I do not think that it can be said that the objective of the typical HOG member is to secure the status of membership of HOG, rather than to secure the individual benefits available. The typical member wants the individual benefits.

105. In order to succeed in his primary argument Mr Hill would need to persuade me that all the benefits provided are simply “ancillary” to the status of membership. In *College of Estate Management* at Lord Walker approved the description of that term by Ward LJ in the Court of Appeal as meaning subservient, subordinate and ministering to something else (paragraph [30]). My view is that this is simply not a correct description of the individual benefits provided. For example, both the evidence of Ms Claridge and the results of the November 2012 survey indicate that receipt of the hard copy magazine is regarded as important. The sample magazine provided clearly indicates that it can be enjoyed by itself, and by any owner or lover of Harley-Davidson motorcycles. Enjoyment is certainly not limited to people who have the “status” of HOG membership. Similarly, it is not that status by itself that enables members to enjoy other benefits including access to events and the websites. Although the patches and pins all display the HOG logo my assessment of the evidence is that they are enjoyed as physical items. Whilst they demonstrate affiliation with HOG I have concluded, as discussed at paragraphs [67] and [68], that the proper inference to draw is that the key affiliation demonstrated is with the Harley-Davidson brand.

106. Mr Hitchmough used an example of a shirt purchased by a rugby club supporter with the team’s colours and logo. It is still a shirt, and is enjoyed and used as such, even though the supporter may have been motivated to purchase it only because of his or her affiliation with the team, and to demonstrate that affiliation. The economic objective of the transaction is the acquisition of the shirt. The logo and colours do not change the shirt’s nature and are not ends in themselves. Similarly, for example, the magazine in this case is still a magazine despite the association with HOG, and can be and clearly is enjoyed by itself, independently of the fact that the reader happens to have the status of membership of HOG. I do not think it is simply a means of better enjoying membership. In a broad sense it is a means of helping owners to enjoy their motorcycles, but that is not the question. I do not think it is comparable with the magazine in *Tumble Tots*, which was found not to be part of what the typical

consumer was really seeking to acquire. In that case the magazine was peripheral or subordinate. Here it is certainly not.

107. I have considered whether the single supply which HMRC contends is made could be better described as a being the acquisition of the status of association with the Harley-Davidson brand through membership of HOG. Although in broad terms this might describe a typical member's motivation for joining HOG, I do not think it correctly identifies what is supplied. Association with the brand is achieved through the use and enjoyment of the individual benefits independently.

108. I have also considered the alternative test described in *Levob*, namely whether there is a single indivisible economic supply which it would be artificial to split. For the reason given at [99] above I do not think it is appropriate to disregard this test. In addition, although it was not Mr Hill's main argument I did understand him to rely on the *Levob* formulation in relation to any elements that were not found to be ancillary. As mentioned above, he also relied at the hearing on an argument that there can be more than one principal element, as discussed by Lord Rodgers in *College of Estate Management*.

109. *College of Estate Management* predated *Levob*. Lord Rodger's comments at paragraph [10] pick up on the point that in *CPP* the CJEU referred to the possibility of a principal supply comprising more than one element. He noted that whilst the court in that case was highlighting a situation where there is a principal and ancillary supply "... plainly, in cases where there is no ancillary supply, a single supply may still be made up of more than one element", citing *Faaborg-Gelting Linie A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774. (That case concerned the provision of restaurant services on a ferry, which was found to be the provision of a service although it obviously included the provision of food and therefore goods.) In my view Lord Rodgers' comments, and those of Lord Walker at [30] in the same case, simply anticipate the test now set out in *Levob* (which also cited the *Faaborg-Gelting Linie* case in the context of categorisation) and do not justify the conclusion that there is a further test that I should apply.

110. Applying the *Levob* formulation, are the individual elements of what is supplied to HOG members indivisible such that it would be artificial to split them? I do not think that they are. A number of the benefits can be enjoyed separately, and clearly are. Many obviously enjoy the magazine, many like owning or wearing patches and pins, some enjoy being able to join a Chapter, some will make use of the websites and some will make use of other benefits such as discounts available, and so on. The precise benefits provided can and do vary from year to year: for example the touring handbook has been replaced by a map, and new benefits have been added such as free Museum entry. I do not think it is irrelevant that HDE's CRM system has in the past prevented it from breaking down membership and offering individual options for membership, or that in the past there has been a cover price for the magazine. The benefits are not only capable of being provided separately, but they can and are also enjoyed as such. This is not like the software in *Levob*, where the software itself was useless to the consumer without significant customisation, or like *Deutsche Bank* where customers were seeking a portfolio management service that combined the

elements of analysis and dealing, each of which would have been pointless without the other and which were both inseparable and indispensable (paragraphs [26] and [27] of the judgment). It is also not like *Mesto*, where the ticket price secured admission to the entire park and what was being supplied was access to all the facilities, in circumstances where it would have been entirely artificial to seek to split that supply.

111. It is relevant that a single price is charged for membership and that HOG members do not in fact have the ability to choose what elements are supplied (irrespective of whether HDE might like to offer that choice in the future). It is also relevant that the price does not vary with the extent of use of the individual elements. However, whilst these factors are important it is clear from the case law that none of them are determinative. Whilst they weigh in the balance in HMRC's favour, in my view they are insufficient to enable me to conclude that there is a single supply, either on the basis that the benefits are ancillary or on the basis that it would be artificial to split the various elements.

112. As recognised in *Mesto*, and by the Upper Tribunal in *Metropolitan International*, the question of characterisation of a supply is closely linked to the question whether there are single or multiple supplies. HMRC are seeking to characterise the single supply that they maintain is made in this case as a supply of membership. I do accept that what is supplied does, to some extent, include something that can be characterised as the supply of the status of membership. This is most relevant in relation to the Chapter structure, where HOG membership does provide a key to the door in a similar way to the service provided in *Tumble Tots*. I also accept that some benefits may be regarded as ancillary to the status of membership. The ability to obtain discounts from some third-party organisations may be an example of this.

113. I am also prepared to accept that membership of HOG can be regarded as conferring some cachet in itself, in the way that was found not to be the case with AA membership in the *Automobile Association* case. This was effectively accepted by Ms Claridge in evidence as regards some HOG members: see [65] above. However, I think this is limited and in my view secondary to the key status for the typical HOG member, which is being an owner of, or closely associated with an owner of, a Harley-Davidson motorcycle. Membership of HOG for the typical consumer fulfils the objectives of obtaining benefits, in particular tangible benefits, associated with Harley-Davidson motorcycles and enhancing the enjoyment of their ownership and use of their bike. Applying the "predominance" and "overarching supply" tests discussed in *Metropolitan International*, I do not think it correct to describe the supply of membership as satisfying these tests. In economic reality, the aim of the typical consumer is to obtain the individual benefits, rather than to obtain something that is predominantly, or primarily, the status of HOG membership.

114. Overall, I think that the individual benefits provided are simply too significant in qualitative terms to allow the supply to be characterised as a single supply of membership, rather than a number of independent supplies. Many or all of them can properly be described as designed to allow enjoyment or better enjoyment of Harley-Davidson motorcycles, but not better enjoyment of membership. This is fully

supported by the fact that HOG was set up to improve brand loyalty to the Harley-Davidson brand, and to provide a “reason to ride” with a view to increasing sales of products.

5 115. Finally, I should make a brief mention of the exemption in Group 9 of Schedule 9 to VATA. This exempts supplies of services and certain goods by certain non-profit-making organisations to their members where the only consideration paid is a membership subscription. It is based on Article 132(1)(l) of the Principal VAT Directive (2006/112/EC). It does not provide any direct assistance in determining
10 whether single or multiple supplies are made in this case, but it is worth noting that it is clearly not inconsistent with the conclusion that multiple supplies can be made in return for membership subscriptions.

Conclusion and disposition

116. My conclusion on the issue that I have been asked to decide is that HDE makes multiple supplies in return for HOG membership subscriptions, and not single
15 supplies. HDE’s appeal is therefore allowed in principle.

117. 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
20 than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**SARAH FALK
TRIBUNAL JUDGE**

RELEASE DATE: 14 DECEMBER 2017