TC02234

Appeal number: MAN/2008/0270, MAN/2008/0278, TC/2009/12316, TC/2009/14599.

VAT – sporting exemption for golf clubs – Article 13A(1)(m) Sixth Directive – members' subscriptions – single supply or multiple supplies – Card Protection Plan considered – held single supply – profit making proprietary clubs – whether entitled to exemption – no – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHIPPING SODBURY GOLF CLUB **Appellants**
MENDIP SPRING GOLF & COUNTRY CLUB
THE DYKE GOLF CLUB LIMITED
TRENT LOCK GOLF CLUB

- and -

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

TRIBUNAL: JUDGE DAVID DEMACK
JUDGE JONATHAN CANNAN

Sitting in public at Manchester on 28-30 May 2012

Michael Sherry of Counsel instructed by Alan Rashleigh Associates for the Appellant

Raymond Hill of counsel instructed by the General Counsel and Solicitor of HM Revenue & Customs for the Respondents

DECISION

Introduction

1. These four appeals all relate to the correct treatment for VAT purposes of members' subscriptions paid to golf clubs. They raise issues which concern a large number of golf clubs across the country which have appeals to the tribunal stood over pending the outcome of these appeals. The appeals concern the application of the sporting exemption from VAT.

2. Two of the appellants, Chipping Sodbury Golf Club ("Chipping Sodbury") and The Dyke Golf Club Limited ("The Dyke") are members clubs in the sense that they are owned and operated for the benefit of the members. Together we refer to these appellants as "the Members' Clubs".

3. The other two appellants, strictly KBA & EM Developments Ltd trading as Trent Lock Golf Club ("Trent Lock") and Yeo Finance Limited trading as Mendip Spring Golf and Country Club ("Mendip Spring") are proprietary clubs owned and operated for the benefit of the proprietors. Together we refer to these appellants as "the Proprietary Clubs".

4. As appears below, each of the appellants has made a voluntary disclosure to HMRC seeking repayment of output tax said to have been overpaid in accounting for members' subscriptions. In each case the voluntary disclosure has been refused by HMRC on the basis that output tax at the standard rate is due in respect of the whole amount of members' subscriptions.

5. Put briefly, the Members' Clubs claim that subscriptions paid in periods prior to 1 January 1990 were consideration for multiple separate supplies which were exempt, zero rated, standard rated or outside the scope of VAT depending on the nature of each type of supply.

6. The claims of the Proprietary Clubs are rather less straightforward. Neither of the Proprietary Clubs has lodged a voluntary disclosure relating to the period prior to 1 January 1990. Their claims relate to periods after that date. Broadly they claim that subscriptions paid in periods after 1 January 1990 were either consideration for multiple separate supplies, alternatively that they were consideration for a single exempt supply.

7. The reasons why the Members Clubs and the Proprietary Clubs put their claims on different bases will become apparent in the light of our consideration of how the statutory framework has changed in the periods before and after 1 January 1990. Once we have considered the legislative provisions we will set out the claims of the various appellants in more detail.

8. The evidence in each appeal was largely undisputed and comprised witness evidence from a representative of each appellant, together with witness evidence from Miss Vivien Saunders. Miss Saunders is the owner of two proprietary clubs with

appeals stood over behind the present appeals. She is the Chairman of the Association of Golf Course Owners which represents a large number of proprietary clubs. She was also the British Ladies' Open Champion in 1977.

9. We are concerned in these appeals with matters of principle. The parties agreed that any matters of quantum arising from our determination of the issues would be dealt with at a later date. For that purpose quantum includes the extent to which any claims for repayment are capped pursuant to *section 80(4) VATA 1994*.

Statutory Framework

10. Until 1978 the primary EU Law relating to VAT was contained in the Council Directive of 28 May 1969 (69/169) "the Second Directive". There is no reference in the Second Directive to any exemption for sporting services.

11. The Sixth Council Directive of 17 May 1977 (77/388) ("the Sixth Directive") was introduced with effect from 1 January 1978. It superseded the Second Directive which had been in force since 1969 and introduced for the first time an exemption for certain sporting services ("the sporting exemption").

12. Article 13A(1) of the Sixth Directive provided for a sporting exemption as follows:

> *"(1) Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:*
> …
> *(m) "Certain services closely linked to sport or physical education supplied by non-profit making organisations to persons taking part in sport or physical education;"*

13. Article 13A(2) of the Sixth Directive further provided that some exemptions, including the sporting exemption at (m), could be made subject to certain conditions as follows:

> "*(2)(a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b), (g), (h), (i), (l), (m) and (n) of this Article subject in each individual case to one or more of the following conditions:*
>
> - *they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied,*

- *they shall be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned,*

- *they shall charge prices approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to value added tax,*

- *exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises liable to value added tax.*

(b) The supply of services or goods shall not be granted exemption as provided for in (1)(b), (g), (h), (i), (l), (m) and (n) above if:

- *it is not essential to the transactions exempted,*

- *its 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 value added tax.*"

14. The Sixth Directive also contained transitional provisions, and Article 28 provided as follows:

"*(3) During the transitional period referred to in paragraph 4, Member States may:*
(a) continue to tax the transactions exempt under article 13 or 15 set out in annex E to this directive;
…
(4) The transitional period shall last initially for five years as from 1 January 1978. At the latest six months before the end of this period, and subsequently as necessary, the Council shall review the situation with regard to derogations set out in paragraph 3 on the basis of a report from the Commission and shall unanimously determine on a proposal from the Commission, whether any or all of these derogations shall be abolished."

15. The relevant derogation was abolished by Directive 89/465 with effect from 1 January 1990. From that date therefore the sporting exemption applied without the possibility of derogation by Member States.

16. The period we are concerned with in this appeal is from 1973 to 2008. In the latter part of that period the Sixth Directive was replaced by *Council Directive 2006/112/EC* ("the Principal VAT Directive"). For present purposes the terms of the Principal VAT Directive are in identical terms to the Sixth Directive (see *Articles 131-134*). In this decision we shall therefore make reference to the Sixth Directive which was in force for most of the period under consideration.

17. The sporting exemption was not incorporated into UK law as such until the *Value Added Tax (Sports) Order 1994 (SI 1994/687)* ("the 1994 Sports Order"). This entered into force with effect from 1 April 1994 although HMRC allowed taxpayers to claim refunds of any overpaid VAT which relied on the direct effect of the sporting exemption in the period between 1 January 1990 and 31 March 1994.

18. The 1994 Sports Order introduced Items 2 and 3 to Group 10 Schedule 9 of the Value Added Tax Act 1994 ("VATA 1994"), which thereafter provided for exemption as follows:

> "*Item No.*
>
> *1. The grant of a right to enter a competition in sport or physical recreation where the consideration for the grant consists in money which is to be allocated wholly towards the provision of a prize or prizes in that competition.*
>
> *2. The grant, by a non-profit making body established for the purposes of sport or physical recreation, of a right to enter a competition in such an activity.*
>
> *3. The supply by a non-profit making body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part.*"

19. The provisions of Group 10 Schedule 9 VATA 1994 were further amended by the *VAT (Sport, Sports Competitions and Physical Education) Order 1999 (SI 1999/1994)* ("the 1999 Sports Order"). In particular Items 2 and 3 were amended so as to replace the term "*non-profit making body*" with the term "*eligible body*". At the same time Notes were introduced which defined eligible body restrictively. In particular an eligible body was defined as a non-profit making body which had certain restrictions over the way in which profits could be distributed or applied and which was not subject to "*commercial influence*" which itself was specifically defined.

20. It appears that the 1999 Sports Order was introduced at least in part to prevent arrangements being implemented by proprietary clubs such as those considered by the VAT Tribunal in *Chobham Golf Club v Commissioners v Customs & Excise (Decision 14867)*. In that case the club members operated on a non-profit making basis but effectively paid management fees and rent to the proprietor.

Claims by the Members' Clubs

21. Chipping Sodbury has a claim for repayment of £49,429 relating to the apportionment of annual subscriptions in respect of the period from 1 April 1973 to 31 December 1989. That claim was made on 21 October 2007 and was refused by HMRC on 2 January 2008.

22. The Dyke has a claim for repayment of £74,433 relating to the apportionment of annual subscriptions in the period from 1 April 1973 to 31 December 1989. That claim was made on 26 February 2007 and was refused by HMRC on 3 June 2008.

23. The apportionment claimed is on the basis that the subscription income represents consideration for a number of separate supplies with different VAT treatment including:

(1) the right to play golf (standard rated prior to 1 January 1990);

(2) golf union fees such as fees for individual membership of Golf England and relevant county associations (said to be a disbursement or outside the scope of VAT);

(3) the supply of credit where members pay by instalments (said to be exempt from VAT);

(4) the right to play in club competitions (said to be exempt from VAT);

(5) the opportunity to hire club rooms (said to be exempt from VAT or outside the scope);

(6) various publications including newsletters, handbooks and magazines (said to be zero rated).

24. In the period since 1 January 1990 the subscription income of the Members' Clubs has been treated as exempt under the sporting exemption on the basis that they are non-profit making organisations. It is implicit therefore that they have been treated as making a single exempt supply in that period. Mr Sherry accepted on their behalf that the argument before us that there were multiple supplies some of which were not exempt would have consequences for the future and in respect of years that were still in time for assessment. However he maintained and we accept that whatever the treatment in the period after 1 January 1990 the Members' Clubs are still entitled to make a claim in relation to the period prior to that date, subject to capping arguments, and it should be determined by us on its merits.

Claims by the Proprietary Clubs

25. Trent Lock has a claim for repayment of £122,754 relating to the apportionment of annual subscriptions in the period from 1992 to 2008. That claim was made on 19 March 2009 and was refused by HMRC on 1 July 2009.

26. Trent Lock has not made any claim that subscriptions should be treated as exempt in the same period. Having said that the evidence adduced by Trent Lock is in part directed to establishing a distortion of competition with Members' Clubs. Whilst giving evidence Mr McCausland also stated that Trent Lock had intended at some stage to claim all the VAT accounted for on members' subscriptions on the basis that it was exempt. Subject to that, the claim by Trent Lock is therefore the same in principle as the claims made by the Member's Clubs although unlike the claims of the Members' Clubs it relates to periods after 1 January 1990.

27. Mendip Spring has a claim for repayment of £444,415. This does not relate to apportionment of annual subscriptions but is on the basis that there is a single exempt supply in the period from 1993 to 2008. The claim was made on 23 March 2009 and was refused by HMRC on 14 September 2009.

28. The claim by Mendip Spring is on the basis that the way in which the UK has implemented the sporting exemption distorts competition between Members' Clubs and Proprietary Clubs and is not justified by the terms of the Sixth Directive. In particular it breaches the principle of fiscal neutrality. Mendip Spring relies upon the direct effect of the Sixth Directive in support of its argument that the subscription income is wholly exempt even though it is a Proprietary Club.

The Issues

29. The appeals before us raise the following two broad issues:

(1) Whether supplies by the Members' Clubs and Trent Lock in consideration for members' subscriptions are single or multiple supplies.

(2) Whether supplies by Mendip Spring are exempt from VAT, in particular whether a restriction confining the exemption to non-profit making clubs is unlawful because it distorts competition and breaches the principle of fiscal neutrality.

30. In relation to issue 2, Mr Sherry relied upon the direct effect of the Sixth Directive. In doing so he also argued that the UK's implementation of the Sixth Directive by the 1994 Sports Order and the 1999 Sports Order goes beyond what was authorised by the Sixth Directive and is therefore ineffective. We deal with these arguments as part of issue 2.

31. The claims by the Members' Clubs and their appeals to the tribunal also refer to the correct VAT treatment of green fees paid by visiting golfers to non-profit making clubs. The question of whether green fees charged by non-profit making clubs to visiting golfers are standard rated or exempt is the subject of the appeal in *HMRC v Bridport and West Dorset Golf Club [2012] UKUT 272 (TCC)* . All parties were content that this aspect of the appeals before us should be stayed pending determination by the Upper Tribunal. The Upper Tribunal released its decision on 30 July 2012. In the light of the Upper Tribunal's decision to refer that issue to the Court of Justice of the European Union the parties are invited to seek any consequential directions for the purposes of the present appeals. Suffice to say we have not addressed that issue in this decision.

Findings of Fact

32. As indicated above we heard evidence from a representative of each appellant together with evidence from Miss Saunders. The witnesses were cross-examined by Mr Hill but there was no real dispute in relation their evidence. On the basis of that evidence we make the following findings of fact:

Chipping Sodbury

33. We heard evidence from Mr Robert Williams, the general manager of Chipping Sodbury since August 2005. It is a non-profit making unincorporated association with approximately 700 members. There are various categories of membership with annual fees in 2012 of up to £930. The club also offers a social membership at an annual fee of £75 plus VAT and there are approximately 60 such members. The club provides in-house bar and catering facilities available to members and their guests.

34. Members are provided with various benefits and services:

(1) The right to use the course, including a golf bag identification tag.

(2) A scorecard for each round of golf.

(3) Use of the clubhouse facilities.

(4) Use of practice facilities including a driving range, practice putting greens and practice bunkers.

(5) The opportunity to use the services of teaching professionals for golf tuition.

(6) Insurance whilst using the course and clubhouse.

(7) Various newsletters, flyers and advertising literature.

(8) The right to enter and play in golf competitions generally held on a Saturday and Sunday.

(9) Use of a membership bar-card which gives a discount on bar and catering services.

35. Each category of member other than social members pays union fees to the county association which also collects fees on behalf of Golf England. Membership of Golf England entitles an individual to consideration for a handicap regulated by the Council of National Golf Unions ("CONGU"). This in turn entitles a golfer to enter "open competitions" at other golf courses.

36. Non-members when paying green fees are entitled to much the same benefits and services save they are not able to enter club competitions nor are they entitled to a membership bar-card.

37. The claim by Chipping Sodbury relates to the period prior to 1990. Mr Williams only joined the club as general manager in August 2005. He did not have any direct knowledge of whether prior to 1990 the union fees were separated out on the invoice provided to members. Likewise he did not know whether at that time it was possible to pay membership subscriptions by instalments or whether there was a separate charge for credit. We are unable to make findings of fact in relation to these matters.

38. Mr Williams was able to say that in the period 1973 to 1990 the right to enter club competitions was part of the package of benefits arising from membership and that there was a separate charge on top of the annual subscription if a member entered

a club competition. He also stated that members received a discount on the charge for use of club rooms. Whilst the source of his knowledge on these matters was not clear we accept his evidence in this regard.

The Dyke

39. We heard evidence from Mr Christopher Allan, finance director of the Dyke. He has been a director of the Dyke since March 2008 but he has been a member since 1993 or 1994. It is a company limited by guarantee. It operates as a non-profit making members club, with approximately 700 members including 100 social members. There is an in-house bar and catering facility serving members, guests and visiting players. Outside bookings are also taken. The club has a full on-licence for the sale of alcohol so that anyone can enter, subject to a right of refusal at the door and the club dress code.

40. There are various categories of membership with annual fees in 2012 of up to £1,005. Members receive much the same benefits and services as Chipping Sodbury. In addition they have an opportunity to purchase golf equipment from the retail shop on the premises at preferential rates. Non-members also receive much the same benefits and services as non-members at Chipping Sodbury.

41. Mr Allan was not aware how the club was operated before 1990. So for example he was unable to say whether there was an instalment option for membership subscriptions before 1990. The current position is that members can pay by 11 equal instalments and there is a small administration charge. It is taken up by approximately 10% of members but it is not a particular selling point.

42. Members pay entrance fees to enter club competitions – membership gives them the right to enter club competitions. A preferential room hire charge is available to members. Union fees to the county association are shown separately on invoices to members and this includes the fee to Golf England. The Dyke then accounts for this to the county association.

43. In the absence of direct evidence as to how matters were administered prior to 1990 we are unable to make any findings of fact relevant to that period. In relation to union fees we are content that the correct treatment should be dealt with as a matter of quantum, to be determined after the points of principle if necessary.

44. Mr Allan said that the attraction of joining the Dyke is the quality of the course and the club competitions. In his words "*the magnet is the quality of the golf course*". Apart from this, some members will choose to enjoy the other facilities and benefits of membership whilst some members will choose not to do so. No discounts are given on the membership subscription if a member chooses not to use certain facilities or benefits. We accept Mr Allan's evidence in this regard and indeed we find as a fact that the same applies to each of the appellants.

Trent Lock

45. We heard evidence from Mr Edward McCausland who is the managing director of the company which owns Trent Lock, KBA and EM Developments Limited. Together with Mr K B Armstrong he founded and developed Trent Lock in 1990. In addition to golf courses, driving range and golf shop there are bar, catering, conference and spa facilities available to the general public.

46. The club has a members' section with approximately 472 members. There are various categories of membership with annual fees in 2012 of up to £568. Members receive much the same benefits and services as Chipping Sodbury, but also the following in particular:

(1) Complimentary ½ hour golf lesson with a PGA professional.

(2) Discounted driving range fees.

(3) Discounted spa treatment rates.

47. The structure of the membership is identical to a typical Members' Club. Members elect their own secretary, competitions secretary, treasurer, captains and vice-captains. Each section of membership (mens, ladies, juniors and seniors) organises and runs its own competitions. There are competition entry fees which are used exclusively for the purpose of prizes. In some cases non-members pay a slightly higher entry fee. Any surplus is retained by the members.

48. Non-members paying green fees also receive much the same benefits and services as non-members at Chipping Sodbury.

49. Members have the option of paying subscriptions by instalments. In that case the particular members are introduced to a business trading as "Premium Credit" who have a credit licence and make a charge for credit.

50. If a member wants to hire a room for an event there will be a charge, although he or she may receive a discount subject to the discretion of Mr McCausland.

51. Mr McCausland stated that union fees were shown separately on invoices and zero-rated. However we were not shown any membership invoices and in those circumstances we consider that findings of fact in this regard should if necessary be dealt with in any quantum hearing. Trent Lock accounts for individual union fees to the county association. Whilst timing differences may cause a small mismatch between the sum charged to a member and the sum accounted for to the county association we do not consider that this affects the treatment of those sums as a matter of principle.

52. As with the Dyke, some members will choose to enjoy facilities and benefits of membership other than playing golf and some members will choose not to do so. For example some members will take up the opportunity of entering club competitions whilst others will not. No discounts are given on the membership subscription if a member chooses not to use certain facilities or benefits.

Mendip Spring

53. We heard evidence from Mr Ralph Richards who is the ultimate owner of Yeo Finance Ltd which itself owns Mendip Spring. Yeo Finance purchased Mendip Spring in 1993. In the same way as Trent Lock, the structure of the membership at Mendip Spring is identical to a typical Members' Club.

54. The appeal of Mendip Spring is on the basis that the sporting exemption for non-profit making Members' Clubs distorts competition with Proprietary Clubs. We deal with the evidence as to distortion of competition in the following section.

Generally

55. Miss Saunders gave evidence as to the distortion of competition between Members' Clubs and Proprietary Clubs, illustrating this by reference to the clubs which she owns, namely Cambridge Meridian Golf Club and Abbotsley Golf and Squash Club. She explained the real difficulties her businesses have experienced because, subject to the outcome of these appeals, she is required to charge VAT on members' subscriptions whereas the Members' Clubs, which to all intents and purposes offer an identical service, are not required to charge VAT.

56. Miss Saunders made out a powerful case to establish that the different VAT treatment applying to Members' Clubs and Proprietary Clubs gives rise to distortion of competition. The evidence in relation to Trent Lock and Mendip Spring supported the existence of such distortion. Neither HMRC, nor indeed the Members' Clubs suggested otherwise, although Mr Hill did not consider that the word "distortion" was apt. Based on the evidence we have heard we are satisfied that in so far as there is competition for members, Members' Clubs do have a competitive advantage over Proprietary Clubs as a result of the different VAT treatment. To that extent the market for the provision of golfing facilities is distorted.

Issue 1 – Single Supply or Multiple Supplies

57. In this section we deal with the respective submissions of the parties and the reasons for our decision on the issue of whether the appellants are making a single supply or multiple supplies.

58. There was a large measure of agreement, as one would expect, as to the correct approach as a matter of law to the distinction between single and multiple supplies. What divided the parties was how the relevant principles apply to the facts of the present appeals.

59. The starting point is the decision of the Court of Justice in *Card Protection Plan v C & E Case C-251/05 [1999] STC 270* ("*CPP*"). The ECJ was concerned with the question of the distinction between single and multiple supplies. In deciding whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be taxed separately, regard must first be had to all the circumstances in which that transaction takes place, taking into account:

"29.… first, that it follows from article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, secondly, that a supply which comprises a single service 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 be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

"30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied: Customs and Excise Commissioners v. Madgett and Baldwin (trading as Howden Court Hotel) (Joined Cases C-308/96 and 94/97) [1998] STC 1189, 1206, para 24."

60. There have been a large number of cases in the ECJ since CPP. Mr Hill helpfully summarised the principles which can be derived from those cases in his skeleton argument:

(1) Every transaction must normally be regarded as distinct and independent (*CPP* at paragraph 29; *Levob Case C-41/04 [2006] STC 766* at paragraph 20; *Aktiebolaget NN Case C-111/05* at paragraph 22);

(2) However, a transaction which 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 (*CPP,* paragraph 29; *Levob,* paragraph 20; *Aktiebolaget NN,* paragraph 22) – this requires a national court to adopt an economic approach in analysing whether there is a single supply;

(3) The essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service *(CPP,* paragraph 29; *Levob,* paragraph 20; *Aktiebolaget NN,* paragraph 22). This requires a national court to analyse the essential features of the transaction from the point of view of the typical consumer;

(4) The first circumstance in which there is a single supply is *"… where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied*" (*CPP,* paragraph 30; *Levob,* paragraph 21);

(5) The second circumstance in which there is a single supply is *"… 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" (*Levob,* paragraph 22; *Aktiebolaget NN,* paragraph 23). This is one aspect of a more general principle of EU VAT law that "*consideration of economic realities is a fundamental criterion for the application of the common system of VAT*" (paragraph 39 of Joined Cases *LMUK and Baxi C-53/09 and C-55/09*)

(6) In assessing whether there is a single indivisible economic supply, it is necessary to determine whether both supplies "*are so closely linked that, in isolation, from the perspective of the average consumer, they do not have the necessary practical benefit for consumers*" (paragraph 69 of the Opinion of AG Kokott in *Levob*) and whether each element can be used without the other (paragraph 71 of the AG's Opinion in *Levob* and *Aktiebolaget NN,* paragraph 25);

(7) It is also necessary to concentrate on "*the economic purpose of the transaction*" and to assess the substance of the supplies "*without entering the realms of the artificial*" and "*without undue contrivance*" (*Levob*, paragraph 24; *Aktiebolaget NN*, paragraph 25); furthermore, "*account must be taken of commercial reality*" (paragraph 45 of the Opinion of Advocate General Léger in *Aktiebolaget NN*);

(8) In assessing whether there is a single supply "*the fact that a single price is charged is not decisive*", but "*Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service*" (*CPP,* para 31). The charging of a single price "*may be an indication, without being decisive, that there is a single supply*" (*Purple Parking/Airparks Case C-117/11* at paragraph 34);

(9) "*The fact that in other circumstances, the elements in issue can be or are supplied separately is of no importance, given that that possibility is inherent in the concept of a single composite transaction*" (*Purple Parking/Airparks* at paragraph 31).

(10) The cost of providing the respective elements in question is not relevant unless it affects "*the provision of the service from the point of view of the customer*" (*Purple Parking/Airparks* at paragraphs 22 and 37).

61. Mr Sherry accepted the principles set out above but with a number of caveats, principally directed towards the way in which those principles are applied in practice.

62. Firstly he identified that whilst a transaction should not be artificially split, that begged the question of when is it artificial to split a transaction? In particular he submitted that if no distortion in the functioning of the VAT system arises from splitting the transaction then it may not be artificial to do so. We accept that submission.

63. Secondly he submitted that the typical customer may have a choice as to whether to take some or all of the elements of the transaction separately. The principle of fiscal neutrality operates so that a multiple supply is not precluded simply because the customer does not have a choice. We accept that submission.

64. Thirdly he submitted that the cost of the various elements is a factor in the analysis. In making this submission he relied on what the ECJ had said in *Levob* at paragraphs 28 and 29:

> "*28 Apart from the importance of the customisation of the basic software to make it useful for the professional activities of the purchaser, the extent, duration and cost of that customisation are also relevant elements in that regard.*
>
> *29 On the basis of these different criteria, the Gerechtshof te Amsterdam correctly concluded that there was a single supply of services within the meaning of Article 6(1) of the Sixth Directive, since those criteria in fact lead to the conclusion that, far from being minor or ancillary, such customisation predominates because of its decisive importance in enabling the purchaser to use the software customised to its specific requirements which it is purchasing.*"

65. We do not accept Mr Sherry's submission in this regard. As Mr Hill pointed out the relevance of cost in *Levob* and other cases where it has been considered has not been in determining whether there was a single or multiple supply. It is relevant to the next question, namely if there is a single supply what is the predominant element of that supply in determining how the supply should be described for VAT purposes?

66. The application of the principles described above can be seen on the facts of the particular cases referred to in support of those principles. In addition we were referred to the facts of other cases which illustrate the application of those principles. Mr Sherry identified a distinction between two types of case. On the one hand cases where an analysis based on principal and ancillary elements is appropriate, in particular where the elements are not "intertwined". On the other hand cases where the appropriate analysis is based on whether it would be artificial to split the transaction so as not to distort the functioning of the VAT system, in particular where the elements are "intertwined". In the latter case the starting point is that every supply is a separate supply.

67. We did not understand Mr Hill to take issue with that submission. He also identified the principal/ancillary analysis as opposed to the economic analysis. There appeared to be some divergence between the parties as to the source of the economic analysis, whether it was *CPP* or *Levob*, and which analysis should be considered first. Given that the parties agree on the underlying principles we do not regard that as an issue of substance.

68. In the light of these principles, Mr Sherry invited us to find that there were various separate supplies in consideration for the members' subscriptions. In his submission the supply of a right to play golf is completely different in nature from the right to use the clubhouse, to hire rooms or to obtain discounts in the bar. These were not ancillary to the right to play golf because they were not a means to the better enjoyment of golf. For example the golf course can be played and enjoyed without also receiving the publications provided in the price of the subscription. Without

conceding the point, he submitted that the closest the respondents get to an ancillary supply is the benefit of receiving a scorecard when playing a round of golf.

69. Mr Sherry submitted that the separate elements are not closely intertwined. In this regard he highlighted the fact that social memberships are available which would give members all the benefits of membership other than the right to play golf. He pointed out that the subscriptions for social membership are not insignificant.

70. Whichever analysis is used therefore Mr Sherry submitted that there are several separate supplies. Either the separate elements are not ancillary to the playing of golf because they are not a better means to enjoy the golf. Alternatively they are not so closely intertwined that it would be artificial to split them up, and splitting them would not cause any distortion to the VAT system.

71. Save in relation to golf union fees, which we deal with separately below, we do not agree with Mr Sherry's submissions on this issue. In our view the following further factors in addition to those relied upon by Mr Sherry are relevant to the analysis:

(1) Each of the appellants offers various membership benefits as part of a package of benefits. In the words of Mr Allan, "*the magnet is the quality of the golf course*". Playing golf on the course is the principal benefit of membership.

(2) A single price is paid for the package of benefits. Members cannot pick and choose which benefits they wish to receive and pay only for those benefits.

(3) The right to pay the membership subscription by instalments is simply one of the terms on which the consideration for the supply is payable. It is not a separate supply independent of the membership package even where there is a separate administrative charge (see *Everything Everywhere Ltd v HMRC Case C-276/09 [2011] STC 316*).

(4) The right to enter club competitions where the member already has the right to play on the course is, in our view, an ancillary supply. It is a means to better enjoyment of the principal supply.

(5) Some of the benefits which the appellants seek to treat as separate supplies are in our view very much incidental to the principal benefit of membership. For example the publications received from the clubs and the possibility of obtaining discounted or free room hire may fairly be described as insignificant elements of the package of benefits. We take the view that they are so closely linked that in isolation they do not have the necessary practical benefit for consumers.

(6) In any event the publications are a means of better enjoying the principal supply, namely playing golf on the course. It is difficult to say that an opportunity to obtain discounted or free room hire falls into the same category. However it would be entering into the realms of artificiality to describe that as a separate supply from the package of benefits generally. We do not consider that treating this element as part of the single supply has any distorting effect on the VAT system.

72. In light of the facts we have found, and on the basis of the factors described above we consider that each of the appellants, including Mendip Spring in so far as it raises this argument, is making a single supply of the right to play golf on the course.

73. In our view the position in relation to golf union fees is different. Unfortunately the evidence available to us in relation to how these fees have been treated at all material times is far from clear. In so far as they have been identified separately on invoices to members and those sums have been accounted for to the relevant association then it appears to us that they are in the nature of disbursements. As such they do not form part of any supply by the appellants to their members and are outside the scope of VAT. If necessary this can be dealt with as a matter of quantum and further evidence may be led as to the circumstances in which the fees were charged, invoiced and accounted for.

Issue 2 – Exemption for Supplies by Proprietary Clubs

74. In this section we deal with the respective submissions of the parties and the reasons for our decision on the issue of whether Mendip Spring (and Trent Lock in so far as it pursues this argument) is making supplies which are exempt under the sporting exemption.

75. There is no dispute that the Proprietary Clubs are entitled to rely on the direct effect of the Sixth Directive to the extent that it is not incorporated into UK domestic law, or where incorporation into UK domestic law is unduly restrictive and restrictions go beyond what is permitted by the Sixth Directive itself. See *Becker v Finanzamt Munster-Innenstadt C-8/81 [2000] STC 16 at [49]* and in the context of the sporting exemption *EC Commission v Spain C-124/96 [1998] STC 1237 at [18] to [22]*.

76. It was also common ground between the parties that exemptions are, as a general rule, to be construed restrictively but not so strictly that the purpose of the exemption is defeated. In the context of the sporting exemption the Court of Justice in *Canterbury Hockey Club v HMRC C-253/07 [2008] STC 3351* stated at [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 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).*"

77. As far as the underlying purpose of the sporting exemption is concerned The Court of Justice stated at [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).*"

78. Mr Sherry's submissions on behalf of the Proprietary Clubs were essentially as follows:

(1) Avoiding distortion of competition is part of the principle of fiscal neutrality. That principle precludes treating in a different way similar supplies made by suppliers in competition with one another.

(2) Member States cannot introduce restrictions which go beyond the terms of *Article 13A(2)*.

(3) When implementing the sporting exemption it is incumbent on Member States to minimise the distorting effects of the exemption, and in particular the distorting effects of any restrictions on the availability of the exemption.

(4) The UK has breached those principles, firstly by restricting the exemption in the 1994 Sports Order to non-profit making bodies; secondly by restricting the exemption to eligible bodies in the 1999 Sports Order. Those restrictions have the effect of unlawfully distorting competition.

79. In support of his submissions on fiscal neutrality Mr Sherry relied on a recital to the Sixth Directive which speaks of enhancing "*the non-discriminatory nature of the tax*". More particularly recital (4) to the Principal VAT Directive refers to eliminating "*as far as possible, factors which may distort conditions of competition, whether at national or Community level*". Recital (7) refers to "*neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden*".

80. Mr Sherry's submissions at (1) to (3) above are not contentious if they are applied in a way consistent with the sporting exemption. We accept that we must construe the terms of the Sixth Directive in the light of the principles described and to that end in a way which, consistent with the terms and purpose of the sporting exemption, minimises distortion of competition. In doing so however we cannot ignore the express terms of the exemption.

81. Mr Sherry submitted that the restrictions on the sporting exemption introduced by the 1994 Sports Order and the 1999 Sports Order clearly created a distortion of competition between the non-profit making Members' Clubs and the Proprietary Clubs. For the reasons given above we accept that such distortion of competition does arise on the facts.

82. In response to the submission at (4), Mr Hill submitted that the claim was wholly unarguable. The different treatment is expressly intended by the Sixth Directive. For the following reasons we accept that submission.

83. *Article 13A(1)(m)* expressly restricts the sporting exemption to "*non-profit making organisations*". It is inherent therefore that profit making bodies such as the Proprietary Clubs will not benefit from the exemption. Distortion of competition is therefore inevitable.

84. The restriction of the sporting exemption to non-profit making bodies has been recognised by the Court of Justice on several occasions.

85. In *Commission v Spain* referred to above, the issue concerned provisions in Spain whereby the sporting exemption was restricted to organisations whose membership fees did not exceed a specific amount. The Court of Justice held that Spain had thereby failed to fulfil its obligations under *Article 13(A)(1)(m)*.

> "*To apply the criterion of the amount of membership fees may lead to results contrary to Article 13(A)(1)(m). As the Advocate General has pointed out at paragraph 5 of his Opinion, to apply such a criterion may result, first, in a non-profit making body being excluded from the benefit of the exemption provided for by the provision and, secondly, in a profit-making body being able to benefit from it.*"

86. In *Kennemer Golf & Country Club v Staatssecretaris van Financien C-174/00 [2002] STC 502* the Court of Justice was concerned with whether or not the taxpayer was a non-profit making organisation. The Court stated at [26] and [27]:

> "*26. …it must be observed first of all that it is clear from Article 13A(1)(m) of the Sixth Directive that an organisation is to be classed as being non-profit-making for the purposes of that provision by having regard to the aim which the organisation pursues, that is to say that the organisation must not have the aim, unlike a commercial undertaking, of achieving profits for its members (see, as regards the exemption provided for in Article 13A(1)(n) of the Sixth Directive, the judgment given today in Case C-267/00 Commissioners of Customs & Excise v Zoological Society of London [2002] ECR I-3353, paragraph 17). The fact that it is the aim of the organisation which is the test of eligibility for the VAT exemption is clearly borne out by most of the other language versions of Article 13A(1)(m), in which it is explicit that the organisation in question must not have a profit-making aim (see besides the French version, the German version - Gewinnstreben, the Dutch version - winst oogmerk, the Italian version - senza scopo lucrativo and the Spanish version - sin fin lucrativo).*
>
> *27. It is for the competent national authorities to determine whether, having regard to the objects of the organisation in question as defined in its constitution, and in the light of the specific facts of the case, an organisation satisfies the requirements enabling it to be categorised as a non-profit-making organisation.*"

87. In *Canterbury Hockey Club v HMRC* referred to above, the Court of Justice was concerned with whether supplies made by England Hockey to affiliated hockey clubs were within the scope of the exemption. The Court stated as follows:

> "*20. The benefit of the exemption under Article 13A(1)(m) of the Sixth Directive is subject to certain conditions, which arise from that same provision.*
>
> *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 order for reference, that requirement may be treated as satisfied in the main proceedings.*"

88. We regard it as clearly established that eligibility for the sporting exemption rests in part on the distinction between non-profit making bodies and profit making bodies. Given the specific terms of the exemption, the general principle of fiscal neutrality cannot be used to give the exemption a wider application that encompasses profit making bodies. This limitation on the principle of fiscal neutrality was recently expressed by Advocate General Sharpston in her Opinion in *Finanzamt Frankfurt am Main V-Hochst v Deutsche Bank AG Case C-44/11 at [56] to [60]*.

89. Notwithstanding the judgments of the Court of Justice, Mr Sherry sought to persuade us that the exemption was available to the Proprietary Clubs. We can see no basis on which that argument can be sustained.

90. That is sufficient for us to deal with Issue 2. However Mr Sherry also made further submissions and criticisms of the means by which the UK has implemented the sporting exemption. In particular he criticised the restrictions introduced in the 1999 Sports Order as going further than was permitted either by the opening words of *Article 13A(1)* or by the conditions in the four indents of *Article 13A(2)(a)*.

91. None of the appellants has appealed on the basis that the restrictions introduced by the 1999 Sports Order have been applied so as to prevent it obtaining the benefit of the sporting exemption. In particular no appellant has suggested that whilst it is a non-profit making body for the purposes of the exemption it does not fall within the definition of "*eligible body*" introduced by the 1999 Sports Order. None of the appellants has purported to set up a structure similar to that in *Chobham Golf Club* where the course is rented to a members section.

92. Mr Sherry submitted that we could still make a decision as to the lawfulness of the 1999 Sports Order. The restrictions imposed by the 1999 Sports Order were, he said, part and parcel of the distortion of competition point.

93. Mr Hill submitted that the Proprietary Clubs were asking the Tribunal to decide a hypothetical issue. On the facts of both appeals the provisions of the 1999 Sports Order do not affect the tax treatment of the appellants' supplies. He relied on the

decision of McCullough J in *Odhams Leisure Group Limited v Customs & Excise Commissioners [1992] STC 332* to support his submission.

94. For the reasons we have given above there is distortion of competition. Further it is accepted by both parties that the Proprietary Clubs are profit making bodies. In those circumstances it would be inappropriate for us to say anything about the lawfulness of the 1999 Sports Order. There is no factual basis on which we can judge the effect of the provisions introduced by the 1999 Sports Order. We agree with Mr Hill that in this regard we are being asked to determine a hypothetical issue over which we do not have jurisdiction.

95. Finally in relation to Issue 2, the appellants at one stage sought to argue that *Note 1 Group 10 Schedule 9 VATA 1994* which excludes exemption for supplies of "*residential accommodation, catering or transport*" was an unlawful restriction on the exemption. In the event however Mr Sherry accepted that the point did not arise on the facts of the present appeals. In the circumstances he did not ask us to deal with the issue.

Conclusion

96. In all the circumstances and for the reasons given above we are satisfied that at all material times there has been a single supply of services by each of the appellants. Further, supplies by the Proprietary Clubs after 1990 have properly been standard rated. In those circumstances, save in relation to union fees, we dismiss the appeals.

97. In relation to union fees, each party should consider its position in the light of this decision. If necessary any party may apply for directions from the tribunal to resolve any outstanding issues. Any such application should be made within 56 days of the release of this decision.

98. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DAVID DEMACK
TRIBUNAL JUDGE

RELEASE DATE: 30 August 2012