

**FIRST-TIER TRIBUNAL
TAX**

**JAMES GILLAN & MARGARET GILLAN
T/A GRACEHILL GOLF COURSE**

Appellants

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS (VAT)**

Respondents

**TRIBUNAL : IAN WILLIAM HUDDLESTON (JUDGE)
MISS PATRICIA GORDON**

Hui Ling McCarthy (Counsel for the Appellants)

Joshua Shields, Instructed by the **Solicitor for HMRC**

Sitting in Belfast on 4th August 2009

DECISION

The Appeal

1. The decision appealed is an assessment raised against James Gillan and Margaret Gillan trading in partnership as Gracehill Golf Course ("the Appellants"). The assessment is raised pursuant to Section 73 of the VAT Act 1994 ("the Act") in the sums of £2,269 (plus interest) and £61,481 (plus interest) representing VAT arrears for the periods 09/04 and 12/04 to 06/07 respectively. The assessments are dated respectively the 2 October 2007 and 3 January 2008.
2. The appeal relates to facility fees which Mr. and Mrs. Gillan charged under a Licence Agreement ("the Licence") entered into on the 1 May 1995 between the Appellants and the Trustees of Gracehill Golf Club ("the Club"), a separate and unincorporated members club affiliated to the Golfing Union of Ireland.
3. The Appellants assert that the supplies made to the Club under that Licence are exempt from VAT by virtue of Item 1 of Group 1 of Schedule 9 of the Act, which exempts:

"The grant of any interest in or right over land or any licence to occupy land."
4. HMRC have taken the view that the facility fees payable under the Licence should have been standard rated as being for the supply of a service rather than exempt, as is the case for a supply of land. The Appeal, therefore, essentially focuses on whether or not there has been an exempt supply of "property" under the Licence.

The Facts

5. The facts of the case are as follows.
6. The Appellants trade in partnership as a golf course, and derive their income from, primarily, three sources:
 - (a) the facility fees ("Facility Fees") which are payable by the Club under the terms of the Licence;
 - (b) green fees which are payable by casual non-members or visitors to the golf course; and
 - (c) the receipts from the bar and restaurant operation which forms an integral part of the Appellants' operation.

7. It is accepted that the latter two supplies are subject to VAT, and VAT is both charged and returned in respect of those supplies. The dispute which arises in this case is as to whether or not the Facility Fees should be subject to VAT at the standard rate.
8. The relationship between the Appellants and the Club was condensed into the terms of the Licence which, initially, was for a year, but under which the Club appear to be overholding. The Licence document, quite simply, provides that:

" In exchange for payment of the Facility Fees, the Club (and therefore its members) are entitled to non-exclusive use of the Golf Club and Club House."

9. It is obviously settled law that the title ascribed by the draftsman of a document does not determine its nature – what one has to look at is the true substance of the document or, beyond that, to the "economic purpose" of the relationship between the parties. Nonetheless, it is essential I feel to quote some of the salient sections from the Licence in this case:
 - (a) clause 2 – contains a declaration (which is not uncommon in document of this type) that the Licence [is] *"not intended to confer exclusive possession upon the Licensees [ie the Club and its members]"*;
 - (b) clause 3.1 provides that *"in consideration of the payment of the Facilities Fees, the Licensees and the Club Members [are] to have the non-exclusive use of the Club Facilities for the purposes [broadly] of playing golf or inviting guests to play golf"*;
 - (c) clause 6 indicates that the Licensees [are] *"permitted to use all areas designated to them by the Owners for the purposes of access and egress in common with [others]"*;
 - (d) clause 7.1 provides the Owners with the *"unfettered discretion [to] close the Club Facilities for repairs or on "specified days" subject to prior notice"*;
 - (e) clause 8 (playing times) provides as follows, *"the Owners in their sole discretion after consultation with the Licensees shall decide the days and times when the Club shall have the non-exclusive use of the Club Facilities"*;
 - (f) clause 10 provides for what is described as "amicable sharing", and provides that the Licensees shall use their *"best endeavours to share the use of the Club Facilities amicably and peaceably with the Owners and with such other persons as the Owners shall from time to time permit to use same, and shall not interfere with or otherwise obstruct the right of the Owners to possession and control of the Club Facilities"*; and finally

(g) clause 16.2 contains an acknowledgement that the Licensees [have] "*a non-exclusive revocable licence to use the Club Facilitiesand that the Licensees and the Club Members shall not have exclusive possession of the Club Facilities under any circumstances, and that the Owners have reserved to themselves the right at all time to possession and control of the Club Facilities*".

10. For the sake of completeness I include a definition of "Facility Fees", which is defined as:

"Firstly, the aggregate of all sums of money or other consideration received or receivable by the Owners during the period of this Licence for entrance fees, membership and other subscriptions, green fees, payments under franchise agreements, all goods sold, leased or otherwise disposed of, and for all services provided or performed by the Owners at, in, from and upon the Club Facilities or elsewhere, and shall for the avoidance of doubt include all grant subsidies, fees of a revenue nature, paid or payable to the Owners by national or local government, or any public authority or source and, secondly, any value added tax charged thereon or any similar tax which shall replace value added tax."

11. In terms of the payment of the Facility Fees, the Licence Agreement provides, and indeed the Appellants' evidence confirmed the point, that the Appellants largely have the right to set both joining and membership fees, which are then levied on club members annually, and the appropriate amount remitted by the Club to the Appellants.

12. I have quoted liberally from the Licence but, as I have already said, the duty of this Tribunal is to look at the economic substance of what constituted the relationship between the Club and the Appellants, rather than purely the wording of the Licence Agreement. Having said that, it was clearly the initial intent of the parties that "exclusive possession" was to be denied to the Club, and the language adopted in the Licence Agreement more than adequately confirms that intent.

13. From the evidence presented to the Tribunal, both by Mr. Gillan and by Mr. Colin Campbell (a former Captain of the Golf Club) we were able to distil the following additional facts:

(a) the Licence Agreement had been entered into in 1995 shortly after the Appellants had set up the Golf Course;

(b) in exchange for the Facilities Fees, the Appellants undertook the day to day running of the Club House and Golf Club, to include:

(i) maintenance and upkeep to the Golf Course itself;

(ii) the provision of Club House Facilities – largely consisting of a restaurant and bar facility;

- (iii) the control of tee times – initially through a manual system and more latterly through a computerised system which was available through the internet;
 - (iv) the provision of reception duties – including some small amount of administration conducted for and on behalf of the Club.
- 14. Mr. Gillan did not take an active role in the Club itself, although both under the terms of the Licence and the Club Rules, it was clear that he did have the ability to attend Club Meetings and, moreover, influence the Club to some extent in certain key areas, such as the expulsion of members.
- 15. On the issue of the Facilities Fees, Mr. Gillan gave evidence that he annually set the membership fee which was then levied, by the Club, on its membership. That membership consisted of a total number of 346 fully paid members, 326 of whom had "seven day" or "full" memberships and 20 of whom had a "five day" membership, the latter unsurprisingly being limited to playing golf Monday to Friday inclusive, but not at the weekends.
- 16. From the evidence presented to us, we find that members (broadly speaking) were entitled to:
 - (a) use the Club House on a non-exclusive basis, but in conjunction with other visitors to the Club House;
 - (b) exclusive use of a small committee room within the Club House;
 - (c) the ancillary book keeping and administrative assistance provide by the Appellants' staff; and
 - (d) last, but certainly not least, the ability to use the Golf Course for playing golf – both generally and for club tournaments and/or competitions.
- 17. Members who were seven day members were entitled to play on the Golf Course at weekends, between the hours of 7am to 12 noon on Saturday and 7.30am to 11am on Sunday. There was produced to the Tribunal a print out from the Club's website which showed that those tee times were excluded from the internet booking of tee-times that is otherwise made available to non-members. It was clear from Mr. Gillan's oral evidence that members of the Club utilised most of the available slots, those generally being re-booked on a weekly recurring basis. Having said that, Mr. Gillan did give evidence that if a tee-time had not been reserved, that he and/or his staff would allow a visitor or non-member to use that vacant slot. No evidence was adduced as to how frequent an occurrence that might be, but certainly the possibility was there.
- 18. It was also clear from the evidence of both Mr. Gillan and Mr. Campbell that members who paid their membership fees to the Club (and then to the

Appellants) could play golf at other times during the week – particularly in the evenings during summer time – subject always to availability.

19. Given that the "full" membership was called a "seven day membership", this is hardly surprising, and certainly Mr. Campbell made it clear that it was an expectation on his part (and presumably other members) that he would be entitled to use the Facilities on any day of the week subject only to the issue of availability.
20. It is on that factual matrix upon which the Appellants rest their case - namely that the Club, as an unincorporated association, had exclusive possession of the Golf Course sufficient to bring it within the exemption contained in Item 1, Group 1 of Schedule 9 of the Act, and that during the tee times on Saturday and Sunday mornings, that the Club had "control" over the Golf Course in the sense that it controlled the tee-bookings during those periods and, as such, had control over who could enter the Golf Course to play. What they say is that this represents a supply of land such as would qualify for the exemption.
21. HMRC contended that the Appellants merely provided the Club with "*golfing facilities, including the use of the land, as opposed to the leasing or letting of a movable property, and that what is provided is a non-exclusive right to use the land, with no legal right to exclude any other person.*"
22. It is that dispute which falls for determination by this Tribunal.

The Law

23. The relevant exemption on which this case is based is contained in Group 1 of Schedule 9 of the Act, read in conjunction with Section 31.
24. Section 31 of the Act provides that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9.
25. It is clear that exemptions of this type are to be strictly interpreted (see *Belgian State –v- Tempco Eurorp SA (Case C-284/03)* but not "*in such a way as to deprive the exemptions of their intended effect.*"
26. The relevant parts of Group 1 of Schedule 9 are:

"Item Number

- (1) the grant of any interest in or right over land or of any licence to occupy land other than:

.....

- (m) the grant of facilities for playing any sport or participating in any physical recreation

.....

Notes

- (16) paragraph (m) shall not apply where the grant of the facilities is for:
 - (a) a continuous period of use exceeding 24 hours; or
 - (b) a series of 10 or more periods, whether or not exceeding 24 hours in total, where the following conditions are satisfied:
 - (i) each period is in respect of the same activity carried on at the same place;
 - (i) the interval between each period is not less than one day and not more than 14 days;
 - (ii) the consideration is payable by reference to the whole series, and is evidenced by written agreement;
 - (iii) the Grantee has exclusive use of the facilities; and
 - (iv) the Grantee is a school, a club, an association or an organisation representing affiliated clubs or constituent associations.
- 27. As I have mentioned before, to deal with the question of whether or not the exemption applies, regard must be had to all the circumstances under which the supply takes place, in order to identify its characteristic features or economic purpose.
- 28. The Appellants argued that the supply was to the Club, rather than to each member individually, and that the actual arrangement in this case was the "supply to the Club of exclusive use of the Golf Course for particular periods – ie. Saturday and Sunday mornings, and during club competitions and other events" when it was argued, "the Club had control over those parties who were entitled to enter the Golf Course to play".
- 29. In support of that contention, Counsel referred to the case of the *Swedish State –v- Stockholm Lindopark [2001] STC 103 ("Lindopark")* which, as in this case, concerned the VAT treatment of green fees. In that case, however, it was decided that the Appellants should levy VAT in respect of green fees payable by non-members at standard rate.
- 30. We were referred to the opinion of Advocate General Jacobs (paragraph 35) in which he acknowledged that there are cases when the exemption would apply:

"If a person or entity were to pay for the exclusive use of a course for a specified period – say, in order to organise a tournament or championship – with a concomitant right to charge entrance fees for players and/or spectators – that would appear to partake fairly clearly of the nature of a lease or let. The same would not apply, however, to the casual golfer or group of golfers coming to play a round. Whilst it is obviously difficult to play golf without a course to play it on, the service provided in that case is the opportunity to play the game, and not the opportunity to occupy the course. Indeed, a golfer may be thought of not as occupying the course in any sense, but as traversing it. He or she has the right merely to move from one part of a golf course to the next, at a pace usually determined in part by other users of the course, for the sole purpose of enjoying the facilities provided at each stage. In that, the first 18 holes do not perhaps differ in essence from the 19th."

31. In support of that contention, Counsel also suggested that "exclusive occupation" could be restricted and did not prevent access by third parties, the issue being the occupiers' relationship with those third parties, rather than with the Landlord, which is material. The Appellants' submission being that in the present case the Club had the ability during those key times to exclude third parties. In short, Counsel for the Appellants invited us to conclude that the right of exclusion (or control) and occupation on Saturdays, Sundays and competition days was sufficient to justify her claim that there was a supply of land.
32. Neither Counsel referred to it, but at paragraph 38 of the same Opinion the Advocate General also stated:

"I would add, as salient and typical characteristics of a lease or let, that it necessarily involves the grant of some right to occupy the property as one's own, and to exclude or omit others, a right which is, moreover, linked to a defined piece or area of property. In the light of all those considerations, Lindopark's activities, as described to the Court, do not appear to me to be of the nature of a lease or let of [the] Golf Course or any part thereof."
33. Counsel also referred us to the case of *Customs & Excise Commissioners –v- Sinclair (Collis) Limited (2003 STC 898)*. That case involved the question of whether or not the contractual ability to locate cigarette vending machines constituted a letting of "movable" property.
34. On referral to the European Court of Justice, it was concluded that it did not, and that the *"essence of a "letting of a movable property" was the conferment for an agreed period and for payment of the right to occupy the property as owner, and to exclude all persons from enjoyment of that right"*.

The Decision

35. In this case, to get to the economic purpose of the Licence, the question which the Tribunal asked itself is "What did members actually expect in return for the membership fee which they contributed?"
36. In the Tribunal's view, the payments were made not with the intention of gaining exclusive possession of the Golf Course – although I acknowledge that would necessarily happen on competition days in the sense referred to by Advocate General Jacobs referred to at paragraph 30 above – but generally speaking and for all other occasions we find that the Facilities Fees were paid by members (and the Club) to secure the priority use of the Golf Club as an entire facility. To use the terminology used by Advocate General Jacobs we find that the Club and its members were paying the Facilities Fees to "play the game of golf" and not to occupy the course. That is the "economic purpose" of the arrangements between them.
37. We say this for the following reasons:
 - (a) in the first case, the membership fee entitled members to much more than the use of the Golf Course facility on Saturday and Sunday mornings and on tournament days. It was not suggested, nor argued before the Tribunal, that there should be an apportionment of the membership fee into vatable and non-vatable supplies. Counsel for the Appellants argued that the supply was to the Club as an unincorporated entity and then to give it control of the Golf Course. That argument, however, to the Tribunal's mind does not hold for a supply made, for example, on a Wednesday evening. On those occasions it is very difficult to distinguish between a casual paying visitor, whose green fees are subject to VAT, and a member whose membership fees, if I were to accept the Appellants' argument, would not. Indeed to my mind, the only distinguishing factor is that in the latter case the person is a member of a club and is allegedly entitled to "exclusive" occupation of the golf club on certain additional specified occasions;
 - (b) to give economic effect to the Licence for those 7 day and 5 day members **occupation** of the Golf Course is not a pre-requisite. What the Club and its members pay for is a general right to use the Golf Course, with a priority right to use it on Saturdays, Sundays and on tournament or event days – that we find is a use that is entirely consistent with the view taken in *Lindepark* (paragraph 35 quoted above) and we do not find that the facts of this case justify us coming to a conclusion that a "lease or let" in the sense in paragraph 38 (quoted above) is either achieved or necessary;
 - (c) we find that the economic purpose of the relationship between the parties was to provide the Club, and the members who claimed through

it, certain priority rights, but those rights, we find, were rights to use the Golf Course, rather than to occupy it.

38. In cross examination, Mr. Shields, on behalf of HMRC, asked Mr. Gillan as to who would be entitled to apply for an injunction against authorised third party access – would it be Mr. Gillan or the Club? Mr. Gillan accepted that he, as the Owner, would be the proper person to take those proceedings and, I would suggest, that has to be correct.
39. In normal land law terms the Club does not have an "interest" in the Golf Course. On balance it has, what I feel, are a collection of priority rights, namely:
 - (a) a right to use the Club House and those facilities within it which are dedicated to the Club;
 - (b) the right to use the Golf Course on certain specified occasions which are, in themselves, subject to:
 - (i) change, at the behest of the Appellants (under the terms of the Licence);
 - (ii) demand – to the extent that where there is unfulfilled demand the Appellants can allow visitors to play alongside members of the Club on Saturdays and/or Sundays.
40. Viewed in that context, we cannot accept that the nature of the relationship provides "occupation" or "control" in the sense to which we were invited.
41. In the language adopted by the Advocate General in Lindopark, I find that there was something more than the passive provision of land. What the Appellants were providing were golfing facilities encompassing all that that entailed. The fact that those golfing facilities are made available on a preferential basis on certain limited occasions is not, in our view, sufficient to constitute occupation, and not enough to establish the exemption.
42. Having so found, we therefore dismiss the Appeal.
43. No order as to costs.