15493: KESWICK GOLF CLUB; SILLOTH ON SOLWAY GOLF CLUB; CARLISLE GOLF CLUB; GRANGE OVER SANDS GOLF CLUB

Golf clubs - members' clubs - charges to non-members for use of club Is facilities - whether standard-rated or exempt - VATA 1994 Sch 9 Group 10 Item 3 - whether UK law properly implements Sixth Directive, Art 13 - whether Art 13A.1(m) of direct effect - distinction in UK Law of clubs with membership schemes - non-profit making organisations - additional income

TRIBUNAL CENTRE: MANCHESTER

DECISION NUMBER: 15493

APPELLANTS: KESWICK GOLF CLUB, SILLOTH ON SOLWAY GOLF CLUB, CARLISLE GOLF CLUB, GRANGE OVER SANDS GOLF CLUB

CASE REFERENCE NUMBERS: (MAN/97/330), (MAN/97/329), (MAN/97/331), (MAN/97/332)

RESPONDENTS: THE COMMISSIONERS OF CUSTOMS AND EXCISE

TRIBUNAL CHAIRMAN: C P BISHOPP

LOCATION: SITTING IN PUBLIC IN MANCHESTER

DATE: 24 FEBRUARY 1998

FOR THE APPELLANT: MR R L BARLOW

FOR THE COMMISSIONERS: MR N PAINES

RESULT OF THE APPEAL: DISMISSED

Decision

The Appeals

1.

These four appeals all raise the same issue, and it was agreed that they should be beard together. That of Keswick Golf Club was treated as the leading appeal for the purposes of the hearing, and it was in respect of that club only that I heard oral evidence. As will become apparent, the evidence I heard was not a determining factor in my decision, and I am able to reach a conclusion of application to all four Appellants.

2.

The Appellants were represented by Mr Richard Barlow, of counsel, instructed by Armstrong Watson & Co, a

firm of chartered accountants instructed by all four Appellants for the purpose of this appeal. The oral evidence I heard came from Mr Ian Fleming, the group VAT specialist of that firm, who has also been a member of Keswick Golf Club for 19 years. The Commissioners were represented by Mr Nicholas Paines QC, instructed by their solicitor's office, who led no oral evidence. Both Mr Barlow and Mr Paines put in small bundles of documents.

The Facts

3.

I take the facts of the case from what I was told by Mr Barlow, Mr Fleming's unchallenged evidence and the documents produced by the parties' representatives. They were not in dispute and can be shortly stated. All four of the Appellants are, as their names imply, golf clubs. Each is a members' club; that is to say they are run by and for the benefit of their members who pay annual subscriptions for the use of the club's facilities which include not only the golf course itself but also the clubhouse which is used for social functions which members may attend. Indeed, the clubs have social members who participate in the social events only and do not play golf. In the case of *Keswick Golf Club*, Mr Fleming told me, the course and clubhouse are situated in a rural part of England where clubs are geographically separated by fairly long distances. The nearest members' golf club to his own is at Cockermouth, about nine miles away, and the nearest commercially run golf course is approximately 20 miles distant.

4.

Like most other members' golf clubs, and commercial golf facilities, the four Appellants permit non-members to play on the payment of a charge, which is known as a 'green fee'. Mr Fleming told me that in the case of *Keswick Golf Club*, the aggregate of the green fees collected each year is about one and a half times the value of the members' subscriptions, and green fees obviously represent a significant part of the club's income. It was acknowledged that the green fees paid by non-members do not merely cover the cost (in wear and tear of the course and the provision of facilities such as changing rooms and showers) of their playing a round of golf, but include an element of profit.

5.

The dispute between the parties relates to the proper treatment for VAT purposes of the green fees. The Commissioners maintain that they attract VAT at the standard-rate, while the clubs contend that they are exempt.

The Legislation

6.

The United Kingdom legislation providing for the exemption of various supplies for VAT purposes is contained in Schedule 9 to the Value Added Tax Act 1994. Group 10 deals with supplies of sporting services. Item 3 of that Group is the only one of application to this case; it, and the two (of three) notes to it which are relevant here and which limit its operation read as follows:-

> '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.

Notes:

(1) Item 3 does not include the supply of any services by a non-profit making body of residential accommodation, catering or transport.

(2) An individual shall only be considered to be a member of a non-profit making body for the purpose of item 3 where he is granted membership for a period of three months or more.'

7.

It was common ground that the clubs are non-profit making bodies (though I shall need to return to this point), that they operated membership schemes, that the supplies (of making their courses available for play) were made to non-members and that the supplies were of the category described in the Item. As Item 3 contains the only exempting provision in UK law which might be relevant to the clubs' position, it follows that the making of the supplies with which these appeals are concerned to non-members has the consequence that they are excluded from the exemption afforded by Item 3, if UK law is to be construed alone.

8.

Mr Barlow accepted that the wording of Item 3 allowed of no other interpretation but, he maintained, Item 3 could not be reconciled with the relevant European legislation which it purported to implement; that European legislation is to be found at Article 13 of the Sixth Council Directive of 17 May 1977 (77/388/EEC). The parts of Article 13 which are relevant to this decision read as follows:

'A Exemptions for certain activities in the public interest

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;

(n) certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned .

2 (a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in 1 . (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 . (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. .'.

9.

I heard conflicting arguments about the intention behind Article 13. Mr Barlow demonstrated (and this too was not in issue) that the original draft of Article 13, so far as it related to sports facilities, provided for the exemption of 'the supply of services, and supplies of goods incidental thereto, by non-profit making sport or physical training organisations to their members; this exemption shall apply only to operations directly connected with the pursuit of sport and physical training activities by amateurs. As can be seen, the distinction between supplies to members and supplies to non-members does not appear in the enacted version of Article 13 and, Mr Barlow argued, the change in wording between the draft and the final versions of Article 13 indicated that there was no intention to limit the scope of the exemption to supplies to members; on the contrary, the change was indicative of an intention to widen the scope of the exemption. Thus the introduction of such a distinction in the United Kingdom legislation could not be justified. The consequence was that the exclusion by United Kingdom law from the exemption, of supplies of sporting facilities made to non-members, must be discarded as it offended European law. If this was done, relevant supplies made by qualifying organisations must all be exempt and the green fees charged by the four Appellants must be treated accordingly.

10.

Mr Paines, however, referred me to the first Report of the Commission of the European Communities to the Council on the Sixth Directive, in which appears the following passage:

'e) Exemptions concerning "certain services closely linked to sport" (Article 13(A)(1)(m) and "certain cultural services" (Article 13(A)(1)(n)

The extremely vague wording of these two categories of exemption is not only puzzling to the reader but also, more importantly, leads to difficulties of implementation which are not without effect on the determination of the basis for calculating the Communities' own resources.

It seems paradoxical to introduce cases of compulsory exemption and leave the substance to the discretion of each Member State. There is however no doubt that in adopting the text of these provisions the Council considered that the Member States should grant only limited exemptions in the two areas of sporting and cultural activities, for otherwise there would have been no reason to use the adjective "certain". The Commission considers that it is especially necessary to achieve genuine harmonisation in these areas as Member States may continue, during the transitional period, to tax those services which should be exempt: confusion is therefore complete, since the substance of such services has not been determined.'

11.

Having reflected on this particular point, I do not find it one which helps me much. The report of the

Commission may be right in stating that the intention was to 'grant only limited exemptions' but it is not obvious from the extract which I have set out what kind of limitation the authors of that report had in mind. The context in which the phrase appears suggests however that the intended limitation related to the nature of the activities, rather than any quality of the participants, and I prefer this interpretation.

12.

Mr Paines also argued that the change in the wording can be explained by its being simply a matter of drafting. The limitation of the exemption to non-profit making organisations, he said, rendered otiose the distinction between members and non-members and the reference to amateurs which appeared in the draft. I am not persuaded by this argument. To my mind, the distinction which Article 13 seeks to draw is between supplies relating to sport which are made for motives of profit, and those made for other reasons, such as the promotion of the sport itself, with no intention of making a profit. Moreover, it is difficult to reconcile Mr Paines' argument with the introduction in UK law, into a provision which clearly borrows from the language of the European legislation, of a distinction which, as Mr Paines argued, was otiose; I must assume that the draftsman of the UK legislation used the words intending them to have some meaning. I will return later to consider what that meaning is.

Direct Effect

13.

It is convenient at this point to deal with Mr Barlow's argument that Article 13 has direct effect in the United Kingdom, and Mr Paines' response to that argument, before returning to consider whether Mr Barlow is right in his argument that there is inconsistency between the two legislative provisions. On this issue, Mr Barlow referred me to a passage from the decision of the European Court in *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53 at p 70 as follows:

> '20 . special problems arise where a Member State has failed to implement a directive correctly and, more particularly, where the provisions of the directive have not been implemented by the end of the period prescribed for that purpose.
>
> 21 It follows from well-established case-law of the Court and, most recently, from the judgment of 5 April 1979 in Case 148/78 *Pubblico Ministero -v- Ratti* [1979] ECR 1629, that whilst under Article 189 [of the EEC Treaty] regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects.
>
> 22 It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude in principle the possibility of the obligations imposed by them being relied on by persons concerned.
>
> 23 Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law.
>
> 24 Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.
>
> 25 Thus, wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.'

14.

This view was endorsed by the European Court in *Kühne v Finanzamt München III* [1990] STC 749 where it was said (at p 766):

> '. wherever the provisions of a directive appear . to be unconditional and sufficiently precise, those provisions may be relied on by individuals as against any national provision which is incompatible with the directive.'

As far as I have been able to ascertain, whether or not paragraph A1(m) of Article 13 has direct effect in the United Kingdom has not been judicially considered but in *Glastonbury Abbey v Commissioners of Customs and Excise* (1996, Case No 14579) the tribunal was asked to consider whether the provisions of paragraph A1(n), which I have included in the extract set out above, had direct effect. In a passage which Mr Paines acknowledged was obiter, the chairman said:

> 'In my view Article 13A1(n) is not conditional; all the conditions are discretionary and so Article 13A1(n) could be implemented by a member state without any conditions if it so wished. In *Becker* the European Court held that the direct effect of exemptions was not lost merely because the member state had not exercised its right under Article 13A1 to enact national legislation to ensure straightforward application of the exemption and prevent possible evasion, avoidance or abuse. In my view the same principle applies to the failure of a member state to enact national legislation to implement the discretionary conditions in Article 13A2(a). However, Article 13A1(n) does refer to "certain cultural services" which are not defined and to "bodies recognised by the Member State concerned" and thus it is, in my view, not sufficiently precise to be enforced by a national court. Also, as Article 13A2(a) is not mandatory but discretionary it may not be relied upon by the Appellant.'

15.

While it might be said that paragraph 1(n) is even less precise than paragraph 1(m), there is in my view no material difference, from the point of view of interpretation, between them. The use of the word 'certain', paradoxically, introduces a measure of uncertainty though I think it is probably the consequence of a not very well thought through translation of the French word 'certain', more accurately rendered in English as 'some'. This seems to be consistent with the second Report of the Commission of the European Communities to the Council on the Sixth Directive, to which Mr Barlow drew my attention, in which it was said:-

> 'The conditions governing the granting of this exemption were deemed to be strict enough for it to be proposed that the expression "certain services" be replaced by "services" without this creating any problem . However, the wording of this provision gives rise to certain problems of interpretation since the Court of Justice was asked, in Case 273/86, to give a preliminary ruling on whether "the supply of food and drink by a sports club to its members in a canteen run by the club [can] be regarded as a service closely linked to sport or physical education supplied to persons taking part in sport or physical education within the meaning of Article 13A1(m) ." The Commission proposed that the Court reply clearly in the negative to this question.'

16.

It was not revealed what the reasoning behind the Commission's proposal to the Court was. Evidently it was sufficient to persuade the applicant, since its action was withdrawn. The chairman m the *Glastonbury Abbey* case appears, from the extract from her decision which I have set out, to have been influenced to some extent by the permissive and discretionary character of Article 13A2(a). In the context of this case I consider the first indent of Article 13A2(b) to be of much greater importance; it is not mentioned in the *Glastonbury Abbey* case and, I think, was of no relevance to its facts though it would probably have disposed of the case referred to in the Commissioner's second report. When one reads 'certain services' with the mandatory limiting words of that indent, it is clear to my mind that the provision by a club to its members of food and drink must be excluded from the exemption (pace Note (1) to Item 3 in the UK legislation). Nevertheless the

exclusion of various peripheral or incidental supplies merely serves to clarify what may be exempted. It does not, in my opinion, throw any better light on what is meant, within that limitation, by 'certain services'. It seems to me that their definition remains with the member states.

17.

Since, on this basis, there is a discretion reposed in the member states about what supplies are to be exempted and what supplies are not, it follows that paragraph 1(m) cannot have direct effect.

18.

Mr Paines argued that the conclusion that paragraph 1(m) did not have direct effect, if I reached it, was sufficient to dispose of the appeal. I do not accept that argument. It is a trite point that European legislation is purposive and that a directive is just that: an instruction to member states about what they must, may, and may not enact. That a particular provision may not be capable of having direct effect does not relieve the member state of the obligation of giving effect to the directive and of doing so in a manner consistent with it. Article 13A, as I interpret it, requires member states to exempt various supplies from VAT. Such supplies include, by virtue of paragraph 1(m), supplies relating to sport to be more closely defined by the member states. The Article allows member states to impose various conditions upon the granting of the exemption (Article 13A2(a)); and requires them to exclude some supplies from the exemption (Article 13A 2(b)).

Consistency Between European and UK Legislation

19.

It was common ground that the manner in which the United Kingdom government had exercised the discretion conferred by Article 13A2(a), by procuring the enactment of Item 3 and the Notes to it, did not offend against the provisions of that paragraph. It was agreed and I accept that the limitation of the exemption of supplies of sporting activities to non-profit making bodies is supported by the Sixth Directive, and that the exclusion by Note (1) of supplies of accommodation, catering and transport was consistent with the first indent of paragraph 2(b). Mr Barlow acknowledged that, if membership schemes were legitimately a feature of the legislation, Note (2) to Item 3 contained a proper anti-avoidance measure. The problem which arises in this case appears to me to stem from the United Kingdom's decision not to adopt the fourth indent of Article 13A2(a), while adopting (as it must, since the provision is mandatory) the similar restriction imposed by the second indent of paragraph (b). One can understand the reasons. There are many sports, including not only golf but also most racquet sports, for example, which can be played at members' clubs or at commercial sports facilities. It is a political and economic question whether the United Kingdom ought to have limited the exemption to non-profit making bodies; the only question for this tribunal is whether it is permitted by Article 13A to do so. It is clear to my mind that the first indent to paragraph 2(a) does so permit it.

20.

At this point it is necessary for the legislative draftsman to consider the implementation of paragraph (b), and in particular its second indent. It is evident that in providing the course on which its members can play golf a members' club is in competition with commercial enterprises which likewise provide a course on which those who pay the requisite fee may play golf as often as they wish, restricted only by the capacity of the course, the weather and the hours of daylight. I am aware that people join members' clubs not merely in order to enjoy the sporting facilities, but also to participate in the social life of the club (albeit social activities may be

offered by commercial organisations) and to have some measure of control over their affairs. It is this latter point which, I think, points the way to the conclusion in this case.

21.

Two factors are identified in the second indent to paragraph 2(b) - the desire to generate 'additional income', and the element of competition with commercial enterprises. A problem of interpretation is immediately perceived: nowhere is there to be found any definition of the basic income to which this income is 'additional'. Mr Paines made the point that a members' club is to be regarded as a non-profit making body because its members engage in mutual trading, that is they provide between themselves the income necessary to support the expenditure which they incur in the pursuit of their common activity. Income which they derive from making supplies to non-members is thus 'additional'. A charity dependent principally upon benefaction for its activities might likewise generate 'additional income' from supplies made for a consideration. This argument is consistent with the first indent of Article 13A2(a) and I have concluded that the phrase 'additional income' must be construed in this way; Mr Barlow did not suggest any other.

22.

He did, however, raise a different point which initially caused me some concern. He told me - and although he did not give evidence on the matter, I naturally accept what he said - that he is the chairman of a village association which does not have members, and which makes supplies, including of sporting facilities (he gave the example of carpet bowls evenings) to members of the public, in exchange for a modest fee. In practice, there is no possible problem since the association's total turnover is well below the registration threshold, but that had been otherwise, and the association had been required to address the question of whether its supplies were exempt, Mr Barlow argued that there was no clear reason why the association, as a non-profit making body without members, should be able to exempt such supplies while the Appellants in this case would not. This argument seems to me to overlook the point, as I understood it, that the modest fees charged by Mr Barlow's association represented its income, and not its 'additional income'.

Competition

23.

The phrase used in Article 13 is 'direct competition'. Quite how this expression is to be interpreted and applied is not explained. Mr Barlow suggested - and I think correctly - that a golf club might be in indirect competition with, for example, a cinema, in that each offered a means of spending one's leisure time, although there was a considerable difference between what each offered. However, Mr Barlow did not concede the converse, that any golf club or commercial organisation offering playing facilities to the public must *ipso facto* be in direct competition with every other. Geographical separation to the extent described by Mr Fleming in his evidence, he said, negated any notion that Keswick Golf Club was in direct competition with the nearest commercial facility some 20 miles distant.

24.

I am well aware from my own experience - and do not consider I need hear evidence on this point - that golfers are influenced by many factors when choosing a course (other than their 'home' course) on which to play. Quite how the various factors will weigh in the balance is a matter of personal choice, but they will include, as well as travelling distance, the quality of the course, its not having been visited before (or alternatively the player's familiarity with and liking for it), the cost of the green fee and possibly other matters.

There might be cases in which geographical separation alone would exclude any degree of competition between two similar organisations, but I think it would be unusual and, even in the more remote areas of the UK, of no application to golf clubs. I have concluded that geographical separation alone could not be the criterion because the distance between one outlet and the next is of far less relevance, when judging the element of competition, than their respective distances from nearby towns, (and there might well be more than one town to consider) and account would have to be taken of the fact that it takes less time to drive 20 miles by motorway than 15 miles by country roads.

25.

In the correspondence included within the bundles, Mr Fleming had introduced, in addition to geographical separation, considerations of quality of supply, arguing that '. a sophisticated country club type of course is not in direct competition with a basic 9 hole course even if they are very close to each other'. This is not an argument Mr Barlow pursued at the hearing but it nevertheless seems to me to illustrate the point that the introduction of subjective criteria of this kind (and I include distance in this category) would make it impossible to apply the exemptions required by Article 13 in a straightforward manner. I accept the force of Mr Paines' argument that to distinguish between golf clubs on the basis that some compete with commercial enterprises while others do not, whether on grounds of distance between them, quality of facilities or similar considerations, would not amount to compliance with the requirement of Article 13 that its implementation by member states should ensure 'the correct and straightforward application of such exemptions'. In my opinion, 'direct competition' requires no more than that two organisations offer to potential 'customers' broadly similar products or services, and that it is possible for the customer to choose between them (by which I mean that an organisation offering services exclusively to women would not be competing with an otherwise similar organisation offering the same facilities only to men). Accordingly I am satisfied that the Appellants, by making their courses available to non-members on payment of a green fee are 'carrying out transactions which are in direct competition with those of commercial enterprises .'.

26.

If one considers the charging of green fees to be a means of generating additional income for the club, and marries that with the conclusion I have reached that each of the Appellants is in direct competition with commercial enterprises, it seems to me to follow that Item 3, in its application to members' golf clubs, does implement correctly the mandatory provisions of Article 13A, supplemented by the discretionary powers given to member states as they have been exercised in the United Kingdom. Thus the Commissioners' requirement that. the Appellants account for VAT at the standard rate on green fees received by them is correct.

27.

The appeal must be dismissed. There will be no direction for costs.