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Kennemer Golf & Country Club v Staatssecretaris van Financiën

(Case C-174/00)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (FIFTH CHAMBER)

JUDGES JANN (PRESIDENT OF CHAMBER), VON BAHR AND TIMMERMANS

ADVOCATE GENERAL: F G JACOBS

26 SEPTEMBER, 13 DECEMBER 2001, 21 MARCH 2002

Value added tax - European Communities - Exemptions - Sport and physical education - Certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education - Golf club's income consisting of annual fees and subscriptions from members and day subscriptions from non-members - Golf club regularly making operating surplus placed in reserve fund for non-annual expenditure - Whether non-profit-making organisation - Whether direct link between annual subscription fees paid by members and services provided by golf club - EC Council Directive 77/388, arts 2(1), 13A(1)(m), (2)(a).

The golf club derived its income from members' subscriptions and admission fees and from day subscription fees paid by non-members. For several years the golf club made an operating surplus which was placed in a reserve fund for non-annual expenditure. The club's value added tax (VAT) return did not include tax on the fees from non-members on the ground that its services to non-members were exempt under Netherlands legislation implementing art 13A(1)(m)[a] and the first indent of art 13A(2)(a) of EC Council Directive 77/388 (the Sixth Directive). Article 13A(1)(m) provided, inter alia, that member states should exempt services closely linked to sport supplied by non-profit-making organisations. The first indent of art 13A(2)(a) provided, inter alia, that member states might grant to bodies other than those governed by public law the exemption provided for in art 13A(1)(m) subject to the condition that they should not systematically aim to make a profit, but any profits nevertheless arising should not be distributed but assigned to the continuance or improvement of the services supplied. The Netherlands tax authorities considered that the golf club was aiming to make a profit on its services to non-members and made an additional assessment to VAT. The Gerechtshof te Amsterdam dismissed the club's appeal on the ground that if it was systematically making profits it was to be presumed that it was seeking to obtain operating surpluses and was pursuing a profit-making aim. The club appealed to the Hoge Raad der Nederlanden which stayed proceedings and referred the following questions to the Court of Justice of the European Communities for a preliminary ruling: (i) was art 13A(1)(m) to be interpreted as meaning that the categorisation of an organisation as non-profit-making had to be based exclusively on the services referred to in that provision or on all the organisation's activities; (ii) was art 13A(1)(m) read together with the first indent of art 13A(2)(a) to be interpreted as meaning that an organisation could be categorised as non-profit-making even if it systematically sought to achieve surpluses which it then used for the purposes of the provision of its services; (iii) was art 2(1)[b] which provided inter alia that the supply of services effected for consideration should be subject to VAT, to be interpreted as meaning that annual subscription fees of the members of a sports association could constitute the consideration for the services provided by the association, even though the

members who did not use or did not regularly use the association's facilities still had to pay their annual subscription fee.

a Article 13A, so far as material, is set out at p 514 *d-g*, post

b Article 2, so far as material, is set out at p 514 *c*, post

Held - (1) All the exemptions listed in art 13A(1)(h) to (p) covered organisations acting in the public interest in a social, cultural, religious or sports setting or in a similar setting. The purpose of the exemptions was therefore to provide more favourable treatment for certain organisations whose activities were directed toward non-commercial purposes. If the categorisation of an organisation as non-profit-making had to be based on the nature of the organisation itself and not on the services which it provided in the form of those specified in art 13A(1)(m), it followed that, in order to determine whether such an organisation met the conditions for application of that provision, account had to be taken of all its activities, including those which it provided by way of extension to the services covered by that provision. Therefore art 13A(1)(m) was to be interpreted as meaning that the categorisation of an organisation as non-profit-making had to be based on all the organisation's activities.

(2) It was clear from art 13A(1)(m) that an organisation was to be classed as non-profit-making for the purposes of that provision by having regard to the aim which the organisation pursued; unlike a commercial undertaking the organisation must not have the aim of achieving profits for its members. It was for the national authorities to determine, having regard to the objects of the organisation as defined in its constitution, and in the light of the specific facts of the case, whether an organisation satisfied the requirements enabling it to be categorised as non-profit-making. Where it was found that that was the case, the fact that an organisation subsequently achieved profits, even if it sought to make them or made them systematically, would not affect the original categorisation as long as those profits were not distributed to its members as profits. Article 13A(1)(m) did not prohibit the organisations covered by that provision from finishing their accounting year with a positive balance. Accordingly, an organisation might be categorised as non-profit-making even if it systematically sought to achieve surpluses which it then used for the purposes of the provision of its services.

(3) The fact that in the instant case the annual subscription fee was a fixed sum which could not be related to each personal use of the golf course did not alter the fact that there was reciprocal performance between the members of a sports association and the association itself. The services provided by the association were constituted by the making available to its members, on a permanent basis, of sports facilities and the associated advantages and not by particular services provided at the members' request. There was therefore a direct link between the annual subscription fees paid by members of a sports association such as that in the instant case and the services which it provided. Accordingly, art 2(1) was to be interpreted as meaning that the annual subscription fees of members of such a sports association could constitute the consideration for the services provided by the association, even though members who did not use, or did not regularly use, the association's facilities still had to pay their annual subscription fees. *Apple and Pear Development Council v Customs and Excise Comrs* [1988] STC 221 and *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509 applied.

Notes

For the exemption for sport, sports competitions and physical education, see De Voil Indirect Tax Service V4.161.

For EC Council Directive 77/388, arts 2(1), 13A(1)(m), (2)(a), see De Voil Indirect Tax Service, Division V15.3.

Cases cited

Apple and Pear Development Council v Customs and Excise Comrs (Case 102/86) [1988] STC 221, [1988] ECR 1443, [1988] 2 All ER 922, ECJ.

Customs and Excise Comrs v Zoological Society of London (Case C-267/00) [2002] STC 521, ECJ.

EC Commission v Spain (Case C-124/96) [1998] STC 1237, [1998] ECR I-2501, ECJ.

EC Commission v United Kingdom (Case C-359/97) [2000] STC 777, [2000] ECR I-6355, ECJ.

Tolsma v Inspecteur der Omzetbelasting Leeuwarden (Case C-16/93) [1994] STC 509, [1994] ECR I-743, ECJ.

Reference

By judgment of 3 May 2000, received at the Court of Justice of the European Communities on 9 May 2000, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court of Justice for a preliminary ruling under Art 234 EC, three questions on the interpretation of art 13A(1)(m) of EC Council Directive 77/388 (the Sixth Directive). The questions were raised in proceedings between Kennemer Golf & Country Club (the golf club) and the Staatssecretaris van Financiën concerning the value added tax which the golf club was charged on certain transactions which it carried out in connection with the practice of the sport of golf. Written observations were submitted on behalf of: the Netherlands government, by A Fierstra, acting as agent; the Finnish government, by E Bygglin, acting as agent; the United Kingdom government, by G Amodeo, acting as agent, assisted by A Robertson, barrister; the Commission of the European Communities, by H M H Speyart and K Gross, acting as agents. Oral observations were submitted on behalf of: the United Kingdom government, by R Magrill acting as agent, assisted by A Robertson; and the Commission, by H van Vliet, acting as agent. The language of the case was Dutch. The facts are set out in the judgment.

13 December 2001.

The Advocate General (Jacobs)

delivered the following opinion.

1. Under EC Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of member states relating to turnover taxes--common system of value added tax: uniform basis of assessment (the Sixth Directive) certain services closely linked to sport and supplied by non-profit-making organisations to persons taking part in sport are to be exempted from value added tax (VAT). Member states may subject that exemption to the condition that the organisation in question must not systematically aim to make a profit, but that any profits arising must not be distributed but assigned to the continuance or improvement of the services supplied.

2. In the present reference for a preliminary ruling, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) seeks guidance on a number of points of interpretation in that regard. Essentially, it asks what aspects of an organisation's activity are to be taken into account when determining whether it is non-profit-making, whether for VAT purposes there is a link between annual membership fees charged by a golf club and the services provided to members and whether the aim of making a systematic surplus to be used for providing sporting services is consistent with non-profit-making status.

THE SIXTH DIRECTIVE

3. Under art 2 of the Sixth Directive, a supply of goods or services effected for consideration by a taxable person acting as such is subject to VAT. According to art 4(1), a taxable person is one who carries out an economic activity, whatever the purpose or result of that activity. Under art 4(2), economic activities comprise 'all

activities of producers, traders and persons supplying services', together with the 'exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis'. However, certain transactions are or may be exempted from VAT under the terms of the Directive.

4. Article 13A is headed 'Exemptions for certain activities in the public interest', and para (1) lists a number of activities which must be exempted by member states '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'.

5. Those activities include, under sub-para (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'. It is that exemption which is relevant in particular to the dispute in the present case. It may be noted that in most of the language versions the concept of a non-profit-making organisation refers explicitly to one which does not aim to make a profit.

6. There are in all 16 such exemptions, though it is unnecessary to list them all; suffice it to add that art 13A(1)(n) exempts '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'.

7. Article 13A(2) provides for a number of limitations, some optional and some mandatory, to be imposed on certain exemptions, including those under art 13A(1)(m) (and (n)). Article 13A(2)(a) lists four optional conditions which member states may impose in each individual case on the granting of such exemptions to bodies other than those governed by public law.

8. The condition set out in the first indent, which is of particular relevance here, is that the bodies in question '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.

9. Again, it is not necessary to list the other conditions, but it may be noted that the condition set out in the fourth indent is that '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'.

THE NETHERLANDS LEGISLATION

10. According to the order for reference, art 13(A)(1)(m) of the Sixth Directive is transposed into Netherlands law by certain provisions of the Wet op de Omzetbelasting 1968 (1968 Law on turnover tax) (Staatsblad 1968 No L 329) of 28 June 1968, read in conjunction with the Uitvoeringsbesluit Omzetbelasting 1968 (1968 Decree on the implementation of turnover tax) (Staatsblad 1969 No 423) of 12 August 1968 and Annex B thereto.

11. Article 11(1) of the 1968 Law states:

> 'Subject to conditions to be laid down by administrative regulation, the following shall be exempt from tax ... (f) supplies of goods and services of a social and cultural nature to be defined by administrative regulation, provided that the trader does not aim to make a profit and there is no serious distortion of competition in relation to traders who aim to make a profit.'

12. 'Supplies of goods and services of a social or cultural nature' are defined by the first paragraph of art 7 of the implementing decree, in conjunction with Annex B thereto. Item 21 in section (b) of that annex is for supplies made by bodies providing sports facilities, provided that they do not aim to make a profit, the exemption applying solely in respect of such supplies.

13. Furthermore, in an apparently distinct exemption, art 11(1)(e) of the 1968 Law provides that services supplied to their members by organisations whose aim is the pursuit or promotion of sport are to be exempt from turnover tax. Under

art 11(2), that exemption applies only where the aim is not to make a profit by means of the services concerned. Operating surpluses are also considered as profits in that regard unless they are not distributed but used for the purpose of the services concerned.

14. Thus, art 11(1)(f) of the 1968 Law appears to transpose the 'cultural' exemption in art 13A(1)(n) of the Sixth Directive, subject to the 'non-profit-making' and 'anti-distortion' conditions set out in the first and fourth indents of art 13A(2)(a); the implementing decree extends that exemption to bodies providing sports facilities, which might otherwise have fallen under the 'sports' exemption in art 13A(1)(m) of the Directive. The combined provisions of art 11(1)(e) and (2) of the 1968 Law, however, appear to transpose that 'sports' exemption, subject again to the 'non-profit-making' condition, but with the proviso that operating surpluses will be regarded as profits unless they are ploughed back into the sports services supplied and subject to the further limitation that only services supplied to the members of the organisations concerned will be exempted.

THE PROCEEDINGS

15. According to the order for reference, Kennemer Golf & Country Club (Kennemer) is an association whose object is the pursuit and promotion of sport and games, in particular golf. It owns a golf complex and clubhouse in Zandvoort, near Amsterdam. Members pay an annual membership fee as well as admission fees for use of the course, and must also participate in an interest-free debenture loan. Kennemer derives other income from related sources such as letting certain immovable property, sponsorship, interest on

investments, the supply of balls and certain rental services and daily green fees paid by non-members who use the golfing facilities.

16. During each of the years 1990 to 1995, Kennemer made an operating surplus which was paid into its reserve funds. One of those funds in particular was earmarked for expenditure other than recurring annual expenditure.

17. In the belief that its services to non-members were exempt from VAT, Kennemer did not pay any tax on them. The tax authorities however considered that the exemptions under Netherlands law did not apply because Kennemer aimed to make a profit, and imposed an additional assessment for the 1994 tax year. Kennemer challenged that assessment, but it was upheld by the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal). The Gerechtshof held that there were reasonable grounds for assuming that the appellant systematically sought to achieve operating surpluses. The fact that Kennemer used those surpluses for the golf facilities it provided did not justify the conclusion that it did not aim to make a profit; that would have been possible only if there had been an incidental and not a systematic intention to make operating surpluses to be used in that way.

18. Kennemer then appealed to the Hoge Raad, which has stayed the proceedings and referred the following questions to the court for a preliminary ruling:

> '1.(a) Where it is necessary to establish whether or not a body aims to make a profit as referred to in art 13A(1)(m) of the Sixth Directive, must account be taken solely of earnings from the services referred to in that provision or must earnings from other services provided by it also be taken into consideration?
>
> (b) If, in determining whether or not the aim is to make a profit, account must be taken solely of the services supplied by the body as referred to in art 13A(1)(m) of the Sixth Directive and not total earnings, must only the costs incurred directly for the services be taken into consideration or also a proportion of the body's other costs?
>
> 2.(a) Is there a direct link, within the meaning of inter alia the judgment of the Court of Justice in *Apple and Pear Development Council v Customs and Excise*
>
> *[2002] STC 502 at 507*
>
> *Comrs* (Case 102/86) [1988] STC 221, [1988] ECR 1443 in the case of subscription fees charged by an association which, pursuant to the object laid down in its articles of association, provides its members with sports facilities in the context of an association and, if not, is the association to be regarded as a taxable person within the meaning of art 4(1) of the Sixth Directive only in so far as it also provides benefits for which it receives direct consideration?
>
> (b) Must the total amount of the annual subscription fees from the members whom the association provides with sports facilities be included in the earnings of a body in the form of an association which are to be taken into account in determining whether or not the aim is to make a profit as described in the first question even where no direct link exists between the various services provided by the association for its members and the subscription fee paid by them?
>
> 3. Does the fact that a body uses surpluses which it systematically aims to make for the purpose of its benefits in the form of a facility to play a type of sport as provided for in art 13A(1)(m) of the Sixth Directive justify the conclusion that it does not aim to make a profit within the meaning of that provision, or is such a conclusion possible only where the intention is incidentally and not systematically to make operating surpluses which are used as described? In answering these questions must account also be taken of the first indent of art 13A(2) of the Sixth Directive and, if so, how is that provision to be interpreted? In particular, in the second part of the provision must "systematically" be read between "arising" and "shall", or "merely incidentally"?'

19. Written observations have been submitted to the court by the Finnish, Netherlands and United Kingdom governments and by the Commission. The Finnish government's observations however are confined to the third question, and only the United Kingdom government and the Commission made oral submissions at the hearing.

ANALYSIS

The first question

20. The first question is essentially whether, for the purposes of art 13A(1)(m), non-profit-making status is to be determined by reference to all the activities of the organisation or only to those which might benefit from the exemption.

21. The Netherlands government--agreeing with the opinion of Advocate General Van den Berge delivered to the Hoge Raad in the present case, which appears to be in line with the approach taken hitherto by the Netherlands courts--submits that the question must be determined with regard solely to the services to be exempted, since it is with them that the provision is concerned.

22. I disagree. As the Commission has pointed out, all the language versions of art 13A(1)(m) clearly attach the qualification 'non-profit-making' to 'organisation' and the legislature would no doubt have chosen different wording had it had any different intent.

23. Moreover, as the United Kingdom government has noted, the provision contains three distinct and cumulative conditions, relating to the nature of the organisation (non-profit-making), the nature of the services (closely linked to sport) and the identity of the recipients (persons taking part in sport). If the exemption were to apply only to non-profit-making services, commercial sports undertakings could seek exemption for certain services they supply, a situation which could not be reconciled with the plain terms of the provision and which would inevitably--given the opportunities for shrewd cross-subsidising which would arise--lead to a distortion of competition.

24. It is true that, as the Netherlands government says, some services provided at a profit by non-profit-making organisations may be in competition with services

[2002] STC 502 at 508

provided by commercially-run organisations, and a discrepancy could arise if the same services were thus subject to tax in some cases and not in others. However, distortion of competition between commercial and non-profit-making organisations can be prevented under the fourth indent of art 13A(2)(a) (cited above) or the second indent of art 13A(2)(b) (which precludes the exemption for supplies whose basic purpose is to obtain income through transactions which are in direct competition with those of commercial enterprises liable for VAT).

25. Thus, in my view, the answer to the first part of the Hoge Raad's first question must be that when determining whether an organisation is non-profit-making for the purposes of art 13A(1)(m) of the Sixth Directive, account must be taken of its activities as a whole. The second part of that question need not be answered.

26. That, of course, leaves open the question of precisely what is meant by 'non-profit-making'. Although the United Kingdom has suggested an answer in the context of the first question, I prefer to consider that issue when examining the third question.

The second question

27. This question is essentially whether annual membership fees paid to a golf club constitute 'consideration' within the meaning of art 2 of the Sixth Directive for the services provided by the club to its members, or whether those fees, if they do not constitute consideration, are to be taken into account when deciding

whether the club aims to make a profit.

28. It is raised in the light of the court's case law as set out in, in particular, *Apple and Pear Development Council v Customs and Excise Comrs* [1988] STC 221, [1988] ECR 1443 in which the court held that a supply of services for consideration (thus a taxable supply) presupposes the existence of a direct link between the service provided and the consideration received. There was no such link in the case of a statutory body promoting the interests of a whole industry and financed by a compulsory levy.

29. I should point out, however, that the answer to this question may be of limited relevance to the resolution of the dispute before the national court unless it is held--contrary to my view--that the 'non-profit-making' criterion in art 13A(1)(m) of the Sixth Directive falls to be assessed separately for each of the organisation's activities.

30. Be that as it may, my view is that a direct link normally exists between the annual membership fee and the services provided to members.

31. The Netherlands government considers that there is no relationship between the fee and the use made of the facilities by the members--the obligation to pay the fee remains whether the member uses the club every day or not at all during the year--and thus no taxable service. That however does not appear to be the correct analysis. As both the United Kingdom and the Commission have pointed out, the service provided in exchange for the fee is not the use made, but the opportunity to make use, of the facilities.

32. The fact that the link is more immediate where daily green fees are concerned does not make it any less direct in the case of annual membership fees. The club exists to provide certain facilities and it does so in exchange for either daily green fees (paid by non-members) or a combination of annual membership and admission fees (paid by members). The benefits provided may differ in the two cases, but they are directly linked to the payments in both. The fact that in one case payment may be made for actual use and in the other for entitlement to use does not change that.

33. The above view assumes that the annual membership fee is indeed paid at least in part in consideration for the opportunity to use the sports facilities. It is possible to imagine that a golf club may have a category of membership which

offers access only to its non-sporting facilities. In that case, the direct link would be to the making available of those facilities. However, as I have indicated, such a distinction may be of limited relevance in the present context if an organisation's non-profit-making status is to be assessed in the light of its activities as a whole.

34. The Netherlands government's approach, on the other hand, would appear to make it possible for practically any service provider to escape VAT by judicious use of all-inclusive charges--with potentially far-reaching results for the VAT system.

35. In my view, therefore, the answer to the Hoge Raad's second question is that annual membership fees paid to a golf club constitute 'consideration' within the meaning of art 2 of the Sixth Directive for the services provided by the club to its members. The remainder of that question need not be answered.

The third question

36. This appears to be the central question in the case: if an organisation is to be classed as non-profit-making for the purposes of art 13A(1)(m) of the Sixth Directive, to what extent may it none the less

make a surplus and what is the relevance in that regard of the first indent of art 13A(2)(a) (see paras 5 and 8 above)? It is most helpful to begin by examining the relationship between the two provisions.

The relationship between art 13A(1)(m) and the first indent of art 13A(2)(a)

37. I take the view that the two provisions must in principle be interpreted and applied separately, despite the undeniable degree of overlap between them in terms of substance.

38. First, whilst art 13A of the Sixth Directive may not be a model of legislative perfection, its structure is none the less unambiguous. Article 13A(1) lists 16 types of supplies which are to be exempted, in sub-paras (a) to (q). Within that list, sub-paras (b), (g), (h), (i), (l), (m) and (n) are all grouped together for the purpose of applying additional conditions, to be found in art 13A(2)(a) and (b). The former contains four optional conditions which may be imposed by member states on the granting of an exemption for an activity within the group and the latter lays down a compulsory limitation on such exemptions (and art 13A(1)(o) provides a further related exemption, subject again to certain conditions).

39. That structure militates against using the terms of an optional condition in art 13A(2)(a) to define those of a compulsory exemption in art 13A(1)(b), (g), (h), (i), (l), (m) or (n). To do so would be to negate the optional nature of the condition.

40. Second, I do not consider that when interpreting art 13A(1)(m) regard should be had to the Commission's original proposal for a Sixth Directive (see art 14(a)(2)(a) of the proposal for a Sixth Council Directive (OJ C80 5.10.73 p 1)) in which the term 'non-profit-making organisation' was defined in terms foreshadowing those of the first indent of art 13A2(a), precisely because that definition was not included in the directive as adopted.

41. However, that is not to say that no light whatever can be shed by one provision on the interpretation of the other.

42. On the one hand, if the provisions of the article are to be interpreted coherently, there must be no contradiction or inconsistency between them. At least at first sight it may therefore be thought that the concept of a non-profit-making organisation in art 13A(1)(m) should be one on which it is possible to impose the conditions of not systematically aiming to make a profit and not distributing any profits nevertheless arising but assigning them to the continuance or improvement of the services supplied, contained in the first indent of art 13A(2)(a); at least cumulatively, those conditions should in principle entail some restriction of that concept.

43. On the other hand it cannot be assumed that each part of the first indent of art 13A(2)(a) must impose a significant limitation on every type of body capable of qualifying for each of the different exemptions concerned. For the sake of convenience, it would appear, the Community legislature has set out a number of conditions as a group capable of being applied to a group of exemptions, rather than stipulating specific conditions individually and repeatedly for each exemption. Thus it may be expected that some indents or parts of indents will be of greater significance in the context of some exemptions than in that of others; it is therefore also possible that there is some overlap or replication between one of the conditions listed in art 13A(2)(a) and an exemption to which it applies.

The concept of a non-profit-making organisation in art 13A(1)(m)

44. The Commission points out that the concept of a non-profit-making entity already exists in the laws of several member states. For the purposes of the Sixth Directive, however, an autonomous and uniform Community definition is required, (see, for example *EC Commission v United Kingdom* (Case C-359/97) [2000] STC 777, [2000] ECR I-63555, para 63 and the case law cited there) which will not necessarily correspond to those concepts in every detail.

45. First, I agree with what appears to be the consensus of the Finnish and United Kingdom governments and the Commission, that the idea of profit-making in this context relates to the enrichment of natural or legal persons--in particular those having a financial interest in the organisation in question--rather than to whether in any given period the organisation's income exceeds its expenditure. The concept of a non-profit-making organisation contrasts essentially with that of a commercial undertaking run for the profit of those who control and/or have a financial interest in it.

46. Second, in accordance with most of the language versions, the focus must be on the aims of the organisation concerned rather than on its results--the mere fact that an entity does not make a profit over any given period is not enough to confer non-profit-making status. Moreover, from the fact that 'non-profit-making' is used to qualify 'organisation', it would seem that the aims in question are those which are inherent in the organisation rather than those which it may be pursuing at a particular point in time.

47. When assessing those aims, therefore, it is necessary but not sufficient to look at the organisation's express objects as set out in its statutes. It is also necessary however to examine whether the aim of making and distributing profit can be deduced from the way in which it operates in practice. And in that context it is not enough to look simply for an overt distribution of profits in the form of, say, a direct return on the investment represented by contributions to the organisation's assets. Such distribution might also, at least in some circumstances, take the form of unusually high remuneration for employees, redeemable rights to increasingly valuable assets, the award of supply contracts to members, whether or not at prices higher than the market rate, or the organisation of sporting 'competitions' in which all the members won prizes. No doubt further methods of covert distribution can be devised.

48. On the other hand, as the Finnish and United Kingdom governments have also submitted, it would not be reasonable to define an organisation as profit-making simply because it sought to achieve a surplus of regular income over regular expenditure in order to budget for irregular but foreseeable expenditure. A golf club might need, for example, to re-roof its clubhouse after a number of years or to extend its course. To deny it non-profit-making status simply because it accumulated a surplus for that purpose would be to discourage it from managing its affairs economically, with prudence and foresight, and to ignore the fact that no material benefit will accrue to any person as a result of the surplus. Organisations would moreover be liable to acquire and lose their right to exemption depending

on where they stood in their budgeting programme, although their fundamental nature and aims would remain unchanged. That cannot in my view have been the intention of the legislature when it enacted the category of 'non-profit-making' organisations.

49. Clearly, in each case the assessment must be a matter for the national court, which is in a position to investigate the circumstances of the organisation. In the present case, it does not seem possible for this court to give more than general guidance, since it is not clear from the case file exactly how the excess income paid by Kennemer into its reserve funds was actually used or intended to be used.

50. The relevant part of the Hoge Raad's question may none the less be answered to the effect that a non-profit-making organisation within the meaning of art 13A(1)(m) of the Sixth Directive is one which does not have as its object the enrichment of natural or legal persons and which is not in fact run in such a way as to achieve or seek to achieve such enrichment; however, the fact that a body systematically aims to make a

surplus which it uses for the services it supplies in the form of a facility to practise a sport does not preclude its classification as such a non-profit-making organisation.

51. In answering that specific question, it is not appropriate, as I have indicated above, to have regard to the terms of the first indent of art 13A(2)(a). However, it appears that the Netherlands legislature has sought also to apply the conditions set out in that indent to the exemption under art 13A(1)(m). In so far as it has done so, those conditions must be examined in order to provide a more complete answer to the national court.

The first indent of art 13A(2)(a)

52. This provision sets out three conditions: (i) there may be no systematic aim of making a profit; (ii) any profits nevertheless arising may not be distributed; (iii) such profits must be used for the continuance or improvement of the services supplied. It seems to me clear from the language used that those conditions are cumulative and not alternative.

53. They must moreover be construed in such a way as to be coherent both among themselves and with the terms of the exemptions to which they may be applied. Therefore, taken together, they should be capable of allowing some non-profit-making organisations within the meaning of art 13A(1)(m) to benefit from the exemption whilst excluding others; put another way, it should be possible for some but not all of those organisations to fulfil the conditions (see paras 37 to 43 above). The same applies, mutatis mutandis, with regard to the bodies referred to in the other sub-paragraphs of art 13A(1) to which the conditions may be applied; whilst there may be some degree of overlap between the definition of the body in question and the conditions which may be imposed, the application of the combined conditions may be expected in some way to limit the scope of that definition).

54. It is inherent in the concept of a non-profit-making organisation as I have defined it that the second condition in the first indent--prohibition of the distribution of profits--will be fulfilled. Moreover, the word 'profit' must be construed here as 'surplus of income over expenditure' rather than 'enrichment of natural or legal persons' (that is to say profit which by its very nature is distributed) or the condition would be circular and would have no meaning (this appears to be specifically supported by the use of the word 'overskud' in Danish).

55. It must consequently bear the same construction in the third condition--use for the furtherance of the services supplied--which will often, but not necessarily, be fulfilled: a non-profit-making organisation may make a surplus which it uses otherwise than for the continuance or improvement of its services whilst none the less ensuring that third parties are not enriched.

56. I should point out here that I do not agree with the suggestion in the Hoge Raad's question that the second and third conditions might be read as referring to any profits nevertheless 'systematically' arising. The word 'systematically' in this context implies the existence of a system and thus, where human activities are concerned, of an organised plan or design. It is not possible in my view for profits to arise systematically in the absence of a systematic aim to make them. However, that does not mean that the words 'merely incidentally' must necessarily be read into the provision either. The reference is simply to a surplus, of whatever nature or origin, to be used in a specified manner.

57. What remains to be determined is whether the first of the three conditions in the indent--that there may be no systematic aim to make a profit--limits or merely replicates the concept of non-profit-making aim set out in art 13A(1)(m) and, if it limits that concept, in what way it does so.

58. The fact that the two provisions are worded differently in all the language versions might well suggest that their meaning was intended to be different. That view would be supported by the fact that the alternative would offer less scope for the member states to use the indent to impose any further condition on non-profit-making bodies; they would be empowered merely to insist that such bodies use any surplus for the furtherance of the services they supply.

59. On the other hand, the reasoning I have set out in para 48 above applies as much in the context of the first indent of art 13A(2)(a) as in the context of art 13A(1)(m). It would seem arbitrary in the extreme to allow an organisation to benefit from a VAT exemption while budgeting regularly for its regular expenditure but not if it accumulates a temporary surplus to budget for irregular but foreseeable expenditure.

60. In line with that reasoning, I take the view that the first part of the optional condition in the first indent of art 13A(2)(a) of the Sixth Directive, to the effect that the bodies in question may not 'systematically aim to make a profit', refers to the making of profit intended to be distributed and thus essentially replicates the 'non-profit-making' criterion in art 13A(1)(m), whereas the second and third parts of that condition refer respectively to prohibited and compulsory uses of any surplus of income over expenditure.

61. That interpretation does not deprive the condition of any substance. The overlap with the 'non-profit-making' criterion in art 13A(1)(m) (and art 13A(1)(l) which exempts certain supplies made by non-profit-making organisations with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civic nature) does not necessarily apply in the case of the bodies referred to in the other sub-paragraphs concerned, such as hospitals or similar recognised establishments, or charitable, educational or cultural bodies recognised by the member states. Medical or educational establishments in particular might well include among their aims the making and distribution of profit whilst still complying with all the other criteria in the relevant sub-paragraphs. Furthermore, a requirement that surpluses must be assigned to the continuance or improvement of the services supplied will significantly circumscribe the uses to which such moneys may be put; for example, a golf club might be required to devote all its income to its own services rather than, say, to making donations to an external fund for promoting excellence in golf journalism.

Further remarks

62. It appears from the order for reference that the case arises out of a dispute as to whether Kennemer is liable to VAT on the services it provides to non-members, and that the question has been approached essentially on the basis of the profit-making or non-profit-making status of the club. It is on that basis that the Hoge Raad has referred three questions, it is on that basis that I have examined them and it is on that basis that this court should provide an answer.

63. However, as I have remarked in paras 13 and 14 above, art 11(1)(e) of the 1968 Netherlands Law on turnover tax, in what appears to be the principal transposition of art 13A(1)(m) of the Sixth Directive, seems to limit the exemption to services supplied to their members by organisations whose aim is the pursuit or promotion of sport. If that limitation were consistent with the Sixth Directive, it might be unnecessary, in the specific circumstances of the case in the main proceedings, to look any further.

64. The limitation may be thought to be consistent with art 13A(1)(m) which, it will be recalled, allows member states to exempt 'certain services closely linked to sport'. On its wording, that would appear to allow the exemption to be limited to services provided by sports clubs to their members. In its first report on the Sixth Directive the Commission stated: 'There is ... no doubt that ... the Council considered that the Member States should grant only limited exemptions ... for otherwise there would have been no reason to use the adjective certain'. However, in his opinion in *EC Commission v Spain* (Case C-124/96) [1998] STC 1237,

para 5, [1998] ECR I-2501, para 5, note 5, the Advocate General (La Pergola) considered that the term 'certain' was an 'unfortunate formulation' but was merely intended to limit the exemption to services provided by non-profit-making organisations. Since, moreover, the point has not been raised or discussed before the court in the present case, it would in my view be inappropriate to express a definitive view here.

65. Another point which falls outside the scope of the Hoge Raad's questions and on which no submissions have been made to the court is whether it is consistent with the Sixth Directive for the Netherlands turnover tax law to include supplies made by bodies providing sports facilities within the exemption for supplies 'of a social or cultural nature' (see paras 11, 12 and 14 above) as well as within the specific 'sports' exemption. It might appear that two separate exemptions are being confused. However, the court does not have sufficient information on the operation of the Netherlands legislation to express a definite view on that point.

CONCLUSION

66. I am therefore of the opinion that the court should answer the Hoge Raad's questions as follows:

(1) When determining whether an organisation is non-profit-making for the purposes of art 13A(1)(m) of the Sixth Directive, account must be taken of its activities as a whole.

(2) Annual membership fees paid to a golf club constitute 'consideration', within the meaning of art 2 of the Sixth Directive, for the services provided by the club to its members.

(3) A non-profit-making organisation within the meaning of art 13A(1)(m) of the Sixth Directive is one which does not have as its object the enrichment of natural or legal persons and which is not in fact run in such a way as to achieve or seek to achieve such enrichment; however, the fact that a body systematically aims to make a surplus which it uses for the services it supplies in the form of a facility to practise a sport does not preclude its classification as such a non-profit-making organisation. The first part of the optional condition in the first indent of art 13A(2)(a) of the Sixth Directive, to the effect that the bodies in question may not 'systematically aim to make a profit', falls to be construed in the same way.

21 March.

The Court of Justice (Fifth Chamber)

delivered the following judgment.

1. By judgment of 3 May 2000, received at the Court of Justice of the European Communities on 9 May 2000, the Hoge Raad der Nederlanden (Supreme Court

of the Netherlands) referred to the court for a preliminary ruling under art 234 EC, three questions on the interpretation of art 13A(1)(m) of the EC Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes--common system of value added tax: uniform basis of assessment (the Sixth Directive).

2. The questions have been raised in proceedings between Kennemer Golf & Country Club (Kennemer Golf) and the Staatssecretaris van Financiën concerning the value added tax (VAT) which Kennemer Golf was charged on certain transactions which it carried out in connection with the practice of the sport of golf.

LAW APPLICABLE

The Community legislation

3. Article 2 of the Sixth Directive provides:

> 'The following shall be subject to value added tax:
>
> 1 The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;
>
> 2 The importation of goods.'

4. Article 4(1) of the Sixth Directive provides: '"Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'.

5. Article 13A(1) of the Sixth Directive is worded as follows:

> '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 ...'

6. Article 13A(2)(a) is worded as follows:

> '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 ...'

The national legislation

7. Article 11(1) of the Wep op de Omzetbelasting (Law on turnover tax) 1968 (Staatsblad 1968 No L 329) of 28 June 1968:

> 'Subject to conditions to be laid down by administrative regulation, the following shall be exempt from tax ... (e) the services rendered to their members by bodies having as their object the practice or promotion of sport, with the exception ... (f) supplies of goods and services of a social and cultural nature to be defined by administrative regulation, provided that the trader does not aim to make a profit and there is no serious distortion of competition in relation to traders who aim to make a profit.'

8. The administrative regulation mentioned in para 1 of the Law referred to in the paragraph above is the Uitvoeringsbesluit Omzetbelasting 1968 (1968 Decree

on the implementation of turnover tax) (Staatsblad 1968 No 423) of 12 August 1968. In art 7(1) and annex B it provides that the following are in particular to be treated as exempt supplies of goods and services:

'(b) supplies of goods and services [of a social and cultural character] made as such by the organisations listed hereinafter, provided that they do not aim to make a profit ... 21. organisations whose activities consists in providing facilities for the practice of sports, solely in respect of such services.'

THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

9. Kennemer Golf is a Netherlands association having about 800 members. Its objects, according to its articles of association, are the pursuit and promotion of sport and games, in particular golf. It owns facilities for this purpose, including a golf course and clubhouse, in the municipality of Zandvoort (Netherlands).

10. Members of Kennemer Golf must pay an annual subscription fee as well as an admission fee. They are required to participate in an interest-free debenture loan issued by Kennemer Golf.

11. Besides the use of the facilities by members of Kennemer Golf, non-members may use the course and the associated facilities in return for payment of a day subscription fee. According to the case file, Kennemer Golf earns relatively large sums in this way, amounting to approximately one-third of the amounts paid by members as annual subscription fees.

12. During the years prior to the 1994 tax year, Kennemer Golf made an operating surplus which was then appropriated as a provisional reserve fund for non-annual expenditure. This also happened in relation to the tax year in question, 1994.

13. In the belief that its services to non-members were exempt from VAT, under art 11(1)(f) of the Wet op de Omzetbelasting 1968 and arts 7(1) and annex B(b), point 21, of the Uitvoeringsbesluit Omzetbelasting 1968, Kennemer Golf did not pay tax on those services for the 1994 tax year. The tax authorities, however, considered that Kennemer Golf was aiming to make a profit and imposed an additional assessment to VAT in relation to those services.

14. When Kennemer Golf's objection to that decision was dismissed by the tax authorities, it appealed to the Gerechtshof (Regional Court of Appeal) Amsterdam. That court dismissed the appeal on the ground that if Kennemer Golf was systematically making profits the presumption had to be that it was seeking to achieve operating surpluses and was pursuing a profit-making aim.

15. Kennemer Golf then appealed against that judgment of the Gerechtshof Amsterdam, to the Hoge Raad der Nederlanden. That court, taking the view that the decision in the case depended on the interpretation of the national VAT provisions in the light of the corresponding provisions of the Sixth Directive, decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1.(a) Where it is necessary to establish whether or not a body aims to make a profit as referred to in art 13A(1)(m) of the Sixth Directive, must account be taken solely of earnings from the services referred to in that provision or must earnings from other services provided by it also be taken into consideration?

(b) If, in determining whether or not the aim is to make a profit, account must be taken solely of the services supplied by the body as referred to in art 13A(1)(m) of the Sixth Directive and not total earnings, must only the costs incurred directly for the services be taken into consideration or also a proportion of the body's other costs?

2.(a) Is there a direct link, within the meaning of inter alia the judgment of the Court of Justice in *Apple and Pear Development Council v Customs and Excise*

Comrs (Case 102/86) [1988] STC 221, [1988] ECR 1443 in the case of subscription fees charged by an association

which, pursuant to the object laid down in its articles of association, provides its members with sports facilities in the context of an association and, if not, is the association to be regarded as a taxable person within the meaning of art 4(1) of the Sixth Directive only in so far as it also provides benefits for which it receives direct consideration?

(b) Must the total amount of the annual subscription fees from the members whom the association provides with sports facilities be included in the earnings of a body in the form of an association which are to be taken into account in determining whether or not the aim is to make a profit as described in the first question even where no direct link exists between the various services provided by the association for its members and the subscription fee paid by them?

3. Does the fact that a body uses surpluses which it systematically aims to make for the purpose of its benefits in the form of a facility to play a type of sport as provided for in art 13A(1)(m) of the Sixth Directive justify the conclusion that it does not aim to make a profit within the meaning of that provision, or is such a conclusion possible only where the intention is incidentally and not systematically to make operating surpluses which are used as described? In answering these questions must account also be taken of the first indent of art 13A(2)(a) of the Sixth Directive and, if so, how is that provision to be interpreted? In particular, in the second part of the provision must "systematically" be read between "arising" and "shall", or "merely incidentally"?'

The first question

16. By part (a) of its first question, the national court is asking essentially whether art 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that the categorisation of an organisation as 'non-profit-making' must be based exclusively on the services referred to in that provision or on all the organisation's activities.

17. According to the Netherlands government, only the specific services referred to in that provision of the Sixth Directive should be considered. Otherwise unreasonable results might occur and fraud or abuses could be encouraged. That approach, in its view, is consonant with the general scheme of the common system of VAT, which always looks at the specific transaction and not at the person of the supplier.

18. On this point, it must be observed, as both the United Kingdom government and the Commission point out, that it is clear from the wording of art 13A(1)(m) of the Sixth Directive that the provision explicitly relates to certain 'services ... supplied by non-profit-making organisations' and that none of the language versions of that provision contains wording which might suggest, owing to its ambiguity, that the expression 'non-profit-making' refers to services and not to organisations.

19. Moreover, all the exemptions listed in art 13A(1)(h) to (p) of the Sixth Directive cover organisations acting in the public interest in a social, cultural, religious or sports setting or in a similar setting. The purpose of the exemptions is therefore to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes.

20. The interpretation advocated by the Netherlands government, whereby only services provided for the above mentioned purposes should be taken into consideration, would mean, as the Advocate General points out in para 23 of his opinion, that commercial undertakings, normally acting with a view to profit, could in principle seek exemption from VAT when, exceptionally, they provide services to which the qualifying adjective 'non-profit-making' could be attached. Such a

result could not, however, be consonant with the wording and aim of the provision in question.

21. If the categorisation of an organisation as 'non-profit-making' must be based on the nature of the organisation itself and not on the services which it provides in the form of those specified in art 13A(1)(m), it follows that, in order to determine whether such an organisation meets the conditions for application of that provision, account must be taken of all its activities, including those which it provides by way of extension to

the services covered by that provision.

22. The answer to be given to part (a) of the first question must therefore be that art 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that the categorisation of an organisation as 'non-profit-making' must be based on all the organisation's activities.

23. In view of that reply, it is not necessary to reply to part (b) of the first question.

The third question

24. By its third question, which it is appropriate to examine before the second question owing to its close link to the first question, the national court is asking, essentially, whether art 13A(1)(m) of the Sixth Directive, read together with the first indent of para (2)(a) of that provision, is to be interpreted as meaning that an organisation may be categorised as 'non-profit-making' even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services.

25. Whilst the Finnish and United Kingdom governments, and also the Commission, submit that the most important consideration is whether the organisation in question aims to make a profit and not the fact that it actually makes a profit, even if it does so habitually, the Netherlands government, on the other hand, contends that the VAT exemption should not be granted when profits are made systematically. In its submission, the exemption is applicable only where surpluses are achieved occasionally or merely incidentally.

26. On that point, it must be observed first of all that it is clear from art 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 art 13A(1)(n) of the Sixth Directive, the judgment given today in *Customs and Excise Comrs v Zoological Society of London* (Case C-267/00) [2002] STC 521, para 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 art 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.

28. Where it is found that this is indeed the case, the fact that an organisation subsequently achieves profits, even if it seeks to make them or makes them systematically, will not affect the original categorisation of the organisation as long as those profits are not distributed to its members as profits. Clearly, art 13A(1)(m) of the Sixth Directive does not prohibit the organisations covered by that provision from finishing their accounting year with a positive balance. Otherwise, as the United Kingdom points out, such organisations would be unable

to create reserves to pay for the maintenance of, and future improvements to, their facilities.

29. The referring court is also unsure whether this interpretation can be maintained in cases where the achievement of surpluses is systematically sought by an organisation. It refers in this regard to the first

indent of art 13A(2)(a) of the Sixth Directive which would seem to suggest that the VAT exemption is to be disallowed where an organisation systematically seeks to make profits.

30. As far as that provision is concerned, it must be observed at the outset that it lays down an optional condition that the member states are at liberty to impose as an additional condition for the grant of certain exemptions set out in art 13A(1) of the Sixth Directive, amongst which figures the exemption covered by that same provision, under (m), which concerns the present case. The Netherlands legislature seems to require compliance with that optional condition before the benefit of that exemption can be granted.

31. As far as the interpretation of that optional condition is concerned, the Netherlands government maintains that the exemption must be refused where an organisation systematically seeks to achieve surpluses. The Finnish and United Kingdom governments, as well as the Commission, on the other hand, submit that systematic pursuit of profits is not of decisive importance where it is clear from both the circumstances of the case and the kind of activity actually carried on by an organisation that it is acting in accordance with the objects set out in its constitution and that these do not include any profit-making aim.

32. It must be observed, with regard to this point, that the first condition set out in the first indent of art 13A(2)(a) of the Sixth Directive, namely that the organisation in question must not systematically aim to make a profit, clearly refers, in the French version of that provision, to 'profit', whilst the two other conditions set out there, namely that no profits should be distributed and that any profits be assigned to the continuance or improvement of the services that supplied, refer, in the French text, to 'bénéfices'.

33. Although that distinction is not to be found in any of the other language versions of the Sixth Directive, it is borne out by the objective of the provisions contained in art 13A thereof. As the Advocate General points out in paras 57 to 61 of his opinion, it is not profits ('bénéfices'), in the sense of surpluses arising at the end of an accounting year, which preclude categorisation of an organisation as 'non-profit-making', but profit ('profit') in the sense of financial advantages for the organisation's members. Consequently, as the Commission also points out, the condition set out in the first indent of art 13A(2)(a) essentially replicates the criterion of non-profit-making organisation as contained in art 13A(1)(m).

34. The Netherlands government argues that such an interpretation does not take account of the fact that the first indent of art 13A(2)(a) must, as an additional condition, necessarily have a content extending beyond that of the basic provision. In response to that argument, it suffices to observe that that condition does not refer only to art 13A(1)(m) of the Sixth Directive but also to a large number of other compulsory exemptions which have a different content.

35. Consequently, the answer to be given to the third question must be that art 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that an organisation may be categorised as 'non-profit-making' even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services. The first part of the optional condition set out in the first indent of art 13A(2)(a) of the Sixth Directive is to be interpreted in the same way.

The second question

36. By part (a) of its second question, the national court is asking, essentially, whether art 2(1) of the Sixth Directive is to be interpreted as meaning that annual subscription fees of the members of a sports association can constitute the

consideration for the services provided by the association, even though the members who do not use or do not regularly use the association's facilities must still pay their annual subscription fee.

37. The Hoge Raad refers in this context to the case law of the court, in particular para 12 of the judgment in *Apple and Pear Development Council v Customs and Excise Comrs* [1988] STC 221, [1988] ECR 1443 in which the court held that the concept of supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive presupposes the existence of a direct link between the service provided and the consideration received. The Hoge Raad is doubtful whether such a direct link exists in circumstances such as those of the present case.

38. According to the Netherlands government, in circumstances such as those in the present case, there is no direct link between the subscription fee paid by members of the association and the services which it provides. Article 2(1) of the Sixth Directive, as interpreted by the court, requires that a specific service be paid for directly, which is not the case where certain members of a sports club do not avail themselves of the services which it offers and nevertheless pay their annual subscription fee.

39. In that regard, according to the case law of the court, the basis of assessment for a provision of services is everything which makes up the consideration for the service provided and a provision of services is taxable only if there is a direct link between the service provided and the consideration received (see *Apple and Pear Development Council v Customs and Excise Comrs* [1988] STC 221, [1988] ECR 1443, paras 11, 12, and *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, [1994] ECR I-743, para 13). A supply of services is therefore taxable only if there exists between the service provider and the recipient a legal relationship in which there is a reciprocal performance, the remuneration received by the provider of service constituting the value actually given in return for the service supplied to the recipient (see *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, [1994] ECR I-743, para 14).

40. As the Commission argues, the fact that in the case before the national court the annual subscription fee is a fixed sum which cannot be related to each personal use of the golf course does not alter the fact that there is reciprocal performance between the members of a sports association such as that concerned in the main proceedings and the association itself. The services provided by the association are constituted by the making available to its members, on a permanent basis, of sports facilities and the associated advantages and not by particular services provided at the members' request. There is therefore a direct link between the annual subscription fees paid by members of a sports association such as that concerned in the main proceedings and the services which it provides.

41. Moreover, as the United Kingdom government rightly points out, the Netherlands government's approach would make it possible for practically any service provider to escape VAT by recourse to all-inclusive charges and thus to set aside the taxation principles which constitute the basis of the common system of VAT established by the Sixth Directive.

42. The answer to be given to part (a) of the second question must therefore be that art 2(1) of the Sixth Directive is to be interpreted as meaning that the annual subscription fees of members of a sports association such as that concerned in the main proceedings can constitute the consideration for the services provided by the association, even though members who do not use or do not regularly use the association's facilities must still pay their annual subscription fees.

43. In view of that reply, it is no longer necessary to answer the second part of part (a) of the second question or part (b) of that question.

COSTS

44. The costs incurred by the Netherlands, Finnish and United Kingdom governments and by the

Commission of the European Communities, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action/proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds, the court (Fifth Chamber), in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 3 May 2000, hereby rules:

1. Article 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that the categorisation of an organisation as 'non-profit-making' must be based on all the organisation's activities.

2. Article 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that an organisation may be categorised as 'non-profit-making' even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services. The first part of the optional condition set out in the first indent of art 13A(2)(a) of the Sixth Directive is to be interpreted in the same way.

3. Article 2(1) of the Sixth Directive is to be interpreted as meaning that the annual subscription fees of the members of a sports association such as that concerned in the main proceedings can constitute the consideration for the services provided by the association, even though members who do not use or do not regularly use the association's facilities must still pay their annual subscription fees.

Karen Widdicombe Solicitor.