**[2012] UKUT 272 (TCC)**

**Appeal number FTC/74/2011**

***Whether charges made by a non-profit-making golf club to persons who do not qualify as members are subject to Value Added Tax at the standard rate or exempt altogether. Interpretation of Articles 132 (1) (m), 133 (d) and 134 of the Principal VAT Directive. Appeal by HMRC against decision of First-tier Tribunal. Reference to the European Court of Justice.***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

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

**Appellants**

**- and -**

**THE BRIDPORT AND WEST DORSET GOLF CLUB LIMITED**

**Respondent**

**TRIBUNAL: The Hon Mrs Justice Proudman DBE**
**Sitting in public at the Rolls Building London EC4A 1NL**

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

**Mrs Amanda Brown of KPMG LLP for the Respondent**

## DECISION

**TRIBUNAL JUDGE: The Hon Mrs Justice Proudman DBE**
**RELEASE DATE:**

### The issue

1. On 1st June 2011 the First-tier Tribunal (Mr Colin Bishopp) allowed the appeal of Bridport and Dorset Golf Club Limited ("the Club") against a determination of the appellant Commissioners ("HMRC"). The Club is a non-profit-making golf club. The question for the First-tier Tribunal was whether the charges ("green fees") made by the Club to visiting non-members playing on its course were exempt from Value Added Tax or whether, as HMRC maintained, they were standard-rated for the purposes of that tax. In the Club rules those visiting golfers are sometimes called "temporary members" and sometimes "visitors" and "guests", but nothing turns on this distinction for the purposes of this appeal.

2. As I have said, the First-tier Tribunal found in favour of the Club. HMRC appeal the decision, with the permission of the Tribunal below, on the ground that it erred in law in holding that as a matter of construction of Articles 132 and 134 of the Principal VAT Directive (Council Directive 2006/112/EEC) ("the Directive") green fees were exempt from the charge to Value Added Tax.

3. It is common ground that UK domestic law (Item 3 of Group 10 of Schedule 9 to the Value Added Tax Act 1994, together with Notes thereto) limits the VAT exemption to supplies to members of the Club who have been members for at least three months:

> "3. The supply by [an eligible body- it is accepted that the Club is an eligible body for this purpose] 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…
>
> Note (2)

> An individual shall only be considered to be a member of [an eligible body] for the purpose of item 3 where he is granted membership for a period of three months or more."

4. For many years the Club accounted to HMRC for VAT on its income from green fees but in 2009, as a result of recent case-law, it made a voluntary disclosure by which it sought to recover £140,358.16 of output tax on the basis that it was not so liable to account. I am told that this case is one of 458 related appeals by golf clubs on this issue and that there are many other connected appeals about distortion of competition between commercial golf clubs and non-profit-making members' clubs.

5. The issue is whether the quoted UK domestic law correctly implements the requirements of what is now Art 132(1) (m) of the Directive, formerly (in the same terms) Art 13A(1) (m) of the Sixth VAT Directive. Other relevant provisions of the Directive also replicate the Sixth VAT Directive and I shall generally refer, as did the First-tier Tribunal, to the Directive. It is common ground that European law applies and that the First-tier Tribunal had jurisdiction to apply the doctrine of direct effect where it appeared to that Tribunal that UK domestic law did not correctly implement the requirements of European law.

6. The issue depends on the interpretation also of Art 133 (d) and Art 134 (b). It is evident from the materials before me that different European Member States interpret these provisions differently. I have for example been referred to legislation in the Republic of Ireland (Value Added Tax Consolidation Act 2010 No 31 of 2010) where it is evident that the same view is taken as by HMRC in the United Kingdom. On the other hand a contrary view is apparently taken in the Netherlands and Germany and I have been referred to the decision in ***Kennemer Golf & Country Club of Zandvoort*** (LJN: AE 8363, Supreme Court, 33764), a decision of the Supreme Court of the Netherlands after the reference to the ECJ, and a decision of the ***Federal Tax Court of Germany*** (FTC V-R74/07 Judgment of 3 April 2008).

7. Art 132 (1) of the Directive provides that,

> "Member States shall exempt the following transactions:…
>
> (m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education."

8. The application of Art 132 is subject to Art 133 which allows a Member State to subject the Art 132 (1) (m) exemption to certain conditions, one of which is contained in Art 133(d),

> "(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT."

9. There is a question, which was not directly argued by HMRC at the First-tier stage, but which was raised by Mr Bishopp and on which he made findings in his decision, whether Art 133 (d) has purportedly been implemented in the UK in respect of sporting services. It is common ground that no particular formality has to be observed in order to implement the provisions of Art 133. I find that the VAT statute itself has purportedly done so. I say purportedly because the First-tier Tribunal found that the provisions of the statute were not in conformity with Art 133 (d) in any event.

10. Art 132 is also subject to Art 134, which provides as follows:

> "The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Art 132 (1), in the following cases:
>
> (a) where the supply is not essential to the transactions exempted [it is common ground that the supply in this case is essential];
>
> (b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT."

**The arguments**

11. HMRC primary submission is that the distinction between use by members and use by visiting golfers (people who have not been members for a period of three months or more) is required by the terms of Art 134 (b) of the Directive since the basic purpose of charging green fees is, it is alleged, to obtain additional income for the Club by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT. It is clear

from the Directive generally and Art 133(d) in particular that the avoidance of distortion of competition is an important objective. Accordingly, the argument runs, the limitation in domestic law is a proper means of achieving that objective since its effect is to put commercial organisations and members' clubs on an equal footing in respect of the supplies by the latter to non-members.

12. The Club ripostes that there is no authority in the Directive for discrimination between supplies to members and supplies to non-members. Such a distinction cannot therefore be made. As the Directive has direct effect the distinction is ultra vires and cannot be relied upon by HMRC.

13. The Club's argument is that the purpose of the Art 132 (1) (m) exemption is to encourage participation in sport. Mrs Brown submitted that the only interpretation of "additional income" consistent with that purpose is additional to income from participation in sport. Her first line of argument was that in the case of sporting facilities there is no scope for engagement of article 134 at all. As sport cannot be said to be provided by the supplier, Article 132(1) (m) can only cover the supply of services "closely linked" to sport.

14. She also submitted that there is a distinction between core supplies on the one hand, and ancillary supplies on the other. Since the provision of the golf course is the provision of sporting facilities in the most direct sense, it is a core supply and Art 134 is not engaged in this instance.

15. In any event, Mrs Brown submitted that there can be no justification for a distinction between the provision of the course for members and for non-members. The basis for justification of the membership criteria runs counter, she said, to the very purpose of the exemption. She relied on ***Canterbury Hockey Club v. HMRC*** [2008] case C 253/07 at [39], ***Commission of the European Communities v. The Kingdom of Spain*** at [18], ***Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v. Ikonomikon*** C 394/04 and C 395/04 [2006] STC 1349 at [20] and the Opinion of the Advocate-General [35] and [36] in ***Criminal Proceedings against Matthias Hoffmann*** [2003] case C144-00.

16. It is true that Art 134 only applies to the parts of Art 132 which exempt not only the supply of goods and services directly promoting activities in the public interest but also the supply of goods and services "closely linked" or "closely related" thereto. This suggests that the other points in Article 132 are indeed core supplies. I also note that in ***British Association for Shooting and Conservation Limited v. HMRC*** [2009] EWHC 399 (Ch) Lewison J thought (see [45]-[47]) that identifying an organisation's main object was one element in deciding whether it fell within the exception. He held that the Tribunal

below was entitled (as the First-tier Tribunal did in the present case) to look at BASC's constitution, supplemented by reference to materials from which conclusions could objectively be drawn about its objectives and to test that against the reality of its activities. It is also true that Article 134 has to cover a multitude of matters since it applies to the many and various types of activities in the public interest provided for by the relevant points in Art 132 (1). However, neither Art 132(1) (m) nor Art 134 distinguishes between core supplies and ancillary supplies.

17. It would seem to be correct that Art 134 (a) to some extent informs the interpretation of 132(1) (m) and that there is an element of overlap between what is "closely linked" and what is "essential": see the observations of Lewison J in the ***British Association for Shooting*** case at [28] and of the European Court of Justice in ***Ygeia*** at [25]. However, as Lewison J also observed, the ECJ does treat the condition in Art 134 (a) separately in the decided cases: see ***Canterbury Hockey*** at [22], ***EC Commission v. Germany*** C 287/00 [2002] STC 982 at [48] and ***Ygeia*** at [29]. To my mind the First-tier Tribunal was therefore right to treat the requirements of Art 132 and of Art 134 as cumulative and sequential.

18. The Tribunal was plainly concerned by the issue of what could be comprised in Art 134 (b) that had not already been ruled out by Art 134 (a). Mr Bishopp came up with one solution, which appeared to be his own definition of what constituted "additional income", namely income from activities not ordinarily undertaken by the body seeking exemption: see [39] and [40] of the decision. However the example given is of ([39]),

> "…the opening of a course, normally restricted to members and their guests, to visitors, for a defined period, with a view to generating income for a specific purpose."

The problem with that example is that it would appear to fall squarely within the exemption afforded by Art 132 (1) (o), and, although the operation of (o) can be restricted by Art 132 (2), the terms and scope of Art 132 (1)(o) were not I am told drawn to the attention of the Tribunal.

19. Mrs Brown proffered another example by analogy with hospital beds for parents of sick children in ***Ygeia***. That is of motorised golf buggies. It would be a matter for the national court whether in any particular instance a golf buggy was essential for the purposes of Art 134 (a). It might not be for an able-bodied golfer, it might be for a disabled one. In cases where it was essential, Art 134 (b) would fall to be considered, again according to the facts of the case.

20. The problem with Mrs Brown's submissions is that they involve a definition of "additional income" which does not appear in the cases. She submitted that the ECJ has decided in many cases that the issue of what is "additional income" is a question of fact for the national courts. However it seems to me that this conflates two matters: first, the legal meaning of additional income (as Mr Hill rhetorically asked, by reference to this case and Mr Bishopp's decision in ***Keswick Golf Club v. Customs & Excise Commissioners*** (1998) VAT Decision 15493, "additional to what?") and secondly, whether the object of the supply is to obtain that income through transactions which are in direct competition with those of commercial enterprises subject to VAT. It is true that the ECJ has never addressed the first issue, despite the fact that many cases in which it is involved have been brought before it, thus leading to the supposition that the focus of Art 134 (b) is on the distortion of competition rather than on additional income.

21. On the one hand, "additional" may simply mean 'more', thus having no real force. On the other hand, as Mr Hill submitted, the reason the ECJ has not addressed the matter specifically may be because the question has never been put to the ECJ in terms. In ***Kennemer Golf & Country Club v. Staatssecretaris van Financiën*** [2002] C 174/00, the Advocate-General, Mr Jacobs, said as follows at [63]-[64],

> "Article 11 (1) (e) of the Netherlands Law on Turnover Tax, in what appears to be the principal transposition of Article 13 (A) (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.
>
> The limitation may be thought to be consistent with Article 13 (A) (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…
>
> 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."

22. Thus, as Mr Hill submitted, it is possible that the Advocate-General was flagging the issue of whether it was legitimate to limit the exemption to members as one that could be raised in another case in the future. In ***Kennemer***, the question was limited to the issue whether Kennemer Golf Club

was or was not a non-profit-making organisation for the purposes of (what is now) Art 132 (1) (m).

23. Mr Hill relied on fiscal neutrality (see ***Horizon College v. Staatssecretaris van Financiën*** [2007] ECR I-4793 at [43]) as the principle underlying art 134 (b), and submitted that if the Club's interpretation were correct this principle would be breached. The legislator would be providing for an exclusion from the exemption where a non-profit-making club was competing for green fees on an occasional basis but not on a permanent basis. Moreover, there would be unjustifiable differences between the VAT treatment of green fees charged by different non-profit-making clubs. He referred to ***Everything Everywhere, formerly T-Mobile, v. HMRC*** (C-276/09). The interpretation would disadvantage non-profit-making clubs which used their green fee income to pay for capital projects as compared to those who used it for recurring expenditure.

24. Mr Hill's principal submission is that I ought to refer the issue before me to the ECJ. He has framed two questions for that Court.

25. Mrs Brown's says that a reference is unnecessary. She also says that it is not open to HMRC to refer the second question (as to the application of Art 133 (d)) in any event. She says it is not the fit subject of an appeal as it does not feature in the grounds of appeal on the basis of which permission was given and as HMRC have not hitherto claimed to have implemented Art 133 (d) it would be an illegitimate hypothetical question in any event.

***Article 133 (d)***

26. I will deal first with this last matter of whether it is open to HMRC to request me to refer a question about the implementation of Art 133 (d) to the ECJ. It seems to me (provided that all the other requirements are satisfied) that it is.

27. It is evident from the terms of the decision of the First-tier Tribunal that implementation of Art 133 (d) was a matter considered by Mr Bishopp: see [41]-[45] and [46] of the decision. He gave permission to appeal generally and not restrictively. He knew that a reference in relation to Art 133 (d) was being sought as the question was specifically raised in the application for permission to appeal, the grounds of appeal and in correspondence between the parties which was before the First-tier tribunal when considering the application for permission to appeal.

28. As the relevant national court I have found that, as no particular formalities are required for implementation, implementation could be effected simply by enactment of a statute. The question is not therefore merely a hypothetical one for the ECJ.

**Whether to refer to the European Court of Justice ("ECJ")**

29. I therefore turn to the question of whether a reference should be made. The criteria are contained in Part 6 Art 267 of the Consolidated Version of the ***Treaty on the Functioning of the European Union*** OJ 2010 C 83/47 (ex Art 234 TEC and Art 177 of the Treaty of Rome). This provides, so far as relevant:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon..."

30. The classic statement of the criteria for a reference is contained in the judgment of Lord Denning MR in ***HP Bulmer Limited v. J Bollinger SA*** [1974] Ch 401. He made it clear that there should only be a reference if it is necessary in order to enable it to give judgment. Even then the national court retains a limited discretion whether to refer and the case provides guidelines as to the type of considerations which the court should take into account in exercising that discretion. Lord Denning mentioned the time it may take to get a ruling, the expense of the reference, the importance of not overwhelming the ECJ with references, the need to formulate the question clearly, the difficulty and importance of the point at issue and the views of the parties. Similar points were made at first instance in ***Adams v. Lancashire County Council*** [1996] ICR, citing the judgment of Bingham J in ***HMRC v. Aps Samex*** [1983] 1 All ER. 1042.

31. In ***R v. Stock Exchange ex parte Else Limited*** [1993] QB 534 at 545 D-G Sir Thomas Bingham (by then MR) summarised the considerations to be taken into account in deciding whether to refer in the following well-known passage:

> "I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer. I am not here attempting to summarise comprehensively the effect of such leading cases as ***HP Bulmer Limited v. J Bollinger SA*** [1974] Ch 401, ***CILFIT (Srl) v. Ministry of Health*** (Case 283/81) [1982] ECR. 3415 and ***R v. Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers*** [1987] 3 CMLR 951, but I hope I am fairly expressing their essential point."

32. At my request I was referred to those further cases (and the review of cases in the ***Pharmaceutical Society*** case, including the decision of the House of Lords in ***Henn and Darby v. DPP*** [1981] AC 850) and also to the more recent cases of ***HMRC v. Federation of Technological Industries and 53 Others*** [2004] EWCA Civ 1020, ***Royal Bank of Scotland plc v. HMRC*** (a decision of the Second Division Inner House Court of Session) [2007] CSIH 15 and ***Able UK Limited v. HMRC*** [2001] UKUT 193 (TCC).

33. Thus there is a distinction between the necessary/critical jurisdictional criterion and matters of discretion. Even where the court considers it necessary to obtain a decision on a question of law to enable it to give judgment, it retains a limited discretion to decline to make a reference in certain cases. This principle is embodied in the doctrine of '*acte clair*', where the answer to a particular question is already covered by a decision of the ECJ or where the answer is otherwise so plain as to leave no scope for reasonable doubt: see ***CILFIT*** C-283/81 [1982] ECR 3415. However the authorities show that the English court should exercise great caution in relying on the doctrine of *acte clair* as a ground for declining to make a reference: see the observations of Lord Diplock in ***Henn and Darby*** at 906a.

34. The Club submits that a reference is not necessary or (to use the terminology of Sir Thomas Bingham MR) critical to my decision and that the answer to the issue is plain. Mrs Brown says that the question has been before the ECJ on a number of occasions and it has always been referred back as a matter for the national court. There is therefore already a plethora of authority on the issue and a reference ought not to be made. The case is one of *acte clair* because the answer to the question is plain, not as a matter of English domestic law, but as a matter of Community law to be derived from the decisions of the ECJ. Thus, she argued, the limits on the scope of the Art 132 (1) (m) exemption are clear. She referred in particular to the decisions in ***Commission v. Spain*** [1998] ECR I-2501, ***Stockholm Lindöpark*** [2001] ECR I-493, ***Kennemer***, ***Canterbury Hockey, Staatssecretaris van Financiën v. Stichting Kinderopvang Enschede*** and ***Horizon College***.

35. However this submission potentially conflates the question of interpretation of Art 134 (b) of the Directive (additional to what?) with the finding of facts about whether there is competition with a commercial organisation subject to VAT. The questions were treated as discrete by the First–tier Tribunal ([39]). It is the latter question which is the question of fact for the national court and which has been determined by the First-tier Tribunal, where ([at [40]) Mr Bishopp said,

> "there does not seem to me to be much room for doubt that the second limb of the art 134 (b) limitation is satisfied in the instant case: as Mr Willcox [the Club's witness] accepted, the right to play golf on the appellant's course in exchange for a green fee is materially indistinguishable from what is provided by commercial enterprises which are required to charge VAT."

36. Despite Mrs Brown's cogent and persuasive submissions, it seems to me that the meaning of "additional income" is critical to the decision on the issue before me. Does it simply mean "more income" thus bearing no particular emphasis, does it mean "additional to income from sport/the core exempted activities", as Mrs Brown submits, does it mean "income from an activity not of a kind customarily made" by the Club, as the First-tier Tribunal found, or does it bear a wider meaning (as the Advocate-General seemed to think in ***Kennemer***) enabling HMRC to exclude the supply of services to non-members? I do not consider that this is a case anywhere near that of the doctrine of "*acte clair*". I feel genuine doubt as to what is comprised in the phrase "additional income" in Art 134 (b).

37. Turning to the question of discretion, Mrs Brown conceded that if there is jurisdiction to refer, the Club would not wish discretionary considerations to preclude a reference, on the basis that it would be the worst of all worlds for the Club and other institutions in the like position to exhaust all the processes

of the domestic courts and, at the end of the process, still have a reference to the ECJ.

38. As to discretionary factors, I take into account the following factors. A reference to the ECJ is based on the principles of international comity. Art 267 of the 2010 Treaty (consolidated version) seeks to prevent divergences between Member States on Community law. It is the undoubted fact that Art 134 and its predecessor have been interpreted in ways which are flatly contrary to each other in different Member States. The ECJ will have access to information about how sporting clubs throughout the European Union deal with the issue. Community law uses terminology peculiar to it and its concepts may be different from those familiar to the English court. The ECJ will have access to the meanings of the words used in all the languages of the member States. The issue is one potentially of great importance for the Community in general. Moreover, within the United Kingdom there are a very great number of cases which turn on or are affected by it.

39. In all the circumstances of this case I would feel considerable unease in refusing to refer the matter to the ECJ. It is true that such a reference may involve delay, but it does not seem to me that this is a logistical reason sufficient to outweigh the need for a reference for the reasons I have given.

40. I therefore turn to the reference of the second question, the Art 133 (d) point. It seems to me that the First-tier Tribunal's decision raises the legal question whether a Member State must eliminate all distortions of competition when imposing conditions under Art 133 (d) on the grant of exemption under Art 132 (1)(m). Mr Hill referred me to [73] of the Opinion of the Advocate-General in ***CopyGene A/S v. Skatteministeriet*** C262/08. Bearing all the other matters in mind to which I have referred, it would not in my judgment be in accordance with the overriding objective of dealing with cases fairly and justly (incorporated as Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008), for example sub-rule (b), (avoiding unnecessary formality and seeking flexibility in the proceedings)), to fragment the questions asked in such a way that an obviously relevant question is left unanswered for the future. This is especially so where there are differences between Member States in interpretation of the Directive. The manner in which the exemption may or may not be restricted may be of general importance in the Community.

41. I have therefore decided to refer both issues as to the construction of Art 134 (b) and 133 (d) to the ECJ for decision.

42. However, as I have said to the parties, I was not convinced as the case unfolded that the questions have been asked in the most relevant and helpful

form. This is a matter which both parties have agreed to consider in drafting the terms of the reference and submitting them to me for approval.

**The Hon Mrs Justice Proudman DBE**

Release date: 30 July 2012