TC03701

Appeal numbers: TC/2009/16390

Application to strike out – does the appeal have a reasonable chance of succeeding – no – should the appeal be stayed – no – appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE CLUB COMPANY (UK) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE LADY JUDITH MITTING

Sitting in public at Manchester on 30 May 2014

Tim Brown of Counsel for the Appellant

Sarabjit Singh, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The application before the Tribunal is that of HMRC to strike out the appeal by The Club Company (UK) Limited ("the Company") against the decision of HMRC that its supplies of sporting services should be taxable at the standard rate.

2. The Principal VAT Directive 2006/112/EC ("the PVD"), from which the domestic provisions derive, provides at Articles 132 and 133 as follows:

> "**Article 132**
>
> 1. 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;
>
> …
>
> **Article 133**
>
> Member States may make the granting of bodies other than those governed by pubic law of each exemption provided for in points … (m) … of Article 132(1) subject in each individual case to one or more of the following conditions:
>
> (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance and improvement of the services supplied;
>
> (b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;
>
> (c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;
>
> (d) the exemption must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT …

3. It was common ground that the Company is a proprietary club and is not thus a non-profit-making body. Its supplies are therefore not treated by HMRC as exempt.

4. The Company's grounds of appeal are, in summary, that:

(1) The current application of VAT in the UK to providers of sporting services is in breach of EU legislation as it causes a distortion of trade in that it contravenes the PVD (Article 133(d)).

(2) Support for this view is provided by the CJEU decision in the case of *Bridport & West Dorset Golf Limited* ECJ Case C-495/12 in which the Court ruled that:

- Article 134(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not excluding from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant, by a non-profit-making body managing a golf course and offering a membership scheme, of the right to use that golf course to visiting non-members of that body.
- Article 133(d) of Directive 2006/112 must be interpreted as not allowing the Member States, in circumstances such as those in the main proceedings, to exclude from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant of the right to use the golf course managed by a non-profit-making body offering a membership scheme when that supply is provided to visiting non-members of that body.

(3) Annex III, paragraph 14 of the EC directive 2006/112 permits Member States to apply the reduced rate to sporting services. The Appellant considers that the reduced rate should be applied to all sporting services provided by proprietary clubs in the UK.

5. The application by HMRC was brought under paragraph 8(3)(c) the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on the basis that there was no reasonable prospect of the appeal succeeding and should therefore be struck out.

6. In support of the application, Mr Singh contended that the domestic legislation was fully compliant with EU legislation and does not breach or contravene the PVD. It was not the domestic legislation which created a distortion of trade between non-profit-making clubs and proprietary clubs because the distortion was inherent in the PVD itself. This was recognised by the ECJ in *Bridport* when it concluded that there was an inherent distortion in the competition because the exemption depended upon the characteristics of the supplier and not just the nature of the supply. The Court went further still in *Bridport* by saying that any use of Article 133(d) of the PVD to attempt to eliminate the difference in the conditions of competition would not be permitted as such a construction would call into question the very scope of the exemption (*Bridport,* paragraphs 36 and 37).

7. In response to the contention by the Company that pursuant to Annex III, the UK should apply the reduced rate to all sporting services provided by proprietary clubs, this was a political issue and not one for the Tribunal. The UK has simply chosen not to apply the reduced rate.

8. Mr Brown, for the Company, said that his starting point and the rationale behind the appeal was that the company merely wanted a level playing field. It believed that all suppliers of sporting services should be treated equally. In *Bridport*, Mr Brown accepted that the Court found that there was a distortion of competition but the Court

did not go on to consider that that distortion in fact contravened higher EU legislation in that the treaties themselves aimed to prevent distortion.

9. Mr Brown argued in the alternative that Annex III allowed the UK to apply a reduced rate rather than a standard rate to supplies by proprietary clubs. In other Member States that reduced rate was applied and as the idea of the Directive was that there should be a uniform application of the VAT system, it was wrong that the UK did not apply the same reduced rate itself.

10. Mr Singh pointed out that the arguments now put forward by the Company have been recently considered by the Tribunal in the *North Weald Golf Company v Revenue & Customs commissioners* – TC03270 in a somewhat different guise. I, of course, am not bound by this decision but, with respect, I agree with it for the same reasons given by Judge Berner.

11. *North Weald* concerned an application by the Appellant to include a new ground in its grounds of appeal, the new ground being in effect what the Appellant is arguing for here. I can do no better than cite paragraphs 32 and 33 of Judge Berner's decision.

> "32. The resort by the Club to the principle of equal treatment is bound to fail. As Mr Singh submitted, it is clear from the case law of the Court of Justice that the principle of fiscal neutrality, whether in the sense of the principle of equal treatment or the sense of ensuring the neutrality of tax burden, is not a rule of primary law with independent effect that can make up for the absence of a relevant provision in a Directive; it is a fortiori that such a principle cannot circumvent the clear words of the Directive itself. That has recently been confirmed by the ECJ in *Gratten Plc v Revenue and Customs Commissioners* (Case C-310/11) [2013] STC 502, at para 29, and as discussed by the First-tier Tribunal in the same case ([2013] UKFTT 488 (TC)).
>
> 33. In *Gratten*, the Tribunal examined the judgment of the Court of Justice in the context of other ECJ authorities, and summarised the position at [43]:
>
> > "The only obligations imposed on the member states were those contained in the directives. The interpretation of those directives, and the way in which they are implemented by the member states, must take into account the fundamental principles of the VAT system, including the principle of fiscal neutrality, both in the sense of equal treatment and that of neutral tax burden. But those principles are given effect only by the directives, as so interpreted and applied, and it is therefore according to the provisions of the directives that the basis of assessment falls to be determined."
>
> The Tribunal concluded, at [45], that there was a clear and consistent thread running through the cases that the principle of fiscal neutrality as a whole did not have independent effect."

12. As far as Mr Brown's alternative Annex III argument is concerned, what Annex III does is to give individual Member States a discretion in certain circumstances to allow a reduced a rate. Whether or not a Member State adopts this course is entirely a

matter for that state and an individual taxpayer cannot challenge the State's refusal to apply a reduced rate in this Tribunal. The Tribunal quite simply has no jurisdiction in respect of this argument.

13. For these reasons I do not consider this appeal has a reasonable chance of succeeding and I therefore strike it out.

14. Mr Brown put forward an alternative course of action, namely that the appeal should be stayed. The background to this suggestion was a complaint which has been submitted by the Association of Golf Course Owners to the EU Commission in January 2014 to take infringement proceedings against the UK for its misapplication of the EC Directive 2006/112. The complaint, I am told, concerns the different VAT treatment of the UK's member owned golf clubs and proprietary golf clubs and the distortion of competition caused which has significantly damaged the latter. Mr Brown submitted that this appeal should be stayed pending the outcome of the complaint. In support of his application he referred me to the overriding objective (paragraph 2 Tribunal Rules) to deal with cases fairly and justly. The suggestion of a stay was not accepted by Mr Singh and I do not accept the suggestion either. Two factors influence my decision. First, the complaint has only just been lodged and acknowledged. It is far too early to predict any possible outcome of it and to even second guess the outcome is completely speculative. It cannot be in the best interests of any Appellant to stay proceedings for what could be a matter of years. Secondly, and I rely here on paragraph 37 of Judge Berner's decision in *North Weald* because I myself have not seen the complaint in question. In paragraph 37 Judge Berner commented that in fact "… the solution proposed in the complaint to the issue of distortion of competition is not to apply exemption to proprietary clubs but to eliminate the exemption from the whole sporting sector." This would appear to run totally contrary to the grounds of the appeal.

15. In summary therefore I rule that there should be no stay in the appeal and the application for a strike out is granted.

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

LADY JUDITH MITTING
TRIBUNAL JUDGE

RELEASE DATE: 9 June 2014