[2014] UKFTT 0130 (TC)

TC03270

Appeal number: TC/2009/11819

PROCEDURE – application for permission to amend grounds of appeal – delay in making application – relevance and merits of new grounds of appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORTH WEALD GOLF CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 23 January 2014

Tim Brown, instructed by Pem VAT Services LLP, for the Appellant

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

DECISION

1. The Appellant, North Weald Golf Club ("the Club"), applied for permission to amend its grounds of appeal. At the conclusion of the hearing, I refused that application and gave a brief summary of my reasons for doing so. This decision notice now sets out my full reasons.

Background

2. The background to the Club's application is its appeal against a decision of HMRC that the sporting services made by the Club since February 2005 are taxable supplies on the basis that the Club is not an eligible body for the purposes of VAT exemption, and against associated assessments.

3. The definition of "eligible body" derives from the description of exempt supplies contained in Item 3 of Group 10 of Schedule 9 to the Value Added Tax Act 1994. Group 10 relevantly provides:

> **3** The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part.
>
> NOTES
>
> (1) Item 3 does not include the supply of any services by an eligible body of residential accommodation, catering or transport.
>
> (2) An individual shall only be considered to be a member of a an eligible body for the purpose of Item 3 where he is granted membership for a period of three months or more.
>
> (2A) Subject to Notes (2C) and (3), in this Group "eligible body" means a non-profit making body which—
>
> *(a)* is precluded from distributing any profit it makes, or is allowed to distribute any such profit by means only of distributions to a non-profit making body;
>
> *(b)* applies in accordance with Note (2B) any profits it makes from supplies of a description within Item 2 or 3; and
>
> *(c)* is not subject to commercial influence.
>
> (2B) For the purposes of Note (2A)*(b)* the application of profits made by any body from supplies of a description within Item 2 or 3 is in accordance with this Note only if those profits are applied for one or more of the following purposes, namely—
>
> *(a)* the continuance or improvement of any facilities made available in or in connection with the making of the supplies of those descriptions made by that body;
>
> *(b)* the purposes of a non-profit making body.

(2C) In determining whether the requirements of Note (2A) for being an eligible body are satisfied in the case of any body, there shall be disregarded any distribution of amounts representing unapplied or undistributed profits that falls to be made to the body's members on its winding-up or dissolution.

(3) In Item 3 "an eligible body" does not include—

(a) a local authority;

(b) a Government department within the meaning of section 41(6); or

(c) a non-departmental public body which is listed in the 1993 edition of the publication prepared by the Office of Public Service and Science and known as Public Bodies.

(4) For the purposes of this Group a body shall be taken, in relation to a sports supply, to be subject to commercial influence if, and only if, there is a time in the relevant period when—

(a) a relevant supply was made to that body by a person associated with it at that time;

(b) an emolument was paid by that body to such a person;

(c) an agreement existed for either or both of the following to take place after the end of that period, namely—

(i) the making of a relevant supply to that body by such a person; or

(ii) the payment by that body to such a person of any emoluments.

(5) In this Group "the relevant period", in relation to a sports supply, means—

(a) where that supply is one made before 1st January 2003, the period beginning with 14th January 1999 and ending with the making of that sports supply; and

(b) where that supply is one made on or after 1st January 2003, the period of three years ending with the making of that sports supply.

(6) Subject to Note (7), in this Group "relevant supply", in relation to any body, means a supply falling within any of the following paragraphs—

(a) the grant of any interest in or right over land which at any time in the relevant period was or was expected to become sports land;

(b) the grant of any licence to occupy any land which at any such time was or was expected to become sports land;

(c) the grant, in the case of land in Scotland, of any personal right to call for or be granted any such interest or right as is mentioned in paragraph *(a)* above;

(d) a supply arising from a grant falling within paragraph *(a)*, *(b)* or *(c)* above, other than a grant made before 1st April 1996;

(e) the supply of any services consisting in the management or administration of any facilities provided by that body;

(f) the supply of any goods or services for a consideration in excess of what would have been agreed between parties entering into a commercial transaction at arm's length.

(7) A supply which has been, or is to be or may be, made by any person shall not be taken, in relation to a sports supply made by any body, to be a relevant supply for the purposes of this Group if—

(a) the principal purpose of that body is confined, at the time when the sports supply is made, to the provision for employees of that person of facilities for use for or in connection with sport or physical recreation, or both;

(b) the supply in question is one made by a charity or local authority or one which (if it is made) will be made by a person who is a charity or local authority at the time when the sports supply is made;

(c) the supply in question is a grant falling within Note (6)*(a)* to *(c)* which has been made, or (if it is made) will be made, for a nominal consideration;

(d) the supply in question is one arising from such a grant as is mentioned in paragraph *(c)* above and is not itself a supply the consideration for which was, or will or may be, more than a nominal consideration; or

(e) the supply in question—

(i) is a grant falling within Note (6)*(a)* to *(c)* which is made for no consideration; but

(ii) falls to be treated as a supply of goods or services, or (if it is made) will fall to be so treated, by reason only of the application, in accordance with paragraph 9 of Schedule 4, of paragraph 5 of that Schedule.

(8) Subject to Note (10), a person shall be taken, for the purposes of this Group, to have been associated with a body at any of the following times, that is to say—

(a) the time when a supply was made to that body by that person;

(b) the time when an emolument was paid by that body to that person; or

(c) the time when an agreement was in existence for the making of a relevant supply or the payment of emoluments,

if, at that time, or at another time (whether before or after that time) in the relevant period, that person was an officer or shadow officer of that body or an intermediary for supplies to that body.

(9) Subject to Note (10), a person shall also be taken, for the purposes of this Group, to have been associated with a body at a time mentioned in paragraph *(a)*, *(b)* or *(c)* of Note (8) if, at that time, he was connected with another person who in accordance with that Note—

(a) is to be taken to have been so associated at that time; or

(b) would be taken to have been so associated were that time the time of a supply by the other person to that body.

(10) Subject to Note (11), a person shall not be taken for the purposes of this Group to have been associated with a body at a time mentioned in paragraph *(a)*, *(b)* or *(c)* of Note (8) if the only times in the relevant period when that person or the person connected with him was an officer or shadow officer of the body are times before 1st January 2000.

(11) Note (10) does not apply where (but for that Note) the body would be treated as subject to commercial influence at any time in the relevant period by virtue of—

(a) the existence of any agreement entered into on or after 14th January 1999 and before 1st January 2000; or

(b) anything done in pursuance of any such agreement.

(12) For the purposes of this Group a person shall be taken, in relation to a sports supply, to have been at all times in the relevant period an intermediary for supplies to the body making that supply if—

(a) at any time in that period either a supply was made to him by another person or an agreement for the making of a supply to him by another was in existence; and

(b) the circumstances were such that, if—

(i) that body had been the person to whom the supply was made or (in the case of an agreement) the person to whom it was to be or might be made; and

(ii) Note (7) above were to be disregarded to the extent (if at all) that it would prevent the supply from being a relevant supply, the body would have fallen to be regarded in relation to the sports supply as subject to commercial influence.

(13) In determining for the purposes of Note (12) or this Note whether there are such circumstances as are mentioned in paragraph *(b)* of that Note in the case of any supply, that Note and this Note shall be applied first for determining whether the person by whom the supply was made, or was to be or might be made, was himself an intermediary for supplies to the body in question, and so on through any number of other supplies or agreements.

(14) In determining for the purposes of this Group whether a supply made by any person was made by an intermediary for supplies to a body, it shall be immaterial that the supply by that person was made before the making of the supply or agreement by reference to which that person falls to be regarded as such an intermediary.

(15) Without prejudice to the generality of subsection (1AA) of section 43, for the purpose of determining—

(a) whether a relevant supply has at any time been made to any person;

(b) whether there has at any time been an agreement for the making of a relevant supply to any person; and

(c) whether a person falls to be treated as an intermediary for the supplies to any body by reference to supplies that have been, were to be or might have been made to him,

references in the preceding Notes to a supply shall be deemed to include references to a supply falling for other purposes to be disregarded in accordance with section 43(1)*(a)*.

(16) In this Group—

"agreement" includes any arrangement or understanding (whether or not legally enforceable);

"emolument" means any emolument (within the meaning of the Income Tax Acts) the amount of which falls or may fall, in accordance with the agreement under which it is payable, to be determined or varied wholly or partly by reference—

(i) to the profits from some or all of the activities of the body paying the emolument; or

(ii) to the level of that body's gross income from some or all of its activities;

"employees", in relation to a person, includes retired employees of that person;

"grant" includes an assignment or surrender;

"officer", in relation to a body, includes—

(i) a director of a body corporate; and

(ii) any committee member or trustee concerned in the general control and management of the administration of the body;

"shadow officer", in relation to a body, means a person in accordance with whose directions or instructions the members or officers of the body are accustomed to act;

"sports land", in relation to any body, means any land used or held for use for or in connection with the provision by that body of facilities for use for or in connection with sport or physical recreation, or both;

"sports supply" means a supply which, if made by an eligible body, would fall within Item 2 or 3.

(17) For the purposes of this Group any question whether a person is connected with another shall be determined in accordance with section 839 of the Taxes Act 1988 (connected persons).

4. Reflected in this extract of the legislation are changes made, with effect from 1 January 2000, by the VAT (Sport, Sports Competitions and Physical Education) Order, SI 1999/1994 ("the 1999 Order"). Item 3 and Note (3) respectively were amended by the insertion of the new expression "eligible body" for the former expression "non-profit making body". New Notes (2A) to (2C) and (4) to (17) were inserted. I have included this substantial extract of the legislation, as the changes made by the 1999 Order are material to the Club's application.

5. The appeal was heard by the Tribunal (Judge Gort and Mr Midgley) on 21 and 22 February 2013. The decision was released on 12 September 2013 ("the 2013 decision"). The Tribunal addressed two questions. One was an issue of limitation. The other was whether the Club was a non-profit making body, the issue on which HMRC had based their decision to treat the Club's supplies as taxable, standard-rated, supplies. On that latter issue, the Tribunal decided that the Club was not a non-profit making body.

6. In reaching that conclusion, the Tribunal referred to the provisions of the European Directive (now the Principal VAT Directive 2006/112/EC) from which the domestic provisions were derived. Reference was made to Articles 132 and 133, which provide 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 to bodies other than those governed by public 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…

7. By notice dated 23 November 2012, the Club applied for permission to amend its grounds of appeal by making the following addition:

> "That the 1999 Sports Order (Value Added Tax (Sport, Sports Competitions and Physical Education) Order 1999 (S.I. 1999/1994)), which amended Group 10 Schedule 9 VATA 1994, contravened the fundamental EU law principle of equal treatment.
>
> The Union has the competency of "… establishing or ensuring the functioning of the internal market …" which includes the fundamental principle of equal treatment other parts of the Union cannot do things under their narrower (or lower) competency that runs contrary to (or frustrates) one objectives and/or higher principles enshrined in the Treaties. Therefore distortions contemplated in the VAT Directive 2006/112/EC must be invalid."

8. The Tribunal did not make any ruling on this application, confining itself to the two issues I have described, but adjourned the appeal to be re-listed to enable the Tribunal to consider whether to give permission to the Club to amend its grounds of appeal. Between the date of release of the Tribunal's decision, and the date of the re-listed hearing, Judge Gort has retired. The application was accordingly heard by me.

The applicable principles

9. I start with the principles to be applied on an application of this nature, as there was some dispute on this.

10. In my judgment, adopting the approach of the Tribunal in *Megantic Services Ltd v Revenue and Customs Commissioners* [2013] UKFTT 371 (TC), the starting point for the exercise of a judicial discretion in this regard is the overriding objective, set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to deal with cases fairly and justly. This means conducting a balancing exercise, weighing the interests of justice and questions of prejudice to either or both of the parties. In referring to the overriding objective in this context, I note that rule 2 expressly provides that dealing with cases fairly and justly includes avoiding delay, so far as compatible with proper consideration of the issues.

11. Well-established authority outside the sphere of the Tribunal, but referring to the same overriding objective, indicates first that any amendment to a party's case must be supported by evidence (a factor that is not relevant here where the proposed additional grounds are on questions of law alone), and secondly, in general terms, but subject always to questions of prejudice, that a relevant factor will be whether the amendment will achieve the effect that the real dispute between the parties can be adjudicated upon (see, for example, *Cobbold v Greenwich LBC*, 9 August 1990,

unrep, CA; *Worldwide Corporation Ltd v GPT Ltd* [1998] EWCA Civ 1894; and *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14). This second factor goes therefore to the essential relevance of the ground of appeal to the determination of the appeal.

12. In conducting such a balancing exercise, all the circumstances must be taken into account. That in my view includes the merits of the new ground of appeal. An analogy may be drawn with applications to appeal out of time, where the merits of an appeal are a relevant consideration (see, for example, *O'Flaherty v Revenue and Customs Commissioners* [2013] STC 1946). It would not be in the interests of justice to permit a ground of appeal to be added which had no merit. The test here, it seems to me, should be whether, if such a ground had been included in the appeal at the outset, it would have been struck out, under rule 8 of the Tribunal rules, on the basis that the Tribunal considered that part of the case to have no reasonable prospect of succeeding.

13. Mr Brown, for the Club, argued that the merits of the new ground should not be regarded as a relevant consideration. The application was to add something to the original appeal, which had been made in time, and that the appeal may be made on the grounds indicated by the appellant Club as of right.

14. I do not agree. In the context of exercising a discretion whether to permit additional grounds to be added to an existing appeal after the time when the latest time for appealing had passed, I do not see any reason why the merits, as well as the relevance, of a ground of appeal should not be among the factors to be considered.

15. On that footing, Mr Brown also resisted my suggestion that the test of the merits should be based on whether the Tribunal considered that the ground would have no reasonable prospect of success, and so should be struck out, preferring instead to put the test as whether what was proposed to be added was an arguable ground of appeal. I am inclined to think that this is an exercise in semantics. The threshold test I have suggested for deciding that a ground of appeal has no merit is a high one in any event, and I do not consider it would be made any more appropriate by setting it by reference to arguability.

Discussion

16. The first question that falls to be addressed is that of timing. The Club's notice of appeal was dated 6 July 2009. On 15 September 2009, HMRC made a formal request for further and better particulars of the Club's grounds of appeal. In its response, dated 10 February 2010, the Club raised three specific challenges to HMRC's decision and the assessments. The validity of the 1999 Order, or the invalidity of any element of the Principal VAT Directive, was not among them.

17. The application of 23 November 2012 was made shortly before the date, 21 December 2012, on which the substantive hearing had originally been listed. That hearing was, for reasons unconnected with the application, vacated, and the appeal was heard in February 2013.

18. Mr Brown argued that HMRC were not, and would not be, prejudiced by the application or the grant of permission for the new grounds to be added to the appeal. By way of reason for the late application, Mr Brown submitted that there had been a hope, which was not in the event realised, that another case on the sporting exemption involving a golf club, the *Bridport* case, would provide an answer to the question now sought to be raised in this case. That is a reference to the case of *Revenue and Customs Commissioners v Bridport and West Dorset Golf Club Ltd* (Upper Tribunal, [2012] STC 2244; ECJ, Case C-495/12, [2013] All ER (D) 203 (Dec.)). The Upper Tribunal in that case, in a judgment released on 30 July 2012, decided to make a reference to the ECJ. Among the issues to be referred was the question whether a member state must eliminate all distortions of competition when imposing conditions under Article 133(d) of the Principal VAT Directive on the grant of exemption under Article 132(1)(m). The reference was ultimately made by a decision of 19 October 2012, and was received by the ECJ on 5 November 2012.

19. The questions referred to the ECJ in *Bridport* included three which raised the issue of distortion of competition: two (Questions 6 and 7) asked whether "additional income" (from certain supplies that it was assumed would otherwise be exempt) could be selectively excluded from exemption if it was likely to cause a distortion of competition; the third (Question 8) asked whether there was any difference in the requirement of Article 133(d), which requires a "likely distortion of competition" and that in Article 134(b), which envisages only the existence of direct competition.

20. There is, in my view, nothing in the timing of the reference to the ECJ by the Upper Tribunal that can provide a reason for the delay in formulating the Club's additional ground of appeal. *Bridport* does not provide any justification. The making of the reference to the ECJ was not an event that could reasonably be regarded as having given rise to a potential ground of appeal that could not have been raised earlier. It is evident that the golf club fraternity has been exercised over questions of distortion of competition for some considerable time, certainly pre-dating this appeal. In this respect, it is illustrative that, in referring to the amendments made to the domestic legislation by the 1999 Order, a recent complaint made by a trade body, the Association of Golf Course Owners (1993), to the European Commission ("the Owners' Complaint") of 18 December 2013, refers (at section 4, page 8) to those amendments as having been made "to maintain the different VAT treatment for proprietary and member-owned golf clubs".

21. The fact that the application for inclusion of the new ground of appeal was made some considerable time after the original notice of appeal and the provision of further particulars of the appeal is not decisive. As I indicated earlier, it is necessary for me to consider all the circumstances, including the relevance and merits of the new ground of appeal.

22. This at once presents a difficulty for the Club. As part of its application it seeks to appeal on the ground that the 1999 Order contravened the principle of equal treatment. The 1999 Order, as I have described, introduced a new requirement for the supplier of the relevant supplies to be an "eligible body", in place of the simple requirement that it be a non-profit making body. The change meant that it was not

enough for a supplier simply to be a non-profit making body; the definition of "eligible body" in Note (2A) of Group 10, Sch 9 VATA, inserted by the 1999 Order, requires the non-profit making body to satisfy three further conditions, or "hurdles" before it can be eligible for the exemption under Item 3.

23. In this case, the Club has been found not to be a non-profit making body. The Tribunal's 2013 decision rests on the meaning of that expression, which pre-dates the 1999 Order, and which follows from the meaning given to "non-profit making organisation" in Article 132 itself. None of the changes made by the 1999 Order are relevant to the Club's position; the Club has fallen at the first hurdle, and the issue of the validity of the changes made by that Order to the VATA is not relevant to the Club's appeal.

24. Before me, Mr Brown accepted this analysis. He agreed that, as a consequence, the only remaining ground of appeal that could be raised by the Club was that, having regard to the distortion of competition as between proprietary clubs and non-profit making bodies, and the principle of equal treatment, and notwithstanding the express terms of Articles 132(1)(m) to 134 of the Principal VAT Directive, UK domestic law should not recognise any distinction between the two types of supplier, and should provide instead an exemption without regard to this difference in the nature of the supplier.

25. That, if I may say, is a bold submission. It is one that is not supported by authority. Mr Brown took me to the judgment of the ECJ in *Bridport*. In that case Bridport was, in contrast to the Club, a non-profit making organisation within Article 132(1)(m) of the Principal VAT Directive. Its supplies of granting members the right to use the golf course were accepted as exempt; the issue was whether the same treatment should apply to the same supplies to non-members, having regard to the exclusions in Article 134(b) and Article 133(d). It was not in dispute that the supplies were closely linked to sport, that they were made to persons taking part in sport or that they were essential to the transactions exempted, as referred to in Article 132(a).

26. In responding to Questions 6 and 7 to which I have referred earlier, the ECJ held, at para 39, that Article 133(d) did not allow the member states to exclude exemption from the relevant supplies to non-members. The adoption of conditions in accordance with that Article could not alter the scope of the exemption (para 35). Importantly, the ECJ went on to say, at paras 36 and 37:

> "36. In this connection, it should be observed that the scope of the exemptions in Article 132(1)(b), (g), (h), (i), (l), (m) and (n) of Directive 2006/112 is defined not only by reference to the substance of the transactions covered, but also by reference to certain criteria that the suppliers must satisfy. In providing for exemptions from VAT defined by reference to such criteria, the common system of VAT implies the existence of divergent conditions of competition for different operators.
>
> 37. Accordingly, Article 133(d) of Directive 2006/112 cannot be construed in such a way as would enable the difference in the conditions of competition stemming from the very existence of the

> exemptions provided for under European Union law to be eliminated, since such a construction would call in question the scope of those exemptions."

27. The ECJ in *Bridport* thus concluded, firstly, that there was an inherent distortion in competition in the exemption in question, because the exemption depended, not only on the nature of the supply, but also on the characteristics of the supplier. Furthermore, any use of Article 133(d) to attempt to eliminate the distortion would not be permitted because to construe Article 133(d) in that way would call into question the scope of the exemption.

28. *Bridport* does not therefore assist Mr Brown's argument. It recognised the inherent distortion in competition between non-profit making clubs and proprietary clubs, but far from acting to mitigate that distortion, whether by reference to the principle of equal treatment or otherwise, it found against any attempt to reduce that distortion by not exempting certain supplies to non-members on competition grounds.

29. Notwithstanding *Bridport*, Mr Brown argued that the elimination of distortion of competition was itself a fundamental principle if the Principal VAT Directive, and that accordingly it was arguable that the distortion created by the supplier having to be a non-profit-making organisation should be eliminated. In doing so he was echoing the submissions that were made for certain golf clubs that were proprietary clubs in *Chipping Sodbury Golf Club and others v Revenue and Customs Commissioners* [2012] UKFTT 557, in the First-tier Tribunal. Those submissions referred to a recital to the Sixth VAT Directive which spoke of enhancing "the non-discriminatory nature of the tax", and to recital (4) to the Principal VAT Directive that refers to eliminating, "as far as possible, factors which may distort conditions of competition, whether at national or community level." Recital (7) refers to "neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden".

30. Consistently with the later ECJ judgment in *Bridport*, and with the conclusions reached in other cases, both in the ECJ and domestically, the Tribunal in *Chipping Sodbury* held (at [80]) that, although the terms of the Directive should be construed in the light of the principle of fiscal neutrality in its equal treatment sense, the Tribunal could not ignore the express terms of the exemption.

31. There is plenty of authority that the exemptions for activities in the public interest must be construed according to their terms, in particular with regard to the requirement that the supplier be a non-profit-making organisation. Thus, in *Canterbury Hockey Club and another v Revenue and Customs Commissioners* (Case C-253/07) [2008] STC 3351, the ECJ, citing the cases of *VDP Dental Authority NV v Staatssecretaris van Financiën* (Case C-401/05) [2007] STC 1506 and *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* (Case C-434/05) [2007] ECR I-4793, made it clear, at para 18, that the exemption does not cover every activity performed in the public interest, but only those which are listed in that provision and described in great detail. At para 21, the Court said that it was essential that the services be supplied by a non-profit-making organisation.

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 the 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 *Grattan 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 *Grattan*, 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.

34. Whilst I accept of course the submission of Mr Brown that both *Chipping Sodbury* and *Grattan* in the First-tier Tribunal are not binding, those cases do no more than follow the clear jurisprudence of the Court of Justice. On that basis, there is no reasonable prospect of the new ground of appeal asserted by the Club succeeding, nor (to put the matter in the way Mr Brown submitted it should be) does the Club have an arguable case on that ground.

Decision on the Club's application

35. Taking all relevant factors into account, that is to say:

(a) the delay in putting forward the new ground of appeal,

(b) the absence of any convincing reason why the new ground was not put forward at an earlier stage,

(c) the irrelevance, having regard to the finding that the Club is not a non-profit-making organisation, of the submission that the 1999 Order was in contravention of the Directive or the principle of equal treatment, and

(d) my conclusion, for the reasons I have given, on the merits of the alternative submission that distortions contemplated by the Directive must be invalid,

I refuse the application to amend the club's grounds of appeal.

36. Mr Brown submitted that one possible outcome of these proceedings would be a reference to the Court of Justice. I do not consider that such a reference is necessary in this case. The law is clear.

37. Finally, I referred earlier to the Owners' Complaint to the European Commission. The fact of that complaint has no bearing on the merits of the Club's case; I note, as Mr Singh submitted, that 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. Although Mr Brown also suggested that this appeal, were I minded to permit the amendment of the grounds of appeal, might be stayed behind that complaint and any infraction proceedings that might result, in light of my decision that question does not arise.

Determination of the appeal

38. In consequence of my decision on the Club's application, and the Tribunal's 2013 decision, the appeal is dismissed.

Application for permission to appeal

39. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 29 January 2014