TC04203

Appeal number: TC/2011/03105

VAT - exemption - sports services - item 3 group 10 Schedule 9 VAT Act 1994 - partnership transferred golf club business and leased golf course to non-profit making company which paid turnover rent to partnership leaving company with token profit - whether arrangement abusive practice - yes - whether company eligible body - no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER JAMES HEARN & JALEH HEARN
t/a HENNERTON GOLF CLUB
First Appellant

HENNERTON GOLF CLUB LTD
Second Appellant

- and -

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

TRIBUNAL: JUDGE GREG SINFIELD
MRS SHAHWAR SADEQUE

Sitting in public in London on 9 and 10 September 2013 and 18, 19 and 20 February 2014

David Moll, DKS VAT Specialist, for the Appellants

Ewan West, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Peter Hearn and, his wife, Mrs Jaleh Hearn, ('the Partnership') and Hennerton Golf Club Limited ('the Company') appeal against two decisions of the Respondents ('HMRC') contained in a letter dated 21 March 2011 and assessments for VAT made pursuant to those decisions. The two decisions were in the alternative but if either is correct then VAT at the standard rate should have been charged and accounted for on supplies of services to members of Hennerton Golf Club ('the Club').

2. Supplies of services closely linked to golf made by golf clubs that are privately owned and run as a business for profit ('proprietary golf clubs') to persons taking part in the sport are chargeable to VAT at the standard rate. Supplies of such services by golf clubs that are owned by their members and not run for profit ('members' golf clubs') are exempt for VAT purposes.

3. With effect from 1 February 1998, the business of the Club, which had previously been carried on solely by the Partnership, was split into two principal activities, namely a letting of land (the golf course) by the Partnership to the Company and a supply of services (membership and the provision of facilities to play golf) by the Company to the members of the Club. The Partnership and the Company treated both activities as exempt supplies for VAT purposes. HMRC did not agree. HMRC's first decision ('the Preferred Decision') was that the arrangements were contrary to the EU law principle prohibiting abusive practices and fell to be redefined as a supply of services, chargeable to VAT at the standard rate, by the Partnership to the members. In case the Preferred Decision were later found to be incorrect, HMRC made a second decision ('the Alternative Decision') that the Company was not an eligible body for the purposes of item 3 of group 10 of Schedule 9 to the VAT Act 1994 ('VATA94') and that supplies of sports services made by the Company were accordingly chargeable to VAT at the standard rate.

Issues to be determined

4. The issues to be determined in these appeals are:

(1) Did the agreements between the Partnership and the Company introduced with effect from 1 February 1998 give rise to a tax advantage contrary to EU law (the 'Abuse of Rights issue')?

(2) If the arrangements were an abusive practice, how should the relevant transactions be redefined (the 'Redefinition issue')?

(3) If the arrangements were not an abusive practice, was the Company an eligible body for the purposes of item 3, group 10, Schedule 9 VATA94 (the 'Eligibility issue')?

5. Mr David Moll, who represented the Partnership and the Company, said that he considered that the assessments had been overstated as they included matters that should not have been included. He did not elaborate but asked us to decide the issues

in principal and, if we dismissed the appeal, to leave the amount of the assessments to be agreed between the parties.

Legislation

6. When the arrangements with which this appeal is concerned were put in place, the VAT legislation of the United Kingdom was derived from the provisions of the Sixth Council Directive 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, 77/388/EEC ('the Sixth VAT Directive'). With effect from 1 January 2007 and for the periods to which the assessments under appeal relate, the relevant directive was Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the Principal VAT Directive'). As there is no material difference between the relevant provisions of the Sixth VAT Directive and those of the Principal VAT Directive and the latter applied during the periods under assessment, we have only set out the provisions of the Principal VAT Directive below. Where it is not necessary to distinguish between the two directives, we use the term 'VAT Directive' which refers to the directive in force at the relevant time.

Sports services exemption

7. Article 132 of the Principal VAT Directive exempts certain activities in the public interest. Article 132(1)(m) exempts:

> "(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. Article 133 of the Principal VAT Directive allows Member States to make the exemption of supplies of, among others, services linked to sport by certain bodies subject to conditions including the following:

> "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 or improvement of the services supplied;"

9. It should also be noted that Article 131 of the Principal VAT Directive provides:

> "The exemptions provided for in Chapters 2 to 9 [which includes Article 132(1)(m)] shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

10. The exemptions provided for in the Principal VAT Directive are implemented in the United Kingdom by section 31 of and Schedule 9 to the VAT Act 1994 ('VATA94'). Section 31(1) provides that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 to the Act.

11. With effect from 1 April 1994, Item 3 of Group 10 of Schedule 9 to the VATA94 exempted supplies by a non-profit making body to an individual of services closely linked with and essential to sport in which an individual is taking part. The

phrase ‘non-profit making body’ in Item 3 was largely undefined although certain bodies were excluded from the term.

12. During the period since the arrangements between the Partnership and the Company were introduced with effect from 1 February 1998, the words of Item 3 of and the Notes to Group 10 of Schedule 9 to the VATA94 have changed on several occasions. With effect from 18 March 1998, a new Note (2A) to Group 10 provided that a body was not to be treated as a ‘non-profit making body’ if it was subject to commercial direction. The term ‘commercial direction’ was defined in Notes (4)-(7) to Group 10. The effect of the Notes was that a body was under commercial direction if, among other things, an officer or shadow officer of the body made a supply to the body of land or any facilities that were used for or in connection with the provision of sport.

13. With effect from 1 January 1999 to 31 December 1999, a definition of “non-profit making body” was added by new Note (2B) which provided that such a body must be precluded from distributing, and must not distribute, any profit that it makes and must apply any profits to the continuance or improvement of the sports facilities.

14. With effect from 1 January 2000, ‘eligible body’ replaced ‘non-profit making body’ in Item 3 and new Notes (2A)-(2C) and (4)-(17) were inserted into Group 10. The definition of an ‘eligible body’ is contained in Notes (2A) and (2B), which provide as follows:

> “(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.”

15. The term ‘commercial influence’, which replaced ‘commercial direction’, was defined in Notes (4)-(17), which we discuss in more detail at [127] below. A further minor amendment was made with effect from 1 April 2010 to insert an up to date reference to the Corporation Tax Act 2010.

Leasing or letting of land exemption

16. Article 135(1)(l) of the Principal VAT Directive exempts the leasing or letting of immovable property. The exemption for supplies of land is implemented in the United Kingdom by item 1 of group 1 of Schedule 9 to the VATA94 which exempts

the grant of any interest in or right over land or of any licence to occupy land. Item 1(m) of group 1 removes that exemption in respect of "the grant of facilities for playing any sport or participating in any physical recreation" but the exemption is restored if the conditions in note 16 to group 1 are met. Note 16 is as follows:

> "(16) Paragraph (m) shall not apply where the grant of the facilities is for -
>
> (a) a continuous period of use exceeding 24 hours; or
>
> (b) a series of 10 or more periods, whether or not exceeding 24 hours in total, where the following conditions are satisfied -
>
> (i) each period is in respect of the same activity carried on at the same place;
>
> (ii) the interval between each period is not less than one day and not more than 14 days;
>
> (iii) consideration is payable by reference to the whole series and is evidenced by written agreement;
>
> (iv) the grantee has exclusive use of the facilities; and
>
> (v) the grantee is a school, a club, an association or an organisation representing affiliated clubs or constituent associations."

Evidence

17. Mr Peter Hearn and Mr Glen Johnson, the Club's general manager and golf professional and a director of the Company, produced witness statements on behalf of the Appellants. The witness statements of Mr Hearn and Mr Johnson stood as evidence in chief and they were cross-examined by Mr West. Mr Rakesh Bhandari, an officer of HMRC (and formerly of HM Customs and Excise) produced a witness statement on behalf of HMRC which was admitted and he was cross-examined by Mr Moll. There were also two bundles of documents to which both parties referred. On the basis of the evidence, we find the material facts to be as set out below.

Facts

18. From 1972, Mr Hearn and his father, Robert Hearn, carried on a farming business at Hennerton Farm, Wargrave in Berkshire in partnership under the name R J Hearn & Son. They applied to be and were registered for VAT with effect from 1 April 1973. Mr Hearn, senior, retired from the partnership in 1979. It appears that Mr Hearn, son, carried on the farming business as a sole trader although his evidence was that his wife was, in reality, a partner from the time of his father's retirement. As Mrs Hearn was not formally a partner at this time, we refer to this as "the Farming Business".

19. In 1991, the Farming Business constructed a 9 hole golf course on some of the farm land. Mr Hearn said in evidence that the motivation for building the course was to make a modest living. He told us that it was initially intended that the golf course should be operated as a 'Pay and Play' facility but that it was decided that it should be operated as a 'Members' Club' before the course opened on the basis that a more formal members only club would have more appeal given the course's location. In early 1992, the Farming Business began construction of the clubhouse.

20. Before opening the Club, the Farming Business appointed two golf professionals, Tim Morrison and William Farrow, to run the Club. The course had been designed by Colonel Dion Beard, a former secretary of Wentworth Golf Club. Colonel Beard was asked to draft the rules of the Club and chair the Club committee.

21. The rules of the Club included the following:

> "1. The name of the Club:
>
> The name of the Club is Hennerton Golf Club. The property of the Club is vested in Mr & Mrs Peter Hearn, whose address is Hennerton Golf Club … (hereinafter called the "Proprietors"). The Proprietors are solely responsible for all expenditure in connection with the Club.
>
> 2. Proprietors powers:
>
> The Proprietors shall have the complete management and control of the club and its staff. The Proprietors shall fix the Entrance Fees, Rates of Subscriptions, Numbers and Conditions of Membership and the scale of charges. They shall have power to alter these rules and to make such new rules … as they may, from time to time, consider desirable, but in these respects the General Committee may be consulted. …
>
> 3. Object of the Club:
>
> The object of the Club is to provide golfing and clubhouse facilities for the Members, their Guests and Temporary Associate Members. The clubhouse facilities shall include a bar. The Proprietors shall provide the Club with appropriate premises and everything reasonably necessary for achieving the object. The Proprietors shall be entitled to do all such things as in their opinion promote the interest or object of the Club. To this end, the Proprietors reserve the right from time to time to close any part of the Golf Course or Clubhouse to Members in order to hold golf competitions, Society Meetings, Company Golf days or other events."

22. Rule 5 provided that the General Committee would include and be chaired by a representative of the Proprietors. The rule stated that the General Committee shall have control over certain matters "subject to the overall control of the Proprietors". Rule 25 provided that "The Proprietors may dissolve the Club at any time."

23. The Club opened to members in June 1992 and had 500 members by the end of the summer. The members of the Club paid an annual subscription in return for the right to play on the golf course and use the facilities. The golf course and facilities were also available to non-members, including guests and visitors.

24. The Club was treated as part of the business activities of the Farming Business. The Farming Business employed green keepers and other staff. The Farming Business charged and accounted for output VAT on membership subscriptions and other taxable income. The Farming Business also recovered the input VAT included in the expenditure on constructing the golf course and clubhouse as well as the costs of running the Club.

25. The first Annual General Meeting of the Club was held on 8 October 1993. Colonel Beard chaired the meeting. Annex A to the minutes of that meeting records that:

> "Peter Hearn, the proprietor of Hennerton Golf Club, wanted to … create a proprietary members' club which was as close as possible to being a members' club; but he must, of course, make some sort of return on the investment he had made, which in these days of recession was not easy.
>
> Nor was it easy to set up a proprietary members' club, because the interests of the proprietor and those of the members were opposed to each other. The members wanted free run of the course and low subscriptions, whilst the proprietor wanted higher subscriptions and room for green fee players."

The minutes then record that the Chairman, Colonel Beard, had been asked to come in as a sort of referee while the right compromise was found. The minutes explain that the committee would represent the interests of the members.

26. With effect from 1 April 1994, the supply of certain sports services by a non-profit making body to an individual who is a member of that body became exempt. This allowed golf clubs that were owned by their members and not run for profit to exempt their supplies of sports services to the members. Supplies by proprietary golf clubs remained chargeable to VAT at the standard rate.

27. Mr Hearn said that, in the first year, he had set the members' subscriptions with guidance from the two golf professionals but, after that, he left it to the professionals to set the level of subscriptions and he agreed to it. We do not accept that Mr Hearn was as uninvolved and disinterested in the members' subscriptions as his testimony suggested. It is clear from the minutes of the annual general meetings below that Mr Hearn was involved in setting the level of the members' subscriptions.

28. The minutes of the Annual General Meeting held on 20 October 1994 record, under the heading 'Statement by the Proprietor', that:

> "Next year's fee structure would be subject to an increase in the region of 5%."

The minutes of the 1994 Annual General Meeting also note that:

> "The question of VAT on golf clubs was raised, but it was pointed out that only members' clubs were exempt and not proprietary clubs."

29. In August 1995, the Partnership (ie Mr and Mrs Hearn) applied to be registered for VAT with effect from 1 July 1995. The registration application form stated that the Partnership traded under the name 'Hennerton Golf Club'. The form described the business activity of the Partnership as 'Golf Club Proprietors'. It also stated that the previous owner of the business was Mr Hearn and that the Partnership wished to retain his VAT number.

30. The minutes of the Annual General Meeting held on 11 April 1997 record the following explanation of the role of the chairman and the General Committee by Colonel Beard:

> "… as a proprietary club the owners need to make a return on their investment, while the members want as much golf as possible at the lowest possible cost. These requirements sometimes came into conflict and it is the task of the General Committee that any problems are solved in an amicable way. As Chairman, he acted as a referee …"

31. In 1997, Mr Hearn became aware that many proprietary golf clubs were changing their method of operation so that the members clubs were separated from the proprietor's interests. This allowed the clubs to exempt supplies of services, such as membership, which meant that the clubs no longer had to charge and account for VAT on members' subscriptions. Mr Hearn contacted Williams Jeffery Barber International Limited ('WJB'), who were accountants with relevant experience, and sought advice as to how this separation could be achieved. WJB advised the Partnership to set up a not for profit company to collect the membership subscriptions and operate the golf programme. The supplies by the new company would be exempt. The intention was that the Partnership would operate the clubhouse, including food and beverages, and would let the golf course land to the new company.

32. On 24 December 1997, the Company was incorporated as a company limited by guarantee. The directors of the Company immediately following its formation were Mr Hearn and Mr J E Sanders, a solicitor, and the company secretary was Mr Colin Dean, a self-employed accountant who acted for both the Club and the Partnership.

33. Clause 4 of the Memorandum of Association of the Company provided in relevant part as follows:

> "The income and property of the Company shall be applied solely towards the promotion of its objects as set forth in this Memorandum of Association and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit, to members of the Company to the intent that any surplus arising from the activities of the Company shall in due course be applied in the carrying out of its objects and in particular ... the provision of sports and physical educational facilities."

34. Clause 4 further provided that nothing in the Memorandum of Association shall prevent any payment in good faith by the Company of reasonable and proper rent or licence fees for premises demised or let or licensed by certain specified persons including any member or director of the Company.

35. On 9 January 1998, the Company applied, on form VAT 1 signed by Mr Hearn, to be registered for VAT with effect from 1 February 1998, which was stated to be when the Company intended to begin trading.

36. On 14 January 1998, Mr M Hitchen of WJB wrote to HMRC in connection with the Company's application for VAT registration stating:

> "Our client is a non-profit making company limited by guarantee and it will take over part of the business from Hennerton Golf Club as the transfer of a going concern on 1 February 1998. In future they will supply the services of a sports club operator to members for which the member pays a subscription. Please confirm that these supplies will be exempt from VAT under the VATA 1994, Schedule 9, Group 10 as being services closely linked to sports or physical education.
>
> The organisation is however entitled to VAT register because it will make taxable supplies of the same facilities to casual users.
>
> I await notification of the company VAT registration and confirmation that the payments by individual members of their subscription is [sic] exempt from VAT."

37. The Partnership and the Company entered into two agreements, dated 15 February 1998, which purported to formalise arrangements that had existed since 1 February 1998, namely:

(1) an agreement under which the Partnership transferred part of its business to the Company ('the Business Transfer Agreement'); and

(2) an agreement under which the Partnership granted the Company a non-exclusive right to occupy premises at the Club in return for a licence fee based mainly on turnover ('the Turnover Licence Agreement').

38. The Business Transfer Agreement and the Turnover Licence Agreement were signed by Mr Hearn on behalf of the Partnership and by Mr Dean on behalf of the Company. At that time, Mr Hearn was a partner in the Partnership and also a director of the Company. Mr Hearn's evidence was that he recalled that the agreements were signed in February 1998. For reasons set out below at [50], we find that the Agreements were not signed on 15 February 1998 but at some time after 17 August of that year although nothing in this appeal appears to turn on this.

39. Under the Business Transfer Agreement, the Partnership agreed to transfer a part of its business, namely "the activity of providing services closely linked with and essential to sport or physical education in which members or casual visitors take part at the Premises (including the driving range)", to the Company. The Business Transfer Agreement also provided for the transfer of the benefit of the contracts of employment for the staff, eg the golf professionals and the green-keeping staff, required to conduct the part of the Partnership's business that was transferred to the Company. In return, the Company agreed to pay the Partnership £1 for the part of the business transferred and to make the payments due under the Turnover Licence Agreement.

40. Under the terms of the Turnover Licence Agreement, the Company agreed to pay, on demand, a licence fee of:

(1) 65% of the turnover (net of VAT) of the Company per month for the licence of the premises; and

(2) £2,000 (plus VAT) per month for the licence of certain equipment and machinery owned by Partnership; and

(3) £1 (plus VAT) per month (or such other amount as the Partnership may determine six months from the date of the Turnover Licence Agreement or six monthly thereafter on 28 days' notice) for the right to use the name 'Hennerton Golf Club'.

41. Under clause 5.2.2 of the Turnover Licence Agreement, the licence fee was to be apportioned between the premises and the equipment and use of name at rates appropriate to allow for wear and tear on the premises and equipment as agreed between the parties from time to time.

42. Clause 6 of the Turnover Licence Agreement provided that the Partnership can terminate the licence:

(1) at any time, by giving not less than 28 days' notice; and

(2) without notice, if the Company breaches any obligation and has not remedied such breach having been given a reasonable period in which to do so.

On termination, the Company must quit the premises and all property vests in the Partnership. In evidence, Mr Hearn said that he would have felt morally obliged to give the Company one year's notice to terminate.

43. The Partnership treated the licence as an exempt supply of land for VAT purposes. The supplies of the equipment and right to use the name of the club were treated as taxable supplies chargeable to VAT at the standard rate. The Partnership retained and accounted for VAT on all income from the bar and restaurant at the clubhouse.

44. The directors of the Company retained the 1993 membership rules and constitution of the Club. The golfing activities were organised by the Golf Professionals and the Executive Committee. The Company collected the joining fees and annual subscriptions from members. In addition, between 1 February 1998 and 30 April 2009, the green fees of non-members were also treated as the income of the Company. Between 1 February 1998 and July 2004, the Company and the Partnership shared the driving range income. From July 2004, the Partnership received all of the income from the driving range (see [56] below).

45. The minutes of the Annual General Meeting on 27 February 1998 recorded the following:

> "Report by the Proprietor - Peter Hearn
>
> …
>
> There is to be no increase in annual subscriptions, despite numerous increases in operational costs.
>
> This has been achieved by setting up a limited company from 1 February 1998 to run the purely golfing side of the business. This enables partial exemption from VAT on subscription income."

46. In a letter dated 3 July 1998 to WJB, Mr Hearn stated:

> "I have now managed to produce budgets for [the Partnership] and [the Company] for 1998/99 … My accountant, Colin Dean, has used a figure of 65% in calculating the licence payments, as this appears to leave [the Company] with only a token profit.
>
> …
>
> I guess it is about time we finalised these agreements. Presumably it is only the matter of deciding on the licence fee percentage."

Mr Dean was the company secretary of the Company as well as its accountant and also the Partnership's accountant.

47. WJB replied to Mr Hearn's letter in a letter dated 17 July 1998 that said:

> "I agree that the only remaining issue to resolve is the level of the licence fees to be charged and then the agreements can be finalised.
>
> [The letter then agreed the 65% licence fee and proposed an amount of £10,000 per annum for the licence of the equipment]

> These two figures may mean that the [Company] may trade at a slight deficit, however, if this is the case, it is possible for you to waive a proportion of the rent due.
>
> I would be grateful if you would let me know whether you are content with the above figures. I will then be able to finalise the legal documents."

48. On 30 July 1998, Mr Hearn wrote again to WJB to say that, based on the machinery depreciation charge of £24,600 in the year to April 1998, the charge for machinery should be set at £2,000 per month plus VAT. He stated that, subject to WJB's agreement, the legal documents could be finalised.

49. A letter dated 17 August 1998 from WJB to the Company stated:

> "There are now two legal entities operating from the same site. [The Partnership] supplies the right to use the premises, equipment and the use of the name to [the Company] for which a licence fee is charged.
>
> …
>
> Licence for Use of Premises and Equipment
>
> I enclose a draft licence from [the Partnership] which licences [the Company] to use the premises. I have sent the original document to [the Partnership] who will contact you so that you can sign it.
>
> …
>
> Transfer of Going Concern
>
> I also enclose a draft agreement for the transfer of the membership business as a going concern from [the Partnership] to [the Company] so that the transfer of the membership and the staff is a supply which is outside the scope of VAT."

50. We consider that the letters dated 3 and 30 July 1998 from Mr Hearn to WJB and the letter dated 17 August 1998 from WJB to the Company show that the Business Transfer Agreement and the Turnover Licence Agreement, both dated 15 February 1998, had not been signed on that date. As we have stated above, nothing in this appeal appears to turn on this and we have not based our decision on the apparent discrepancy but, in case it is necessary to do so, we find that the agreements were not signed, as dated, on 15 February 1998 and were not signed until after 17 August 1998.

51. In a letter to WJB that was undated but was received by WJB on 20 November 1998, Mr Hearn stated:

> "According to my calculations savings on the 1998/99 year to date will be based on subscription income of £198,578 and joining fee income of £9,020. This gives a gross VAT saving of £30,919."

52. At some point prior to the changes to Group 10 of Schedule 9 to the VATA94, which introduced the concept of 'an eligible body' and substituted 'commercial influence' for 'commercial direction', coming into force on 1 January 2000, WJB advised the Partnership and the Company that the Company's supplies to the members would be chargeable to VAT at the standard rate from 1 January 2000 if Mr Hearn remained a director. On 21 December 1999, Mr Hearn resigned as a director of

the Company. He was replaced by William Farrow, the golf professional. There were no other changes to the arrangements.

53. The minutes of the Annual General Meeting of Hennerton Golf Club held on 3 March 2000 recorded, under the heading ‘Report by the Proprietor - Peter Hearn’ that:

> “You will no doubt be relieved that we do not propose to increase subscriptions this year, despite the fact that we desperately need to improve revenue.”

54. The subject of subscription fees was mentioned by Mr Hearn in his proprietor’s report at the Annual General Meeting on 23 February 2001. The minutes recorded the following:

> “We are at present considering our charges for the coming year, with a possible increase not exceeding 5%, which we trust you will consider reasonable as we did not increase fees last year.”

55. Mr Hearn’s evidence was that the Club committee, chosen by the members, set the membership subscriptions and organised the golf programme. We do not accept that the Club committee set the membership subscription. The passages from the Annual General Meetings quoted above show that Mr Hearn was reporting as the proprietor. The minutes reveal that the proprietor was not merely interested in the level of fees charged but was able to say whether they would be increased. His control over the level of the subscription fees was constant throughout the period both before and after the Company had been established.

56. At some point in 2004, the Partnership decided to construct a further nine holes, thereby increasing the golf course to 18 holes, and to refurbish the driving range. At the beginning of 2005, the Partnership sought advice from its accountants on how it might recover the input VAT that it would incur on the cost of constructing an additional nine holes and refurbishing the driving range. The accountants advised that the new nine holes and the refurbished driving range should be operated by the Partnership. The Partnership would make a direct charge to the players for the use of these facilities and apply VAT to this charge.

57. On 22 February 2005, the Company applied to be de-registered for VAT with effect from 1 August 2004. The Company was de-registered for VAT but only with effect from 1 February 2005.

58. During 2005, the Partnership built the nine hole extension to the original nine hole course. The Partnership opted to tax the land on which the new part of the golf course was built. The option to tax meant that the Partnership would charge VAT at the standard rate on the additional charge of £1 per round that the Partnership charged for the use of the new nine holes. The option did not apply to the existing nine holes and so the licence fee based on the turnover of the Company remained exempt. As a consequence of the option to tax in relation to the new nine holes, the Partnership was able to recover all the input VAT incurred on the construction of the extension to the original course.

59. Mr Johnson said that he became a director of the Company in January 2005. Mr Johnson said that he chaired the committee meetings. The committee discussed matters such as upcoming competitions, trophies, the members’ suggestions book,

membership subscriptions and the general running of the Club. The committee did not discuss finance although the accounts were an item at the Annual General Meeting and members could see the accounts if they wished. Mr Johnson said that Mr and Mrs Hearn never attended the committee meetings. He said that Mr Hearn lives on site and often walks his dog on the golf course. Mr Hearn is passionate about the golf course and wants it to look good.

60. Mr Johnson told us that he did not know what the Company was obliged to pay Mr Hearn (by which we assume he meant the Partnership) under the Turnover Licence Agreement. Mr Johnson said that he could not remember seeing the Turnover Licence Agreement although he might have done. He said that he thought that the amount of rent payable was discussed between Mr Hearn and Martin Gatehouse, an accountant who acted for the Company. Mr Johnson said that the Company was only able to keep going if the Partnership did not enforce its full entitlement to rent under the Turnover Licence Agreement. He agreed that a third party would not normally operate on the basis of accepting a lower amount of rent from a tenant just because the tenant could not pay. He said that he had not tried to renegotiate the rent with Mr Hearn.

61. The extended course was opened in mid-2006 and, from that time, the Partnership received £1 plus VAT for every round played over the new nine holes. After the nine hole extension to the course was completed, the Company's directors decided that it would be simpler for the Company to pay the £1 plus VAT per round charge to the Partnership and increase its subscriptions from members rather than require the members to make separate payments to the Partnership. The Partnership agreed to this suggestion.

62. In March 2006, Mr Dean and Mr Sanders resigned their positions as company secretary and director of the Company respectively. Mr Gatehouse became company secretary.

63. In March 2010, Mr Farrow resigned as a director and golf professional. He was replaced by Paul Deaney, who was employed by the Partnership as the catering and clubhouse manager.

64. HMRC began to make inquiries into the arrangements between the Partnership and the Company. In a meeting with HMRC on 4 May 2010, Mr Hearn and Mr Gatehouse discussed the licence fee. HMRC's note of the meeting states that the licence fee was 55% and that Mr Gatehouse said that it had been 45% and was dependent on what the Company could afford. In the event that the Company did not raise enough revenue, a credit note would be raised. Mr Gatehouse said that, as the Company was the Partnership's only customer, the Partnership had to waive the licence fee as the alternative would have been to make the Company insolvent. This point was confirmed in a letter dated 16 February 2011 from the Company's accountants, Eacotts, written by Mr Gatehouse, who was also the Company's company secretary at the time. Mr Gatehouse said that

> "… the % of turnover used to calculate the licence fee has been varied since its inception at 65%, as the level of income achievable became clearer. Furthermore, the directors have found it necessary on occasion to approach the partnership business for a discretionary credit note to

> reduce the fee, in order for the company to remain in a solvent position at the end of each financial year."

65. The note of meeting with HMRC on 4 May 2010 also records that

> "Mr W Farrow had been the head professional for a number of years. He was paid a £20,000 retainer by the partnership and was treated as self-employed. Mr Farrow ran the pro shop and was director of [the Company]. During discussions, it was stated by Mr and Mrs Hearn that they had now taken over the running of the pro shop and that the assistant golf professional had been appointed to run this in Mr Farrow's place as his services were dispensed with. The partners stated that he did not have the drive to make the business more profitable. Mrs Hearn said he had a contract which could be terminated with 3 months notice and payment of wages.
>
> [HMRC] asked how the situation at [the Company] was resolved as Mr Farrow was a director of [the Company] and this could be a potentially difficult situation. It was stated that following the AGM in February 2010 he resigned his position. Mrs Hearn said they would get someone else."

Mr Hearn told us that when his wife said "they", ie "we", in the last sentence of the paragraph above, she did not know the full facts. All those who attended signed the note of the meeting as accurate.

66. In a letter dated 21 March 2011, HMRC made two decisions, namely:

(1) the Preferred Decision that the arrangements whereby the business of the Club, which had previously been carried on solely by the Partnership, was split into two activities carried on by the Partnership and the Company were contrary to the EU principle of abuse of rights and should be redefined as a supply by the Partnership of sports services chargeable to VAT at the standard rate; and

(2) the Alternative Decision that the Company was not a non-profit making body for the purposes of item 3 of group 10 of Schedule 9 to the VATA94 and, therefore, supplies by the Company to the members of the Club were chargeable to VAT at the standard rate.

67. Having made the decisions, HMRC raised assessments on the Partnership to give effect to the Preferred Decision and on the Company in relation to the Alternative Decision. The assessments under appeal are as follows:

Taxable person	**Date**	**Period**	**VAT**	**Interest**
Partnership	20/04/11	04/07	£29,305	£3,447.86
Partnership	20/07/11	07/07-04/09	£88,402	£8,059.62
Partnership	13/12/11	07/09-10/11	£129,030	£4,147.30
Company	12/03/12	03/08-03/11	£153,035	

The assessments in relation to the Preferred Decision (the Partnership) and the Alternative Decision (the Company) are, of course, mutually exclusive.

Summary of the parties' submissions

68. Mr Moll submitted that the new arrangements introduced by the Partnership in 1998 did not constitute an abusive practice because the Principal VAT Directive contemplated exempt supplies of sports services and the land on which those sports were enjoyed and thus the arrangements did not give rise to a tax advantage contrary to EU law. Mr Moll also submitted that the arrangements were not abusive as they were not contrary to the provisions of the Sixth VAT Directive or the VATA94 at the time that the arrangements were introduced in 1998. For this, he relied on *Chobham Golf Club v Customs and Excise* [1997] V&DR 36 ('*Chobham'*) in which the VAT and Duties Tribunal held that similar arrangements by the golf club in that case were effective to convert it from a commercial body to a non-profit making members' club, enabling supplies to its members to be exempt.

69. Mr Moll also contended that if, contrary to his submission, the Partnership did obtain a tax advantage then it was not an abusive practice because the Partnership had not entered into the arrangements in 1998 for the purpose of obtaining a tax advantage. There were commercial reasons for implementing the new arrangements, namely that the members of the Club could receive the benefit of not paying VAT on their subscriptions. Further, the new arrangements merely formalised the position prior to 1998, which was that the members ran the Club which was separate from the Partnership.

70. If the arrangements introduced in 1998 were an abusive practice contrary to EU law, Mr Moll submitted that the appropriate redefinition of the supplies would not give rise to any liability to account for VAT. He contended that the only possible redefinition would be that the business had not been divided and the Partnership continued to make all the supplies to the members. Mr Moll submitted that those supplies would be exempt by virtue of Note 16(a) to Group 1 of Schedule 9 VATA94 and so no liability to VAT would arise.

71. In relation to HMRC's alternative argument, Mr Moll submitted that the Company is a not for profit entity for the purposes of Article 132(1)(m) of the Principal VAT Directive and meets the test to demonstrate that it is not and never was under commercial influence. In any event, he contended that the condition that a non-profit making body must not be under commercial influence is not permitted by exclusion Article 132(1)(m) and the Company can rely on the direct effect of that provision.

72. The Appellants had originally included submissions based on fiscal neutrality and legitimate expectations in their pleadings. On the morning of the first day of the hearing, Mr Moll said that he was not relying on legitimate expectations. When asked, on the last day of the resumed hearing, whether he was relying on fiscal neutrality, Mr Moll said that it was no longer part of his submissions.

73. In summary, Mr West submitted that the arrangements between the Partnership and the Company were artificial and abusive. There was no evidence of any genuine arm's length commercial negotiation between the two parties in relation to the licence fee or other amounts payable by the Company. The licence payable under the

Turnover Licence Agreement was designed so that the Partnership could charge the maximum amount without the Company becoming insolvent. The arrangements enabled the Partnership to extract all the profit arising from membership fees from the Company and treat it as the Partnership's income. A tax advantage was gained by the Partnership that is contrary to EU law and the membership subscription income received by the Company should be redefined as being received by the Partnership and subject to VAT.

74. In relation to the alternative decision, Mr West submitted that, applying the approach set out in Case C-174/00 *Kennemer Golf & Country Club v Staatssecretaris van Financiën* [2002] STC 502, [2002] ECR I-3293 ('*Kennemer*'), the Company was not a non-profit-making organisation as required by Art 132(1)(m) of the Principal VAT Directive. He contended that this was shown by the absence of any negotiation of the terms of the Turnover Licence and the way that it operated in practice.

Abuse of Rights issue

75. We start by considering the meaning of the principle of the prohibition of abusive practices and how it has been applied by the courts and then we consider its application to the facts of this case.

Case law on the principle of the prohibition of abusive practices

76. The Court of Justice of the European Communities, later the Court of Justice of the European Union, (together 'the ECJ') first applied the principle of the prohibition of abusive practices in the context of VAT in Case C-255/02 *Halifax plc and Others v HMCE* [2006] STC 919 ('*Halifax*'). Halifax, a bank making predominantly exempt supplies, wished to construct four call centres. Because it was partially exempt, Halifax would have recovered only five per cent of the VAT it paid on the building works. Halifax entered into arrangements that were intended to enable it to recover all the VAT on the cost of constructing the call centres. The arrangements involved Halifax lending money to a special purpose, wholly-owned subsidiary ('Leeds') to enable Leeds to acquire an interest in the sites and develop them. Leeds also agreed to carry out a small amount of construction work on the sites for Halifax. Halifax paid Leeds for that work and Leeds accounted for VAT in respect of it. Leeds, in turn, contracted with another special purpose, wholly-owned subsidiary of Halifax ('County') to carry out all the construction work, including the small value work that Leeds had agreed to carry out for Halifax. Leeds made a large advance payment, including VAT, to County for the works. Leeds claimed a repayment of the VAT charged by County on the basis that, in the relevant tax year, Leeds had made only standard rated supplies of the small-value construction work and no exempt supplies. County accounted for VAT on the supplies made to Leeds but would eventually be able to deduct the VAT incurred on the amounts charged by contractors and professionals who actually carried out the construction work. HMRC refused Leeds' claim for the repayment of VAT and County's claims in relation to VAT charged to it by the independent contractors. Halifax, Leeds and County appealed to the VAT and Duties Tribunal. One of HMRC's arguments in support of the refusal to pay the amounts claimed was that transactions entered into solely for the purposes of VAT avoidance were an 'abuse of rights' and should be disregarded for VAT purposes. The Tribunal referred some questions to the ECJ for a preliminary ruling.

77. In its judgment, the ECJ observed, at [71], that preventing possible tax evasion, avoidance and abuse was an objective recognised and encouraged by the Sixth VAT Directive. The ECJ noted, at [73], that taxable persons may choose to structure their business so as to limit their tax liability. The Sixth VAT Directive did not require a taxable person to choose the structure that involves paying the highest amount of VAT. The ECJ then set out the two elements necessary for a finding that arrangements constitute an abusive practice in relation to VAT at [74] and [75]:

> "74 In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
>
> 75 Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages."

78. The ECJ gave further guidance at [80] and [81] of its judgment:

> "80 To allow taxable persons to deduct all input VAT even though, in the context of their normal commercial operations, no transactions conforming with the deduction rules of the Sixth Directive or of the national legislation transposing it would have enabled them to deduct such VAT, or would have allowed them to deduct only a part, would be contrary to the principle of fiscal neutrality and, therefore, contrary to the purpose of those rules.
>
> 81 As regards the second element, whereby the transactions concerned must essentially seek to obtain a tax advantage, it must be borne in mind that it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden"

79. The ECJ summarised the position in relation to abusive practice at [86]:

> "86. For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage."

80. In *Halifax,* the ECJ clearly held that the principle prohibiting abusive practices applies in the context of VAT. The principle applies where, first, transactions, even if formally compliant with legislation, result in the accrual of a tax advantage which is contrary to the purpose of the VAT Directive and the national legislation transposing

it; and, secondly, the principal aim of the transactions, established by reference to objective factors, is to obtain a tax advantage. If the transactions may have some explanation other than obtaining a tax advantage then the principle does not apply to prohibit that result. The ECJ acknowledged that a taxable person may choose to structure transactions so as to limit his or her VAT liability.

81. The principle prohibiting abusive practices first applied in relation to VAT in *Halifax* has been considered by the courts and tribunals in the UK on several occasions. In *WHA Ltd & Anor v HMRC* [2007] EWCA Civ 728, [2007] STC 1695 Lord Neuberger, having reviewed the ECJ's decision in *Halifax*, said at [12]-[13]:

> "12. The abuse issue can usefully be considered by answering four questions, which appear to emerge from the passages I have quoted from the judgment in *Halifax*. First, does the Scheme, or an aspect of the Scheme, result in the accrual of a tax advantage which, as HMRC assert, is 'contrary to the purpose of' the provisions of the Sixth Directive? Secondly, if so, was it, as HMRC contend, the 'essential aim' of the Scheme, or of the relevant aspect, that a tax advantage be obtained? Thirdly, if so, are there any special features of the Scheme itself, or of the law relating to it, which should nonetheless prevent the abuse argument succeeding? Fourthly, if not, can (and must) the Scheme, or the relevant part, be 'redefined'?
>
> 13. While one can analyse the issue in this case by breaking it down into these four questions, it is right to acknowledge that the answers may overlap to some extent, and that it may be a matter of opinion as to which question a particular argument or point goes. Nonetheless, I propose to consider the four questions in turn, as that makes it less difficult to achieve a structured and tolerably clear approach to what is, to my mind at least, a potentially confusing problem."

82. As Lloyd LJ observed in *Pendragon Plc v HMRC* [2013] EWCA Civ 868, [2014] STC 844, at [63] ('*Pendragon'*), following the Supreme Court's decision dismissing WHA's appeal on other grounds, Lord Neuberger's observations on abuse of right in the Court of Appeal are not binding but they remain persuasive. We adopt that approach (ie the questions suggested by Lord Neuberger) in this case in deciding whether there was an abuse of rights.

83. The abusive practice in *Halifax* did not involve disaggregation of a supply into separate supplies. That issue came before the ECJ in Case C-425/06 *Ministero dell'Economia e delle Finanze v Part Service Srl* [2008] STC 3132 ('*Part Service'*). In *Part Service,* two companies belonging to the same financial group were involved together in leasing transactions, mostly in relation to motor vehicles. One company entered into a lease, with an option to purchase, with a customer in consideration of lease payments with a surety for the amount not covered by the lease payments with both covered by an unlimited security. At the same time, the other company entered into an agreement with the customer under which it insured the vehicle and guaranteed the customer's obligations to the first company by financing the surety and security. The first company charged and accounted for VAT on the payments under the lease whereas the payments under the insurance, finance and guarantee contract were treated as exempt. The Italian tax authority considered that VAT was due on the total payments made by the customer. The Italian court referred two questions to the ECJ, both of which referred to the concept of abuse of rights.

84. In its judgment in *Part Service*, the ECJ held that there could be an abuse where two companies entered into separate contracts with a single customer for leasing, financing, insurance and intermediation in relation to the leasing of a motor car. The ECJ held in [59]-[61] that such transactions could be contrary to the provisions of the Sixth Directive as they would allow an exemption in respect of a transaction that is normally subject to VAT which would be contrary to the objective that tax should be charged on all the consideration received from the customer. At [62], the ECJ stated:

> "As regards the second criterion [ie that the essential aim of the transactions is to obtain a tax advantage], the national court, in the assessment which it must carry out, may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved (*Halifax and Others*, paragraph 81), those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations."

85. The ability of a taxable person to choose to structure transactions so as to reduce his or her VAT liability, as noted by the ECJ in [73] of *Halifax*, was referred to in another reference from the United Kingdom on the subject of abuse, Case C-103/09 *HMRC v Weald Leasing Ltd* [2011] STC 596 ('*Weald*'). In that case, an insurance group purchased assets and leased them through a subsidiary, Weald Leasing, and an unconnected third party. The effect of the lease arrangement was to defer irrecoverable VAT that would have been incurred by the insurance group if it had purchased the business assets. The lease rentals were set below open market value thus extending the period of deferral. The reason for inserting the third party into the structure was to prevent HMRC from being able to impose market value on the lease rentals under paragraph 1 of Schedule 6 to the VATA94. The ECJ was asked whether the transactions gave rise to a tax advantage contrary to the Sixth VAT Directive and whether they constituted an abusive practice if the person did not engage in them in the course of normal commercial operations. The ECJ held, at [33], that leasing transactions came within the scope of the Sixth Directive and the tax advantage that arose did not in itself constitute a tax advantage contrary to the purpose of those provisions. The ECJ's ruling was subject to the point that the contractual terms of the leases, particularly the level of rentals, corresponded to arm's length terms and that the involvement of the third party was not such as to preclude the application of the provisions of Schedule 6 to the VATA94. Specifically, the ECJ stated, at [39]:

> "… the national court will have to determine, first, whether the contractual terms of the leasing transactions at issue in the main proceedings are contrary to the Sixth Directive and of the national legislation transposing it. That would particularly be the case if the rentals were set at levels which were unusually low or did not reflect any economic reality.

86. At [42], the ECJ rejected Weald Leasing's argument that the principle of prohibiting abusive practices did not apply to its case because the arrangements were designed to circumvent paragraph 1 of Schedule 6 to the VATA94, which was a question of national law. The ECJ pointed out that the provision was part of the national legislation implementing the Sixth VAT Directive.

87. At [43] and [44] of *Weald*, the ECJ held that the fact that an entity did not engage in leasing transactions in the context of its normal commercial operations was not a relevant factor in determining whether there was an abusive practice. The ECJ held that a finding that there is an abusive practice is to be inferred, not from the nature of the commercial operations usually engaged in by the person who engaged in the disputed transactions, but from the object and effects of those transactions, as well as their purpose.

88. The application of the *Halifax* principle in the context of the sports services exemption was considered by Roth J in *HMRC v Atrium Club Limited* [2010] EWHC 970 (Ch), [2010] STC 1493 (‘*Atrium*’). Atrium Club Limited (‘ACL’) operated a health club. ACL implemented a structure to take advantage of the sports services exemption and change supplies from standard rated to exempt. In 2000, ACL entered into a Turnover Licence with AAB Sports Limited (‘AAB’) granting AAB a non-exclusive right to occupy premises and carry on business in return for £2000 plus 50% net turnover per month. In 2004, HMRC challenged the scheme on two principal grounds. The first was that, notwithstanding the involvement of AAB, ACL was liable to account for VAT. The second was that the arrangements were an abusive practice as described in *Halifax* and should be redefined. On appeal, the VAT and Duties Tribunal found in favour of ACL, in part because the scheme did not work as AAB was, as ACL accepted, not within the sports services exemption and was accordingly liable to account for VAT. In fact, AAB did not have the funds to pay an assessment of VAT and had already gone into liquidation. HMRC appealed to the High Court solely on the ground of abuse.

89. Roth J considered *Halifax* and the four questions posed by Lord Neuberger in *WHA*. At [32], he held that the Tribunal was correct when it stated that it was necessary to identify what tax advantage the scheme sought to achieve in order to answer Lord Neuberger’s first question (whether a tax advantage resulted). In [33], Roth J described the scheme and its intended effects as follows:

> “When Atrium itself operated the Club and made supplies of sporting services, it accounted for VAT on the consideration for those supplies. The WJB Scheme, which replaced the AIC scheme, was designed to secure for Atrium the net proceeds of the supplies by the Club free from liability to VAT. That was to be done through establishing a new company to operate the Club that would make the supplies as a non-profit making organisation without attracting VAT, and pay over all the benefit derived from those supplies to Atrium by way of a licence fee under a Turnover Licence which similarly did not attract VAT. This combination of inter-related elements was essential to the scheme. And the latter element was necessary not in order to remove AAB's capacity to make a profit, since AAB could have used all the net proceeds for the development of the Club facilities without losing its non-profit making status, but so as to pass the profit over to Atrium without VAT being incurred. Accordingly, I do not accept Atrium's submission, as set out in its skeleton argument, that use of the land exemption was no part of the arrangements seeking to achieve a tax advantage.”

90. At [34], Roth J identified the tax advantage obtained by ACL in the particular circumstances of the case as the receipt of the licence fee payable under the Turnover Licence without being liable to account for VAT on it combined with fact that AAB was liable to account for VAT but could not pay it as it had gone into liquidation.

91. The ECJ considered the application of the *Halifax* principle again in Case C-653/11 *HMRC v Paul Newey trading as Ocean Finance* [2013] STC 2432 ('*Newey*'). Mr Newey was a loan broker, established in the UK, who made exempt supplies and was, therefore, unable to recover VAT charged on advertising services supplied to him. In order to avoid the irrecoverable VAT, Mr Newey incorporated a company ('Alabaster') in Jersey and granted that company the right to use the business name Ocean Finance. Mr Newey was the sole shareholder of Alabaster. Mr Newey played no part in the management of Alabaster which had a full-time employee and part-time directors in Jersey who were responsible for managing and exercising the powers of the company.

92. Alabaster entered into broking contracts with the lenders. The lenders paid broking commissions to Alabaster and not to Mr Newey. Alabaster entered into a services agreement with Mr Newey for the supply of processing services for the loan broking business. Those services were provided by Mr Newey's employees in the UK. Under that agreement, Mr Newey had the power to negotiate the terms of the broking contracts between Alabaster and the lenders. In return for providing the processing services, Alabaster paid Mr Newey fees of 50%, later 60%, of its gross commissions, plus certain expenses or disbursements.

93. In practice, potential borrowers contacted Mr Newey's employees in the UK directly. They processed each file and sent those applications that satisfied the credit eligibility criteria to Alabaster's directors in Jersey for authorisation. The approval process generally took around one hour to complete and no request for authorisation was ever refused.

94. The advertising aimed at potential borrowers was critical to the loan broking business and represented a considerable part of the costs borne by Alabaster. Alabaster entered into a contract with an unconnected company ('Wallace Barnaby'), also established in Jersey, for the provision of advertising services. Wallace Barnaby obtained the advertising services from an advertising agency established in the UK. No VAT was chargeable on the supply of the advertising services by the UK advertising agency to Wallace Barnaby or the services supplied by Wallace Barnaby to Alabaster.

95. Mr Newey, although not able to use the advertising services or liable to pay for them, had the power to approve the content of the advertisements. He did this at meetings with one of the UK advertising agency's employees in the UK. Following the meetings, the employee made recommendations to Wallace Barnaby which, in turn, made recommendations to Alabaster. In practice, none of the recommendations was ever rejected.

96. HMRC assessed Mr Newey to recover the VAT on the advertising services on the basis that, for VAT purposes, the advertising services were supplied to Mr Newey in the UK and therefore subject to UK VAT and the loan broking services were supplied by Mr Newey in the UK. Alternatively, HMRC contended that the arrangements were an abuse and must be redefined. Mr Newey appealed against that assessment. The First-tier Tribunal (Tax Chamber) allowed the appeal. HMRC appealed to the Upper Tribunal (Tax and Chancery) which referred six questions to the ECJ.

97. The ECJ reformulated the questions referred into a single question, namely: "whether contractual terms are decisive for the purposes of identifying the supplier and the recipient in a 'supply of services' transaction … and, if the answer is in the negative, under what circumstances those terms may be recharacterised." The ECJ answered the reformulated question at [52] as follows:

> "… contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a 'supply of services' … They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine."

98. *Pendragon* concerned a scheme that was very different from the arrangements in this case. Lloyd LJ, who gave the only judgment, conducted a thorough review of *Halifax* and the cases that followed it and made several useful points about the proper approach to deciding whether there has been an abusive practice. At [67], Lloyd LJ accepted the appellant's submission, which was not disputed by HMRC, that it is necessary to assess the aim of the particular series of transactions objectively and not by reference to the actual intentions of the parties. Having referred to the ECJ's statement in paragraph 81 of *Halifax* that the national court may take account of the purely artificial nature of the transactions at issue, Lloyd LJ observed, at [158], that:

> "… in all but the clearest of cases (such as *Halifax* and *Part Service* may very well have been), a significant exercise of assessment, evaluation and judgment is necessary, once the relevant facts have been identified and, in case of any dispute, found as facts, in order that the national court (here the First-tier Tribunal) can determine what the real substance and significance of the transactions is, whether the essential aim, or the principal aim, of the transactions is to obtain a tax advantage or whether the transactions have some other adequate economic or commercial explanation. This may not be by any means an easy task, requiring a judgment to be made in order to resolve the inherent tension in the European Court's enunciation of the principle as between the freedom of economic undertakings to organise their business affairs to their own best advantage, and in so doing to be able to rely on the principle of legal certainty, on the one hand, and the proposition that they may not obtain tax advantages which are contrary to the purpose of the relevant provisions by entering into purely artificial arrangements, on the other hand."

Our approach

99. Applying the principles that we have derived from the cases referred to above, we approach the question of whether the principle prohibiting abusive practices applies to the arrangements between the Partnership and the Company introduced with effect from 1 February 1998 by asking:

(1) Did the arrangements entered into in February 1998 result in the accrual of a tax advantage that is contrary to the purpose of the provisions of the VAT Directive?

(2) If so, was the essential aim of the arrangements to obtain such a tax advantage?

(3) If so, are there any special features that should prevent the principle prohibiting abusive practices applying?

100. We should not look at individual elements or transactions in isolation but must look at the arrangements as a whole and ask whether the outcome of those arrangements is contrary to the purpose of the provisions of the VAT Directive and the national legislation implementing it. Arrangements that would allow the exemption of supplies of services that are normally chargeable to VAT would be contrary to the principle of fiscal neutrality and, therefore, contrary to the purpose of the provisions of the VAT Directive.

101. We must assess the essential aim of the arrangements objectively and not by reference to the actual intentions of the parties. If the arrangements may have some explanation other than obtaining a tax advantage then the principle prohibiting abusive practices does not apply to prohibit that result. In ascertaining the aim of the arrangements, we can take account of any artificiality and any links of a legal, economic or personal nature between the persons involved.

102. In accordance with the ECJ's statements in [81] of *Halifax* and approach in *Newey*, we have regard to the terms of the various agreements between the parties described above but we do not treat them as conclusive in determining the identity of the supplier of the sports services. Contractual terms that do not reflect economic and commercial reality are artificial and may be disregarded. In particular, if we consider that the agreements implemented with effect from 1 February 1998 were a wholly artificial arrangement that did not reflect the economic and commercial reality of the relationship between the Partnership and the Company then we will disregard those agreements unless there are some special features that mean that we should not do so.

Did the new arrangements in 1998 result in the accrual of a tax advantage contrary to the purpose of the VAT Directive and the relevant provisions of VATA94?

103. Mr Moll submitted that the Partnership made supplies of land that were exempt under Article 135 of the Principal VAT Directive as implemented by Group 1 Schedule 9 VATA94 and the Company made supplies of sports services that were exempt under Articles 132 and 133 of the Principal VAT Directive and Item 3 of Group 10 of Schedule 9 VATA94. He contended that, in those circumstances, there is no tax advantage contrary to either EU or UK law so that there can be no abuse. We regard this submission as misconceived in the context of the principle prohibiting abusive practices. Lord Neuberger rejected a similar submission in *WHA* and stated at [22]:

> "Effectively by definition, each step of such a scheme would [when considered individually] be unassailable (as it would otherwise be unnecessary to invoke the abuse principle). Accordingly, on this argument, the scheme itself would be unassailable. Indeed, if this argument were correct, the European Court would have decided Halifax differently. The whole point of the principle is that, although each step of the scheme in question works, the overall effect of the scheme is unacceptable."

As stated above, we have regard to the arrangements as a whole and ask whether the outcome of those arrangements is contrary to the purpose of the provisions of the VAT Directive and the national legislation implementing those provisions.

104. Mr Moll also submitted that the Partnership had not gained a tax advantage contrary to the VAT Directive or VATA94 as a result of the arrangements introduced in 1998 because it could make exempt supplies without the Company. He contended that the Partnership could make exempt supplies of the golf course to groups of people for more than 24 hours by virtue of Item 1(m) of and Note 16(a) or (b) to Group 1 of Schedule 9 VATA94 and, therefore, the arrangements did not create any tax advantage for the Partnership. He said that the members received a benefit in that the new arrangements meant that they did not pay VAT on their subscription fees but that was not a tax advantage for the Partnership.

105. We do not accept Mr Moll's submissions on this point. We consider that the Partnership could not have simply made exempt supplies of the golf course to members. We accept that, if there is no abusive practice, the Partnership, as a property owner, could make exempt supplies of part of the land to an unincorporated association that would use the land for sport. The Partnership had opted to tax the land on which it had constructed the second nine holes in order to recover the VAT incurred and so any grant of that part of the land would be taxable in any event. In our view, the Partnership could not make exempt supplies of the remainder of the golf course when, in reality, it was acting as proprietor of the Club. That is the abuse in this case: the Partnership did not cease to act as the proprietor (and the Club did not, in reality, become a non-profit-making organisation) when the new arrangements were introduced in 1998.

106. We consider that the facts described above clearly show that Partnership, through Mr Hearn, continued to behave and be regarded as the proprietor. The minutes of the Annual General Meetings in 1998, 2000 and 2001 quoted above refer to a report from the proprietor given by Mr Hearn. On 27 February 1998, Mr Hearn informed the Annual General Meeting that there would be no increase in subscriptions because VAT was no longer chargeable due to the formation of the Company to run the golfing side of the business. There is no mention in the minutes of any discussion about a reduction in subscriptions to reflect the fact that VAT was no longer being charged.

107. The letters between Mr Hearn and WJB in 1998 show that Mr Hearn had set the budgets for both Partnership and Company in 1998/99. On the basis of the letter dated 3 July 1998, it is clear (and we so find) that the licence fee was fixed by and for the benefit of the Partnership. The licence fee was calculated by Mr Dean, the Partnership's accountant and the Company's company secretary, at a level to ensure that the Partnership received as much as possible while leaving the Company with no more than a token profit. There was no evidence of any negotiation between the Partnership and the Company about the level of the licence fee and other charges. The correspondence between Mr Hearn and WJB shows that the amounts payable by the Company were set by Mr Hearn or subject to his approval.

108. Subsequent events showed that the licence fee had initially been set at too high a level. Although the Company was required to pay 65% of its turnover to the Partnership under terms of the Turnover Licence Agreement, the amount actually paid by the Company to the Partnership fluctuated from year to year according to the

Company's ability to pay. On at least one occasion, the Partnership raised a credit note in favour of the Company after the year-end when the Company was unable to pay the original amount. There were no formal amendments to the Turnover Licence Agreement. Mr Hearn's evidence was that the rent was set initially on the basis that there would be 600 members. The Company was unable to achieve that number of members and, as a consequence, the Partnership had to support the Company by agreeing a reduction in the rent payable. There was no evidence of any renegotiation of the licence fee but, instead, the Company relied on the Partnership waiving its entitlement to part of the licence fee to ensure the continuing solvency of the Company.

109. On the evidence, we conclude that agreements put in place with effect from 1 February 1998 were a wholly artificial arrangement that did not reflect the economic and commercial reality of the relationship between the Partnership and the Company and the members of the Club. The reality was that the Partnership continued to run the golfing business of the Club after February 1998 as it had done before, that is as the proprietor. Any supply of the golf course by the Partnership as proprietor would be a supply of sporting facilities and excluded from exemption by virtue of Item 1(m) of Group 1 of Schedule 9 VATA94. Mr Moll submitted that the Partnership could have achieved exemption by meeting the conditions of either Note 16(a) or (b) to Group 1 but we regard that as incompatible with operation as a members' club, which requires the provision of services beyond the supply of land (see [122] below) and, in any event, it was not what happened.

110. We cannot accept Mr Moll's submission that, because the members benefited from not paying VAT on their fees, there was no tax advantage for the Partnership. It does not follow from the fact that members did not pay VAT that the Partnership did not also gain an advantage as a result of the arrangements. In fact, the minutes of the Annual General Meeting on 27 February 1998 show that the members' subscription fees were not reduced, although there was no increase that year. The amount previously included in the subscription fees as VAT was retained by the Company. The retained VAT formed part of the Company's turnover (net of VAT) which was used to calculate the amount payable to the Partnership under the Turnover Licence Agreement. If VAT had been chargeable by the Company then the Partnership would have received less by way of licence fee. In the undated letter received by WJB on 20 November 1998, Mr Hearn stated that there would be a gross VAT saving of £30,919 for 1998/99. That VAT saving accrued to the Partnership, not to the Company. We find that the result of the new arrangements in that year and subsequently was that the Partnership received a higher licence fee than it would have done if the Company had been required to charge and account for VAT at the standard rate on the members' subscription fees.

111. Mr Moll submitted that, if there was a tax advantage, it was not one that was contrary to the purpose of the VAT Directive and the relevant provisions of VATA94. As we understood it, his submission was that Chobham Golf Club had similar arrangements to those between Partnership and the Company. In *Chobham*, the VAT and Duties Tribunal had held that the arrangements were effective and both entities in that case made exempt supplies. Mr Moll contended that the decision in *Chobham* showed that, at that time, arrangements that were materially the same as those implemented by the Partnership were not contrary to the provisions of Sixth Directive or the VATA94. We consider that this submission is misconceived for reasons that can be stated quite shortly. *Chobham* pre-dated the ECJ's judgment in *Kennemer* on

the meaning of non-profit making organisation and *Halifax* on the principle of the prohibition of abusive practices. The ECJ in *Kennemer* held, at [19], that the purpose of the exemptions is to provide more favourable VAT treatment for certain organisations whose activities are directed towards non-commercial purposes. Arrangements that allow a commercial organisation, such as the Partnership, to benefit from the exemption would be contrary to the purposes of the provisions of the VAT Directive. While it might have been reasonable for the Partnership to take the view that *Chobham* supported the view that the new arrangements were not inconsistent with the Sixth Directive and the VATA94 when they were introduced, such a view does not assist the Partnership. The effect of the ECJ's decision in *Kennemer* in 2002 was not that the arrangements should be regarded as contrary to the purpose of the VAT Directive from that date but that such arrangements had always been contrary to the purpose of the VAT Directive.

112. Before the arrangements were introduced in 1998, the Partnership charged and accounted for VAT on the members' subscriptions and, after the introduction of the new arrangements, no VAT was charged or accounted for on the subscriptions. The new arrangements were designed to ensure that the Partnership received the net proceeds of the supplies of sports services by the Company without any liability to VAT. That was done by establishing the Company as a non-profit making organisation, which would charge members their subscriptions without VAT, and requiring it to pay over all but a token amount of any profit derived from its supplies of sports services to the Partnership by way of a licence fee under the Turnover Licence Agreement which similarly did not attract VAT. In our view, the decided cases show that arrangements that would allow the exemption of supplies of services that are normally chargeable to VAT would be contrary to the purpose of the provisions of the VAT Directive and the relevant provisions of the VATA94 because such arrangements would be at odds with the objective that tax should be charged on such supplies and contrary to the principle of fiscal neutrality.

113. In conclusion, we find that the arrangements introduced in 1998 were a wholly artificial arrangement that did not reflect the economic and commercial reality of the relationship between the Partnership and the Company and that, if effective, they would have resulted in a tax advantage contrary to the purpose of the provisions of the VAT Directive and the relevant provisions of the VATA94.

Was principal/essential aim obtaining a tax advantage?

114. The Court of Appeal in *Pendragon* stated that, when determining whether the essential aim of the scheme was to obtain an illegitimate tax advantage, it was necessary to assess the aim of the particular series of transactions objectively and not by reference to the actual intentions of the parties. In carrying out that assessment, it is clear from *Halifax* and the cases that followed that we may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the persons involved.

115. We have already found that the arrangements were wholly artificial in that they did not reflect the economic and commercial reality of the relationship between the Partnership and the Company. Mr Moll submitted that the evidence showed that the Partnership had not entered into the arrangements in 1998 for the purpose of obtaining a tax advantage. He contended that there were commercial reasons for implementing the new arrangements, namely that:

(1) the members of the Club would benefit from not paying VAT on their subscriptions which would bring them into line with other members' clubs; and

(2) the new arrangements merely formalised the position prior to 1998, which was that the members ran the Club which was separate from the Partnership.

116. We do not consider that the evidence supports those submissions. In relation to the first point, we have already pointed out that the subscriptions did not reduce when VAT ceased to be charged. Further, the correspondence between Mr Hearn and WJB, described at [46]-[49] above, discusses a VAT saving for the Partnership but does not allude to any benefit to the members. Mr Hearn's evidence before us was that he took no account of any benefit to the Partnership but he also told us that he had to live and that he wanted to obtain a reasonable return for his investment. That testimony was entirely consistent with the proprietor's position set out in the minutes of the Annual General Meeting held on 11 April 1997, shortly before the new arrangements were introduced. We do not, of course, criticise Mr Hearn, who had invested so much in the creation of the Club, for wanting a reasonable return or for wanting to retain control of the club of which he was and continued to be the proprietor. The desire for a return and control is, however, inconsistent with a non-profit making organisation. We do not suggest that Mr Hearn did not also want the best for the Club. He clearly wanted to have (and, over time, had developed) a beautiful and high quality golf course. He was also keen that the Club should attract and retain members. To that end, he was concerned that the Club's membership fees should remain competitive with those charged by other clubs in the area, which included some members' clubs that were exempt for VAT purposes. Mr Hearn's desire to do the best for the Club was entirely consistent with the fact that he also wanted to make a profit from the Club. The profit was achieved or enhanced by implementing the arrangements which, if successful, allowed the subscriptions to be exempt for VAT purposes.

117. In support of the second submission, Mr Moll contended that, in 1992, the Partnership had set up a members' section of the Club to run the golfing activities. This was in accordance with guidance provided by the English Golf Union (now England Golf) to proprietary golf clubs. Mr Moll submitted that the position of the English Golf Union was that a proprietary club had to have a members' section. We were shown the rules for affiliation to the English Golf Union but there was no reference in those rules to a members' section or any such requirement. Mr Moll referred us to clause 1.3 of the rules, which stated that "a club not having control of its course must have an agreement with the person or body controlling the course to make reasonable playing facilities available". We cannot see how that required the establishment of members' section. Further, Mr Hearn said in evidence that the English Golf Union were happy that the members of the club contributed funds to the English Golf Union. He said that the English Golf Union had never had any complaints about the way the club operated or suggested that it was doing anything wrong before the changes were introduced in 1998. In any event, there was no evidence that the Club was run by a separate members' section prior to the introduction of the new arrangements in 1998. Although the minutes of the Annual General Meetings prior to 1998 show that there were different committees (or sections) for men and women members, there is no suggestion that they ran the Club.

118. We find that that the essential (or principal) aim of the arrangements was to obtain a tax advantage. We reach that conclusion on the basis of clear evidence of Mr Hearn's motive in approaching WJB and implementing the arrangements as disclosed by the correspondence described above together with the nature of the arrangements.

We consider that the artificiality of the arrangements supports our conclusion on this point.

Are there any special features that should prevent the principle prohibiting abusive practices applying?

119. Neither party suggested that there are any special features that should prevent the principle prohibiting abusive practices applying to the arrangements and we cannot detect any such features.

Conclusion on Abuse of Rights issue

120. We find that the agreements dated 15 February 1998 were a wholly artificial arrangement that did not reflect the economic and commercial reality of the relationship between the Partnership and the Company and that they would have resulted in a tax advantage contrary to the provisions of the Principal VAT Directive and the relevant provisions of the VATA94. We also find that the essential aim of the arrangements introduced in 1998 was to obtain a tax advantage for the Partnership. Accordingly, those agreements may be disregarded. We discuss how the arrangements between the Partnership and the Company should be redefined in the next section.

Redefinition issue

121. In *Halifax*, the ECJ concluded at [98] that, where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice. The ECJ also stated that the redefinition must go no further than is necessary for the correct charging of the VAT and the prevention of tax evasion. Mr Moll submitted that the appropriate redefinition of the supplies would be that the Partnership made exempt supplies of land to the members under Note 16(a) to Group 1 of Schedule 9 VATA94. Mr West submitted that the arrangements should be redefined as standard rated supplies of sports services by the Partnership to the members.

122. We consider that the appropriate redefinition in this case is clear. The abusive transactions are the agreements dated 15 February 1998. In order to re-establish the situation that would have prevailed in the absence of the abusive transactions, all that is required is that those agreements and supplies made pursuant to them are disregarded. The result in this case is that the Partnership is regarded as continuing to make the supplies to the members of the Club as was the case before the arrangements were introduced. Those supplies were the provision of sports services in the form of the provision of the facilities for playing on a golf course. Contrary to Mr Moll's submissions on Note 16(a), the provision of a golf course outside the provisions of Article 132(1)(m) Article 132 of the Principal VAT Directive, eg by an entity other than a non-profit-making organisation, is a standard rated supply. This is shown conclusively by the ECJ's decision in *Sweden v Stockholm Lindopark* [2001] STC 103 ('*Lindopark'*) at paragraph 26, which was quoted and applied by Blackburne J in *Holland (t/a The Studio Hair Company) v HMRC*, *Vigdor Limited v HMRC* [2008] EWHC 2621 (Ch), [2009] STC 150 at [52] as follows:

> "… in its judgment in *Lindopark*, after emphasising that the exemptions provided by article 13 are to be interpreted strictly, the ECJ went on to state:
>
>> '26. Second, services linked to the practice of sport or physical education must, so far as is possible, be considered as a whole. According to the case law of the Court of Justice, in order to determine the nature of a taxable transaction, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features …. As the Commission has rightly pointed out, the activity of running a golf course generally entails not only the passive activity of making the course available but also a large number of commercial activities, such as supervision, management and continuing maintenance by the service provider, provision of other facilities and so forth. In the absence of quite exceptional circumstances, letting out a golf course cannot therefore constitute the main service supplied.'
>
> In other words, the provision of a range of other activities along with the activity of making the course available would ordinarily mean that the supply was not to be treated as an exempt supply within art 13B(b) since it was necessary to have regard to all of the circumstances of the transaction in order to determine its essential nature. …"

Conclusion on Redefinition issue

123. For the reasons given above, we hold that the arrangements entered into in 1998 should be redefined so as to re-establish the situation that would have prevailed if they had never happened. That means that the agreements dated 15 February 1998 and supplies made pursuant to them are disregarded. Accordingly, the Partnership is regarded as making standard rated supplies of the provision of the facilities for playing on a golf course to the members of the Club.

Eligibility issue

124. Our conclusions in relation to the Abuse of Rights issue and the Redefinition issue mean that it is not necessary for us to decide the Eligibility issue. In case we are wrong in our conclusions and because both parties made submissions on the point, we set out our views on this issue.

125. HMRC decided that the Company was not an eligible body for the purposes of item 3 of group 10 of Schedule 9 to the VATA94. That meant that supplies of sports services made by the Company were not exempt but were chargeable to VAT at the standard rate. On the basis of its decision, HMRC assessed the Company for VAT which the Company had not accounted for during the period March 2008 to March 2011.

126. During the period covered by the assessment, 'eligible body' was defined in Notes (2A) and (2B) to group 10 which are set out above at [14]. In summary, an eligible body is a non-profit making body that cannot distribute any profit (other than to another non-profit making body) but must use it to continue providing the sports facilities or to improve them and is not subject to commercial influence.

127. The term 'subject to commercial influence' is defined in Notes (4) to (17) to group 10. Applying those notes to the facts of this case, the Company would be

regarded as subject to commercial influence if, at any time during the period of three years ending on the date of the supplies that were the subject of the assessment, a shadow officer of the Company supplied, other than for a nominal consideration, land to the Company that was used by it to provide facilities for playing golf. A shadow officer is defined by Notes (16) to group 10 as a person in accordance with whose directions or instructions the members or officers of the Company are accustomed to act.

Submissions on Eligibility issue

128. Mr Moll submitted that the Company did not aim to make a profit for its members. He referred to clause 4 of the Memorandum of Association of the Company which provided that no profit shall be distributed to members of the Company and any surplus shall be applied for the provision of sports and physical educational facilities. The same clause also allowed the Company to pay reasonable rent or licence fees to persons, including any member or director of the Company, for a lease or licence of the premises. Mr Moll contended that the Company was a non-profit making body which was precluded from distributing any profit and could only apply any profit for the continuance or improvement of making supplies of sports services. He further submitted that the Company was not subject to commercial influence but if it was then the Company could rely on the direct effect of Article 132(1)(m) of the Principal VAT Directive which did not allow the UK to restrict the exemption by reference to commercial influence. Accordingly, the Company was an eligible body for the purposes of item 3 of group 10 of Schedule 9 to the VATA94.

129. Mr West said that HMRC did not seek to argue that an eligible body cannot be associated with a commercial organisation or pay to use facilities that it does not own. He submitted that the Company was not a non-profit making body as that concept has been interpreted in the decided cases such as *Kennemer* and *Atrium*. Mr West contended that the function of the Company was to generate profits for the Partnership and this was shown by the negotiation and terms of the Turnover Licence Agreement. Under that agreement, the Company pays its entire surplus except for a token profit to the Partnership. Mr West referred us to paragraph 47 of the opinion of the Advocate General in *Kennemer* which stated that the terms of supply contracts could constitute covert distributions of profit, such as the turnover rent in this case. Mr West also submitted that the fact that the Partnership had to waive its entitlement to all of the rent due, sometimes by issue of a credit note, showed that the Partnership was in a controlling position.

Discussion on Eligibility issue

130. Item 3 of group 10 of Schedule 9 to the VATA94 implements Article 132(1)(m) of the Principal VAT Directive and must be interpreted in accordance with it. The meaning of non-profit making organisation in the predecessor to Article 132(1)(m) was considered by the ECJ in *Kennemer*. In *Kennemer*, the club made an operating surplus over a period of time and the Dutch tax authorities considered that it was systematically aiming to make a profit and, therefore, its supplies did not qualify for exemption because of what is now Article 133. The ECJ's decision in *Kennemer* was summarised by Jonathan Parker LJ in *Messenger Leisure Developments Ltd v HMRC* [2005] STC 1078 at [47] as follows:

> "The Court of Justice held that an organisation was non-profit-making if it did not have the aim, such as that of a commercial undertaking, of achieving profits (in the sense of financial advantages) for its members; but that, provided that was so, the fact that the organisation made operating surpluses, even if it sought to make them and did so systematically, did not affect its non-profit-making status so long as the surpluses were not distributed to the organisation's members as profits."

131. The reference to the distribution of profits to the organisation's members must, in our view, be seen as a reference to the facts of *Kennemer* and not part of the definition of non-profit making. This is shown by paragraph 45 of the Advocate General's opinion:

> "… 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."

It is clear that the Advocate General did not consider that only profits distributed to the club's members were relevant when assessing whether it was a non-profit making organisation.

132. In this case, the evidence clearly shows (and we have already found) that the licence fee was set at a level that would leave the Company with only a token profit. The Partnership and the Company did not produce any evidence of any negotiations between them about the level of licence fee that should be payable or, after the agreement had been entered into, about any adjustment to the amount payable. We accept Mr West's submission that there were no negotiations. We find that the amount payable by way of licence fee was fixed and controlled by the Partnership. The intention of the Partnership was that any surplus in the accounts of the Company should be paid to it as a licence fee, subject to the amount not being such as to make the Company insolvent. We conclude that the Company was not a non-profit-making organisation, as that term has been interpreted by the ECJ in *Kennemer*, because it was run with the aim of achieving profits for the Partnership through the mechanism of the Turnover Licence. For that reason, the Company was not an eligible body for the purposes of item 3 of group 10 of Schedule 9 to the VATA94.

133. In addition, we conclude that the Company was subject to commercial influence because Mr Hearn, a partner in the Partnership, was a shadow officer of the Company. We consider that the evidence clearly shows that the members and officers of the Company were accustomed to act in accordance with the directions or instructions of Mr Hearn during the relevant period.

134. We do not accept Mr Moll's submission that the Principal VAT Directive does not allow the United Kingdom to make it a condition of the exemption for sports services that a non-profit making body must not be under commercial influence. Such a condition is permitted by Article 131 of the Principal VAT Directive. Article 131 allows Member States to lay down conditions for the purposes of, among other things, preventing any possible evasion, avoidance or abuse. That is clearly the purpose of

the commercial influence condition in Note (2A) to Group 10 of Schedule 9 to the VATA94.

Conclusion on Eligibility issue

135. For the reasons given above, we hold that the Company was not an eligible body for the purposes of Item 3 of Group 10 of Schedule 9 to the VATA94 and, therefore, its supplies to members were not exempt but were subject to VAT at the standard rate. It follows that, if we are wrong about the other issues in this appeal then the Company is liable to pay the VAT on the supplies of sports services during the period March 2008 to March 2011 although Mr Moll has reserved his position on the amount of the assessments. If we are right about the other issues, however, then these assessments fall away.

Decision

136. We have found that:

(1) the agreements between the Partnership and the Company introduced with effect from 1 February 1998 were wholly artificial arrangements that did not reflect the economic and commercial reality of the relationship between the Partnership and the Company that would have resulted in a tax advantage contrary to the provisions of the Principal VAT Directive and the relevant provisions of the VATA94, and the essential aim of which was to obtain a tax advantage; and

(2) accordingly, the agreements dated 15 February 1998 and supplies made pursuant to them should be disregarded and the Partnership should be treated as having made standard rated supplies of the provision of the facilities for playing on a golf course to the members of the Club; or

(3) if the arrangements were not an abusive practice, the Company was not an eligible body for the purposes of Item 3 of Group 10 of Schedule 9 to the VATA94 and its supplies to the members of the Club were chargeable to VAT at the standard rate.

137. For the reasons given above, our decision is that the appeal is dismissed.

Right to apply for permission to appeal

138. 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 for permission 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.

GREG SINFIELD

TRIBUNAL JUDGE

RELEASE DATE: 29 December 2014