TC02880

Appeal number: TC/2009/11819

Value added tax – Exemptions – Sport and physical education – whether Appellant an eligible body for the purposes of VAT exemption – whether assessments out of time – application for late amendment grounds of appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORTH WEALD GOLF CLUB LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JILL C GORT
JAMES MIDGLEY

Sitting in public in London on 21 and 22 February 2013

Mr T Brown of Counsel, instructed by PEM VAT Services LLP appeared on behalf of the Appellant

Mr S Singh of Counsel, instructed by the Solicitors Office appeared on behalf of Respondents

DECISION

1. This is an appeal against (1) a decision of the Commissioners dated 2 March 2009 and upheld on review on 22 June 2009 that the sporting services made by North Weald Golf Club Limited ("NWGC") since February 2005 are taxable supplies as NWGC is not an eligible body for the purposes of VAT exemption; (2) an assessment issued on 27 March 2009 for the period ending 03/06 in the sum of £70,481 VAT, plus interest; and (3) an assessment issued on 19 June 2009 for the periods 06/06 to 12/08 in the sum of £169,016 plus interest.

2. The grounds of appeal contained in the notice of appeal dated 6 July 2009 were that:

> "The Appellant's supplies of sporting services qualify for exemption by virtue of VATA 1994 ("VATA") Schedule 9 Group 10 Item 3. A ruling to that effect was provided to the Appellant by the Commissioners on 20 September 2004 …"

3. Before us NWGC no longer pursued the issue relating to an alleged ruling by the Commissioners. A further ground of appeal was that:

> "The resulting assessments were issued outside the parameters provided by VATA s.73(6)."

4. By a notice dated 23 November 2012 NWGC applied for permission to amend its grounds of appeal and add the following:-

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

5. At the outset of the hearing we heard argument as to the admissibility of the above ground of appeal, and in that regard whether or not we should decide the issue of whether NWGC was a non-profit-making body and whether or not the assessment fell outside the time limits provided by s.77 of the VATA prior to determining the admissibility of the further ground of appeal. After consideration, it was decided that in the interests of justice we would be prepared to hear the substantive appeal and decide whether NWGC was or was not a non-profit-making body, and as such was an eligible body within Item 3 of Group 10 of Schedule 9 of VATA, and whether or not the assessment fell outside the time limits provided by s.77 of the VATA before deciding the issue of admissibility of the further ground of appeal.

The Legislation

6. Section 1 of the VATA provides:

> "(1) Value added tax shall be charged, in accordance with the provisions of this Act –
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply),
>
> (b) …
>
> and references in this Act to VAT are references to value added tax."

7. Section 2 of VATA provides:

> "(1) Subject to the following provisions of this section … VAT shall be charged at the rate of 17.5 percent and shall be charged –
>
> (a) on the supply of goods or services, by reference to the value of the supply as determined under this Act; and
>
> (b) …"

8. Section 31(1) VATA provides:

> "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 …"

9. Schedule 9 provides:

> "GROUP 10 SPORT, SPORTS COMPETITIONS AND PHYSICAL EDUCATION
>
> Item No
>
> 3. The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part.
>
> NOTES
>
> (1) Item 3 does not include the supply of any services by an eligible body of residential accommodation, catering or transport.
>
> (2) An individual shall only be considered to be a member of an eligible body for the purpose of Item 3 where he is granted membership for a period of three months or more.
>
> (2A) Subject to Notes (2C) and (3), in this Group "eligible body" means a non-profit making body which –
>
> (a) is precluded from distributing any profit it makes, or is allowed to distribute any such profit by means 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 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 non-profit making body.

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

(1) …

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

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

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

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

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

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

10. Section 73 provides:

"(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

…

(6) As assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following -

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment."

11. Section 77 provides:

> "(1) Subject to the following provisions of this section, an assessment under section 73 … shall not be made –
>
> (a) more than 3 years after the end of the prescribed accounting period or importation or acquisition concerned …"

12. Item 3 of Group 10 of Schedule 9 to VATA exempts:

> "The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part."

13. Note 2A to Group 10 states that:

> "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."

14. These provisions in VATA are derived from what are now Articles 132 and 133 of Directive 2006/112/EC ('the Principal VAT Directive' or 'the PVD'). Article 132 provides, insofar as is material, that:

> "1. Member States shall exempt the following transactions:
>
> …(m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education."

15. Article 133 of the PVD provides that:

> "Member States may make the granting of bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject to each individual case to one or more of the following conditions:
>
> (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;
>
> (b) those bodes must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest,

> either themselves or through intermediaries, in the results of the activities concerned ..."

16. On 1 December 2005 following the Court of Appeal's decision in the case of *Messenger Leisure Developments Ltd v The Commissioners for HMRC [2005] STC 1078* the Commissioners issued a Business Brief. Following reference to that case and to *Kennemer Golf and Country Club v Staatssecretaris van Financien (C-174/00) [2002] STC 502* HMRC set out its clear view that: "…..any company which is precluded from distributing profit, but whose function is nevertheless to create VAT exemption in the context of a wider commercial undertaking, is not a non-profit making body for VAT purposes. It follows that such a company is not entitled to claim the VAT exemption which is directed at such bodies."

The Background

17. On 7 January 2004 a consortium, including Mr Andrew Lloyd-Skinner and a business partner of his, Mr Joseph Collingwood, acquired the assets of a company called Active Point Limited from the administrators. Those assets included freehold land, buildings, a golf club known as North Weald Golf Club ("The Club") and its membership. A company called Home Counties Golf & Leisure Limited ("Home Counties") had been incorporated on 12 December 2003 for the purpose of making the acquisition. That company was registered for VAT with effect from 7 January 2004.

The Evidence

18. An agreed bundle of documents was provided which included unchallenged witness statements from two officers of the Commissioners, Mrs G Watkins and Mrs F Voges. Mr Lloyd-Skinner supplied a witness statement and gave evidence on behalf of NWGC.

The facts

19. At the time of the takeover by Home Counties, the Club, which consisted of an 18-hole golf course, a clubhouse, three outbuildings and 160 acres of green belt land was in decline with a reducing membership. Neither Mr Lloyd-Skinner nor Mr Collingwood had previous experience of managing a golf club but were experienced businessmen with a love of golf. It was decided at an early stage that they needed to do two things:

(1) To acquire planning consent to alter and improve the golf course through the use of imported inactive soil waste; and

(2) To obtain advice on the most effective structure for taxation purposes to allow as much investment into the golf course facilities as possible and allow the company to compete with the four "member-owned", not-for-profit clubs which existed within a 10-mile radius of NWGC.

20. The Club had supplied golfing packages at varying prices ranging from £50 - £150 per annum for junior members and £150 - £855 per annum for adults. If a

member wanted to play golf he would have to pay for a golfing package. At the time of the take-over by Home Counties there were around 400 members of the Club and around 350 packages were sold annually to those members. Around 10,000 rounds of golf were being played by visitors on a pay and play basis. All these supplies were initially treated as taxable by Home Counties, together with the services supplied by the restaurant and the hire of golf buggies.

21. At some stage in 2004-5 the necessary planning consent was obtained, and in 2004 Mr Collingwood contacted a tax consultant, Mr R Plumbly of PEM VAT Services LLP. On 10 September 2004 Mr Plumbly wrote to the Commissioners setting out the proposals for the structure of Home Counties, the Club and the proposed new company (referred to as "Newco") and stated:

> "It is not intended that HGCL (Home Counties) will provide any management services or other supplies to Newco. There will be a peppercorn rent under the terms of the lease, but this, in itself, will not make Newco subject to commercial influence (VATA 1994, Schedule 9 Group 10 Item 3 Note 2A(c)). As such, our understanding is that Newco will be entitled to exempt its income from golfing packages. Based on the information provided, we would be grateful if you could confirm this. Newco's other income from retail shop sales and a proposed operations fee from HGCL will be taxable and will give Newco an entitlement to VAT registration."

22. By a letter dated 20 September 2004 Mr R Baker of HMRC replied to that letter *inter alia* as follows:

> "With reference to the income for the golf packages I can confirm that certain sporting and physical education services by eligible bodies can qualify for VAT exemption. However, the following must apply for Newco to exempt its income.
>
> - The organisation has activities included within the meaning of "sports and physical education.
> - It supplies services that are closely linked with and essential to sports and physical education.
> - It supplies services to an individual, except, where the body operates a membership scheme.
> - It is an eligible body.
>
> An eligible body must be non-profit-making, have in its constitution restrictions on the distribution of profits and not be subject to commercial influence.
>
> The subscription is exempt if the service that is the benefits, facilities and advantages of membership meet these conditions. From the information provided, I agree that this would be the case."

23. Following receipt of this letter from the Commissioners, NWGC was established. Its Memorandum and Articles of Association (the "Articles") are dated 19 October 2004 and are headed "Private Company limited by guarantee and not having a share capital". It was registered for VAT with effect from 1 February 2005. NWGC

acquired the assets of the Club from Home Counties for £750,000, of which £615,000 was for goodwill, £167,000 for equipment and £16,000 for stock. The financial statements for NWGC show that there was a credit of £48,000 for prepaid fees. The objects of NWGC are "to carry on business as operators of golf clubs, sports, fitness and health clubs, grounds, tracks, clubhouses …".

24. Articles 5-7 provide:

> "5. The income and property of the Company shall be applied solely towards the promotion of its Objects and no part shall be paid or transferred, directly or indirectly, by way of dividend, bonus or otherwise by way of profit, to members of the Company, and no trustee shall be appointed to any office of the Company paid by salary or fees or receive any remuneration or other benefits in money or monies worth from the Company; provided that nothing in this document shall prevent any payment in good faith by the Company;
>
> 6. Every member of the Company undertakes to contribute to the assets of the Company, in the event of the same being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts or liabilities of the Company contracted before he ceases to be a member and of the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding £1.00.
>
> 7. If the Company is wound up or dissolved and after all its debts and liabilities have been satisfied there remains any property it shall not be paid to or distributed among the members of the Company, but shall be given or transferred to some other company or companies having Objects similar to the Objects which prohibits the distribution of its or their income and property to an extent at least as great as is imposed on the Company by Clause 5 above, chosen by the members of the Company at or before the time of dissolution and if that cannot be done then to some other company."

25. The original shareholding was 30% to Mr Lloyd-Skinner, 33% to Mr Collingwood and the balance was held by other investors. Mr Lloyd-Skinner and Mr Collingwood were the directors of NWGC and also of Home Counties. The accounts for NWGC dated 31 December 2005 show the bank as a longstanding secured creditor in the sum of £696,708. The accounts provide:

> "Instalments amounting to £415,586 in respect of the loan are payable after 5 years."

And also:

> "The bank loan is secured by a debenture over the Company's assets and the undertaking as a whole. Additionally, the directors have provided personal guarantees limited to £75,000 each."

26. The single 'undertaking' included Home Counties. Because NWGC is limited by guarantee, it did not have a share capital. These accounts refer to the 'member's

liability' in the event of the winding up or dissolution of NWGC being liable to contribute an amount not exceeding £1.00 towards the debts and liabilities of NWGC. The 'member' is Home Counties, NWGC being a wholly owned subsidiary undertaking of Home Counties.

27. NWGC was established to collect the fees for playing golf and was set up in accordance with the Commissioners' letter of 20 September 2004, which Mr Lloyd-Skinner had erroneously believed stated that the scheme proposed would be exempt from VAT. Home Counties leased the golf course to NWGC and operated the club membership scheme. It traded in soil importation royalties and let some property to a tenant.

28. Home Counties made taxable profits from the soil importation between 2007 and 2009 when the course was being reconstructed, and from leasing the course to NWGC. These profits were all re-invested to reduce debt and improve the golfing facilities. It also received the membership fees and royalties from NWGC from the soil it had imported. NWGC charged the members of the club for golfing packages, described in an Agreement ("the Agreement") between Home Counties and NWGC dated 1 February 2005 as:

> "The categories of options for the playing of golf at the Golfing Facilities together with their rights to play golf at the Golfing Facilities and such other options for the playing of golf at the Golfing Facilities as shall be agreed in writing by the Parties from time to time."

29. In its recitals the Agreement provided *inter alia* as follows:

(1) Home Counties operates a membership scheme for the provision of golfing facilities for its members;

(2) North Weald operates a golf course;

(3) North Weald has agreed to provide the Golfing Facilities to the use of the Members in consideration of payment of the Fee by Home Counties;

(4) North Weald has agreed to collected payment of the fees due from the Members at Home Counties agent, in consideration of payment of an Agency Fee …

30. Mr Lloyd-Skinner's daughter, Stacey Smith, had previously worked for Mr Collingwood and it was his decision to employ her. She worked at the Club from the outset. There she had met the man who would become her husband, Bradley Smith, a golf professional. They both became paid NWGC club managers. Stacey Smith in 2007 became Secretary of NWGC and was a minority shareholder in Home Counties.

31. In 2007 Mr Collingwood decided to sell his interest in NWGC and Mr Lloyd-Skinner agreed to buy him out as well as the other shareholders. He raised £975,000 from the bank for this purpose. His intention was to involve his family in developing NWGC as a leisure operation for the local community.

32. On 20 February 2007 Officer Watkins of the Commissioners carried out a joint assurance visit to NWGC and Home Counties and subsequently requested information from Mr Lloyd-Skinner. After receiving that information she explained to him to that investigations were ongoing. In August 2007 an Officer Voges of the Commissioners took over the case. On 24 July 2008 she wrote to NWGC requesting additional information. Considerable correspondence followed between that officer and Mr Lloyd-Skinner. By a letter dated 24 July 2008 she asked for various information and documents to be provided, including copies of all the annual accounts, who decided how the membership fees were set and how they were calculated and how the business was purchased from the previous owners. By a long letter dated 28 July 2008 Mr Lloyd-Skinner provided much of the information asked, but was only able to provide the 2005-6 accounts for Home Counties, not the 2007 accounts which were not ready, nor were there any 2007 accounts for NWGC. He stated *inter alia* that he was the only current director and was paid through the payroll. He himself had set the membership fees in consultation with the club manager and representatives (of Home Counties). All elements of the membership fee were paid through NWGC. The annual membership fee was treated as being liable for VAT but the golf package fee was VAT exempt.

33. With regard to the buy out of Home Counties Mr Lloyd-Skinner in his letter of 28 July 2008 had informed HMRC that in February 2007 the Company re-purchased 442,076 shares from dissenting shareholders leaving a balance of 344,615 shares owned primarily by himself and family members. There were now 9 shareholders of which two had a day-to-day involvement in the business, himself and his daughter, Tracey Smith.

34. With regard to NWGC, the Commissioners were informed that the assets in the accounts consisted of goodwill, some fixtures and fittings and some plant and machinery relating to the golf course. Home Counties was its guarantor. Mr Lloyd-Skinner was the only director and did not receive remuneration from NWGC. All golf related fees were deposited in NWGC and the membership proportion (net of VAT) was transferred to Home Counties through an inter-company transfer account in the balance sheets of the two companies. VAT on the membership element was accounted for in NWGC.

35. Officer Voges subsequently asked further questions and was informed *inter alia* that Home Counties rented course machinery and course buggies to NWGC on a quarterly basis and VAT was applied on this rental. The primary taxable supply in Home Counties was at the time when royalties were received from an environmental contractor for soil importation relating to golf course redevelopments. A letter was received from Mr Lloyd-Skinner dated 23 September 2008 in which he asked Ms Voges what her objectives were and if she was considering removing the VAT-exempt, not-for-profit status of NWGC.

36. Further correspondence ensued with further requests by Ms Voges for information. Although there is no reference to this in her subsequent letters, Ms Voges had not been in receipt of the 2007 accounts for Home Counties or NWGC. Other questions were answered by a letter from Mr Lloyd-Skinner dated 20 February

2009 which included the information that Home Counties was the 'member' referred to in NWGC's 2005 accounts. On 2 March 2009 the appeal decision was issued and subsequently on 27 March 2009 a notice of assessment was issued in respect of VAT period 03/06 and subsequently a further assessment in respect of the periods 06/06 to 12/08 was issued on 27 March 2009. Following the promulgation of the decision and the assessments, as from 1 July 2009 Mr Lloyd-Skinner treated all the golf-related transactions as standard-rated for VAT purposes. As from March 2010 he decided to transfer the packages element of NWGC to Home Counties for no consideration and NWGC ceased to trade.

37. Following the issuing of the assessments NWGC was invited by the Commissioners to provide details of any supplies it considered should not be standard-rated and of any input tax that might be due. No such information was ever supplied to the Commissioners. There was further correspondence on behalf of NWGC conducted by Mr Plumbly, and in a letter dated 13 January 2010, in reply to a request from the Commissioners as to what was 'the driver' behind the model ultimately adopted by NWGC, he replied:

> "I felt that the intentions regarding the development of the golf club and the package structure provided scope to 'ring-fence' the golfing operations in a separate non-profit-making arrangement. A similar VAT-efficient arrangement had been developed at [another] Golf Club …"

In his evidence to us Mr Lloyd-Skinner had said that the intention in setting up NWGC had not been to create a VAT exemption, but to "... prevent inequality and to allow investment back in the business". He was concerned to regenerate the facilities, and to do so his aim was to achieve a surplus from trading in order to re-invest in the facilities. Whilst we accept that his primary aim was to do as he said, we find that it was part of his aim to achieve this by the most tax efficient method available, and he had sought Mr Plumbly's advice as to how to achieve this.

The Commissioners' Case

38. The reason for the Commissioners' decision to treat NWGC's supplies as VAT-rated was that it was not considered to be a non-profit-making body. This was based upon the purpose of the re-organisation of Home Counties in 2004 being to reduce the amount of VAT payable in respect of the operation of NWGC. The Commissioners considered NWGC was part of a wider commercial undertaking and remained under the commercial influence of Home Counties. By collecting the membership fees and the golf package fees, NWGC was acting as an agent for Home Counties. It was considered that NWGC and Home Counties operated as a single commercial undertaking.

39. Mr Singh referred us to the case of *Kennemer* where Advocate General Jacobs gave guidance on how to assess whether or not an organisation is non-profit-making. He stated:

> "25. … when determining whether an organisation is non-profit-making for the purposes of Article 13(A)(1)(m) of the Sixth Directive

> [the predecessor to Article 132(1)(m) of the Principal VAT Directive], account must be taken of its activities as a whole."

At paragraph 45 the Advocate General stated that the idea of profit-making "relates to the enrichment of natural or legal persons – in particular those having a financial interest in the organisation in question".

40. At paragraphs 46 and 47 the Advocate General stated that the mere fact that an entity does not make a profit over any given period is not enough to confer non-profit-making status. It was necessary but not sufficient to look at the organisation's express objects as set out in its statutes; it was also necessary to "examine whether the aim of making and distributing profit can be deduced from the way in which operates in practice". At paragraph 50 he stated *inter* alia that an organisation could only be a non-profit-making organisation within the meaning of what is now Article 132(1)(m) of the PVD if it was "not in fact run in such a way as to achieve or seek to achieve" the enrichment of natural or legal persons.

41. We were referred to the case of *Messenger* in which the Court of Appeal applied *Kennemer*. It held in considering what the taxpayer's aim was that it was necessary to look at the transactions in their full factual context.

42. In the present case Mr Singh submitted that NWGC was part of wider commercial undertaking whose function was to seek to create a VAT exemption in the context of that undertaking.

43. With regard to the claim that the assessments were out of time under s.73(6) of VATA, we were referred to the case of *Cumbrae Properties (1963) Limited v. C&E Commissioners* [1981] STC 799 in which the High Court followed the rule in *C&E Commissioners v. J H Corbitt (Numismatist) Limited* [1980] STC 231 and held that:

> "The Tribunal cannot substitute its own view of what facts justify the making of an assessment but can only decide when the last of those facts was communicated or came to the knowledge of the officer. In my judgment, the Court can only interfere if there is sufficient material to show that the officer's failure to make an earlier assessment was perverse …"

44. It was submitted by Mr Singh that the following principles of law emerged from the authorities *Cumbrae* (supra), *Spillane v. C&E Commissioners* [1990] STC 2112, *C&E Commissioners v. Post Office* [1995] STC 749, *Pegasus Birds Limited v. C&E Commissioners* [2000] STC 91 and *Heyfordian Travel Limited v. Customers & Excise Commissioners* [1979] VATTR 139:

(a) The Tribunal has to proceed on the basis of evidence of facts which in the Commissioners' opinion justified the making of the assessment;

(b) The Tribunal must identify what those facts were;

(c) The Tribunal must decide when the last of those facts actually came to the Commissioners' knowledge; and

(d) In the light of all the above, the Tribunal can only intervene if the Commissioners acted perversely in not assessing earlier.

45. In the present case Mr Singh contended that time under s.73 did not begin to run until 20 February 2009 as it was not until Mr Lloyd-Skinner's letter of 20 February 2009 that he had confirmed that the "member" of NWGC was Home Counties. In any event it could not have been before 28 July 2008 when Mr Lloyd-Skinner provided information about his own role, about the buy out and also the earlier set of accounts.

The Appellant's Case

46. Mr Brown submitted that NWGC's services fell within Schedule 9, Group 10 VATA as being made by a non-profit-making organisation principally on the basis that it never made a profit during its period of trading, was limited by guarantee, and could on these grounds be distinguished from the case of *Messenger*.

47. *Kennemer* was relied on for the provision in that case that an organisation's aims need to be determined by taking into account the way it operates in practice.

48. Mr Brown sought to distinguish the present case from that of *Messenger* on the basis that NWGC never made a profit during its period of trading and was limited by guarantee, and that the aim of NWGC was comparable to that of the owner of the Club in the case *Chobham Golf Club (Chobham)* VTT 14867, namely for the members to be able to enjoy facilities comparable to that of a member-owned club.

49. In support of NWGC's case that the assessments in respect of periods 03/06 and 12/06 were invalid as being outside the parameters provided for in VAT s.73(6), it was submitted that no new facts had come to the attention of the Commissioners after NWGC's representative's letter of 10 September 2004 that would have made any difference. It was apparent to the Respondents from at the latest 2007 that NWGC's intention was to create a VAT exemption and therefore the Commissioners had sufficient information to reach that conclusion when PEM had written saying that NWGC would be a "wholly-owned" subsidiary of Home Counties. On 19 April 2007 Mrs Watkins had written acknowledging receipt of documents from Mr Lloyd-Skinner, which included the 2005 accounts, and at the latest by that date the Commissioners had sufficient information to raise the assessments.

50. Mr Brown pointed to the Commissioners' Business Brief issued on 1 December 2005 as making clear that a company which was set up with the aim of benefiting from the VAT exemption did not qualify as a non-profit-making body. In 2007 the Respondents had had sufficient information to reach that conclusion in respect of NWGC and therefore the assessments were out of time.

Reasons for decision

51. The case of *Chobham* was relied on by Mr Brown, but that case was heard long before either *Kennemer* or *Messenger*. As cited above, in the case of *Kennemer* Advocate General Jacobs specifically stated that not making a profit did not confer

non-profit-making status. The decision in *Kennemer* was summarised by Jonathan Parker LJ in *Messenger* at paragraph 47 as follows:

> "47. 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."

Jonathan Parker LJ then went on to cite paragraph 45 of *Kennemer* in which Advocate General Jacobs said as follows:

> "45. First, I agree with what appears to be the consensus of the Finnish and United Kingdom governments and the Commission, that the idea of non-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."

In paragraph 50 of his Opinion in *Kennemer* the Advocate General, having referred to the meaning of Article 13A(1)(m) the Sixth Directive as being one which does not have as its object the enrichment of natural legal persons and which is not in fact run in such a way as to achieve or seek to achieve such enrichment, continued:

> 'However, the fact that a body systematically aims to make a surplus which it uses for the services it supplies in the form of a facility to practise a sport does not preclude its classification as a non-profit-making organisation."

52. In the case of *Messenger* a Company, Messenger Developments Ltd, ("Messenger") was established which was stated by Mr Shah, the sole director, to be for the purpose of being able to compete with nearby members only golf clubs which benefited from the exemption. His contention was set out in the Tribunal's decision in *Messenger* as follows:

> "It was Mr Shah's stated intention to create something different from either an elite private members' club or a municipal golf course. He wished to provide golf and other sporting facilities which families could use and enjoy without the cost being prohibitive. He wished to invest properly in sporting facilities at these clubs as it was his view that it was often the case in both members and proprietary clubs that they were overused, not looked after sufficiently, and deteriorated to the detriment of the players. It was his stated aim to provide improved facilities, and he said he was not interested in extracting profit from the business."

53. Mr Lloyd-Skinner's contentions had been somewhat similarly expressed. In the case of *Messenger* it was held that, in determining the aim the company was pursuing when it made the supply in question, it was necessary to look at the transactions in their full factual context. In that case this included the fact that the company represented an integral part of a commercial operation, The Messenger Group Ltd ("MGL"). Messenger was the wholly owned subsidiary of a company Messenger Leisure Ltd ("Leisure"), which itself was a wholly owned subsidiary of MGL. MGL was owned by Mr Shah and his wife and Mr Shah was the sole director. He was also a director of Leisure and a sole director of Messenger. There had been a building up of reserves in Messenger which was a clear financial advantage to MGL, and hence to Mr Shah. It was held that taking all the surrounding circumstances into account, the inevitable conclusion was that Messenger's aim in making the supplies in question was to further the commercial aims of the group as a whole and hence of Mr Shah. It was further held in Messenger that, as a company registered under the Companies Acts and limited by shares, Messenger had the power to alter the conditions in its memorandum of association by special resolution under s.4 of the Companies Act 1985. Accordingly, it could remove the restrictions set out in its memorandum on the distribution of profits by special resolution. If it did so, the profits of Messenger could be distributed to its shareholders even though, when they were earned, the restrictions were in place. This was considered to be a factual matter relevant to take into account and evaluating the totality of the facts for the purpose of determining whether in reality the aim of Messenger in this case was to make profits for its members.

54. We take from the above authorities that whilst not making a profit does not confer non-profit-making status, nor does making a profit necessarily mean that a company is not entitled to non-profit-making status. What is necessary is that the entity should not in fact be run in such a way as to achieve the enrichment of natural or legal persons, either directly or as a consequence of its organisation.

55. It had been found in the case of Messenger that the club in that case had been set up with the intention of obtaining a physical advantage following the introduction into law of the exemption provided by Article 13, and it had no independent purpose. In the present case it was acknowledged by Mr Plumbly that, as cited above at paragraph 31, the intentions regarding the development of the golf club and the package structure provided scope to "ring fence" the golfing operations in a separate non-profit-making arrangement. This was referred to as being a VAT-efficient arrangement. Whilst the structure of NWGC is different from that of the club in Messenger, it was a wholly owned subsidiary undertaking of Home Counties. The bank loan used by NWGC to purchase the packages part of the business from Home Counties was secured by debenture over the companies' assets and the undertaking as a whole, that undertaking including Home Counties. Mr Lloyd-Skinner's own family members, namely his daughter and her husband, had been appointed as club managers of NWGC, albeit it was Mr Collingwood who had initially appointed Mrs Stacey Smith. Mrs Smith, prior to Mr Collingwood's resignation as a director of NWGC on 19 February 2007 had been appointed secretary at NWGC.

56. The everyday activities of NWGC and Home Counties were substantially interlinked. Whilst the packages part of the business was transferred by Home Counties to NWGC, Home Counties still received membership fees from NWGC's members. NWGC effectively ran the golfing business for Home Counties' members and in order to play golf a member would pay his membership fee to Home Counties, before paying NWGC for his golfing package. We find that the effect of making the supplies in question was to further the commercial aims of the group as a whole, and those of the director, Mr Lloyd-Skinner. Mr Lloyd-Skinner was therefore in a similar position to Mr Shah in Messenger in that he effectively controlled NWGC, and NWGC's function was to seek to create a VAT exemption in the context of Mr Lloyd-Skinner's broader commercial operation, which included Home Counties.

57. It is clear from the evidence that Mr Lloyd-Skinner was in control of both NWGC and Home Counties. He was able to make a decision to treat the supply of golfing packages by NWGC as standard-rated as from 1 July 2009 following correspondence with the Commissioners. Furthermore, as from March 2010 the packages element of the business was transferred from NWGC back to Home Counties and NWGC ceased trading. Despite this element of the business being sold on 1 February 2005 by Home Counties to NWGC for £750,000, it was transferred back to Home Counties for no consideration. If NWGC had been a truly independent entity in an arms-length relationship with Home Counties, it could not have acted in that way. For the above reasons we find that NWGC is not a non-profit-making business and that part of the appeal is dismissed.

58. Turning to the question of whether the assessments for periods 3/06 to 12/06 were out of time, following the decision in *Cumbrae Properties* (cited above) the Tribunal has to proceed on the basis of the facts which in the Commissioner's opinion justified the making of the assessment, and decide when the last of those facts came to the Commissioner's knowledge. It is not sufficient for us to interfere merely if we think the assessment could have been raised earlier.

59. In *Spillane v. C&E Commissioners* [1990] STC 212, Simon Brown J (as he then was) indicated that an assessment could not be regarded as out of time if the "evidence of facts" which justified the making of the assessment should have been obtained by the Commissioners earlier. He stated that the reference "to evidence of facts coming to the Commissioners' knowledge, in my judgment, means what it says; the word does not encompass constructive knowledge". This principle was upheld by Potts J in *C&E Commissioners v. Post Office* [1995] STC 749.

60. In *Post Office*, Counsel for the Commissioners had submitted that the purpose of the one-year rule was to protect the taxpayer from tardy assessment, not to penalise the Commissioners for failing to spot an error. The Court of Appeal in *Pegasus Birds Limited v. C&E Commissioners* [2000] STC 91, held that against that background, the one-year rule was clear, and that the relevant evidence of fact is that which was considered in the Commissioners' opinion to justify the making of the assessment. "The one-year time limit runs from the date when the facts constituting the evidence came to the knowledge of the Commissioners".

61. In the present case it is not for the Tribunal to say that the Commissioners should have issued an assessment at a time when, although they may have believed NWGC was established with the intention of achieving the exemption, they did not have sufficient factual evidence to be certain of that. They were not in possession of such items as were sought quite properly by Ms Rowley in her letter of 13 March 2007 when she requested various contracts, including *inter alia* the contract for the sale of the packages to NWGC; documentary evidence relating to supplies between the entities; the memorandum and articles of association for NWGC and Home Counties and also any VAT planning advice given to NWGC. As late as July 2008 the Commissioners were asking for information in respect of 11 different aspects of NWGC, in particular annual accounts of NWGC, detail of the assets included in the accounts, confirmation of the guarantors of the company, how the director were appointed and their remuneration calculated.

62. In our judgment even had the Commissioners been told in 2007, as they eventually were by Mr Plumbly in 2010, that NWGC's intention was to create a non-profit-making company in order to be single "VAT-efficient", that would not be sufficient for the Commissioners to have been in a position to issue the assessment without the further information as to the functioning of the two inter-related companies.

63. In the circumstances we do not find that the assessments were issued out of time and the appeal in respect of that issue also is dismissed.

64. This appeal is now adjourned to be re-listed for the Tribunal to consider whether to give permission for NWGC to amend its grounds of appeal.

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

JILL C GORT
TRIBUNAL JUDGE

RELEASE DATE: 12 September 2013