JUDGMENT OF THE COURT (Fifth Chamber)

21 March 2002 *

In Case C-174/00,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Kennemer Golf & Country Club

and

Staatssecretaris van Financiën,

on the interpretation of Article 13A(1)(m) of the Sixth Council Directive 77/388/EC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, S. von Bahr and C.W.A. Timmermans, Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Finnish Government, by E. Bygglin, acting as Agent,

— the United Kingdom Government, by G. Amodeo, acting as Agent, assisted by A. Robertson, barrister,

— the Commission of the European Communities, by H.M.H. Speyart and K. Gross, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the United Kingdom Government, represented by R. Magrill, acting as Agent, assisted by A. Robertson, and the Commission, represented by H. van Vliet, acting as Agent, at the hearing on 26 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2001,

gives the following

Judgment

1 By judgment of 3 May 2000, received at the Court on 9 May 2000, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 234 EC, three questions on the interpretation of Article 13A(1)(m) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1997 L 145, p. 1, hereinafter 'the Sixth Directive').

2 The questions have been raised in proceedings between Kennemer Golf & Country Club (hereinafter 'Kennemer Golf') and the Staatssecretaris van Financiën concerning the value added tax (hereinafter 'VAT') which Kennemer Golf was charged on certain transactions which it carried out in connection with the practice of the sport of golf.

Law applicable

The Community legislation

3 Article 2 of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. The importation of goods.'

4 Article 4(1) of the Sixth Directive provides:

'"Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.'

5 Article 13A(1) of the Sixth Directive is worded as follows:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

...

(m) certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education;

...'.

6 Article 13A(2) is worded as follows:

'(a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b), (g), (h), (i), (l), (m) and (n) of this Article subject in each individual case to one or more of the following conditions:

— they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied,

...'

The national legislation

7 Article 11(1) of the Wep op de Omzetbelasting (Law on turnover tax) 1968 (*Staatsblad* 1968 No L 329) of 28 June 1968:

'Subject to conditions to be laid down by administrative regulation, the following shall be exempt from tax...:

...

(e) the services rendered to their members by bodies having as their object the practice or promotion of sport, with the exception...

(f) supplies of goods and services of a social and cultural nature to be defined by administrative regulation, provided that the trader does not aim to make a profit and there is no serious distortion of competition in relation to traders who aim to make a profit'.

8 The administrative regulation mentioned in paragraph 1 of the Law referred to in the paragraph above is the Uitvoeringsbesluit Omzetbelasting 1968 (1968 Decree on the implementation of turnover tax, *Staatsblad* 1968, No 423) of 12 August 1968. In Article 7(1) and annex B it provides that the following are in particular to be treated as exempt supplies of goods and services:

'(b) supplies of goods and services [of a social and cultural character] made as such by the organisations listed hereinafter, provided that they do not aim to make a profit:

...

21. organisations whose activities consists in providing facilities for the practice of sports, solely in respect of such services'.

The main proceedings and the questions referred for a preliminary ruling

9 Kennemer Golf is a Netherlands association having about 800 members. Its objects, according to its Articles of Association, are the pursuit and promotion of

sport and games, in particular golf. It owns facilities for this purpose, including a golf course and clubhouse, in the municipality of Zandvoort (Netherlands).

10 Members of Kennemer Golf must pay an annual subscription fee as well as an admission fee. They are required to participate in an interest-free debenture loan issued by Kennemer Golf.

11 Besides the use of the facilities by members of Kennemer Golf, non-members may use the course and the associated facilities in return for payment of a day subscription fee. According to the case-file, Kennemer Golf earns relatively large sums in this way, amounting to approximately one third of the amounts paid by members as annual subscription fees.

12 During the years prior to the 1994 tax year, Kennemer Golf made an operating surplus which was then appropriated as a provisional reserve fund for non-annual expenditure. This also happened in relation to the tax year in question, 1994.

13 In the belief that its services to non-members were exempt from VAT, under Article 11(1)(f) of the Wet op de Omzetbelasting 1968 and Articles 7(1) and annex B(b), point 21, of the Uitvoeringsbesluit Omzetbelasting 1968, Kennemer Golf did not pay tax on those services for the 1994 tax year. The tax authorities, however, considered that Kennemer Golf was aiming to make a profit and imposed an additional assessment to VAT in relation to those services.

14 When Kennemer Golf's objection to that decision was dismissed by the tax authorities, it appealed to the Gerechtshof (Regional Court of Apeal) Amsterdam (Netherlands). That court dismissed the appeal on the ground that if Kennemer Golf was systematically making profits the presumption had to be that it was seeking to achieve operating surpluses and was pursuing a profit-making aim.

15 Kennemer Golf then appealed against that judgment of the Gerechtshof Amsterdam, to the Hoge Raad der Nederlanden. That court, taking the view that the decision in the case depended on the interpretation of the national VAT provisions in the light of the corresponding provisions of the Sixth Directive, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. (a) Where it is necessary to establish whether or not a body aims to make a profit as referred to in Article 13(A)(1)(m) of the Sixth Directive, must account be taken solely of earnings from the services referred to in that provision or must earnings from other services provided by it also be taken into consideration?

(b) If, in determining whether or not the aim is to make a profit, account must be taken solely of the services supplied by the body as referred to in Article 13(A)(1)(m) of the Sixth Directive and not total earnings, must only the costs incurred directly for the services be taken into consideration or also a proportion of the body's other costs?

2. (a) Is there a direct link, within the meaning of *inter alia* the judgment of the Court of Justice of the European Communities in Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, in the case of subscription fees charged by an association which, pursuant to the object laid down in its articles of association, provides its members with sports facilities in the context of an association and, if not, is the association to be regarded as a taxable person within the meaning of Article 4(1) of the Sixth Directive only in so far as it also provides benefits for which it receives direct consideration?

(b) Must the total amount of the annual subscription fees from the members whom the association provides with sports facilities be included in the earnings of a body in the form of an association which are to be taken into account in determining whether or not the aim is to make a profit as described in the first question even where no direct link exists between the various services provided by the association for its members and the subscription fee paid by them?

3. Does the fact that a body uses surpluses which it systematically aims to make for the purpose of its benefits in the form of a facility to play a type of sport as provided for in Article 13(A)(1)(m) of the Sixth Directive justify the conclusion that it does not aim to make a profit within the meaning of that provision, or is such a conclusion possible only where the intention is incidentally and not systematically to make operating surpluses which are used as described? In answering these questions must account also be taken of the first indent of Article 13(A)(2)[(a)] of the Sixth Directive and, if so, how is that provision to be interpreted? In particular, in the second part of the provision must "systematically" be read between "arising" and "shall", or "merely incidentally"?'

The first question

16 By part (a) of its first question, the national court is asking essentially whether Article 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that the categorisation of an organisation as 'non-profit-making' must be based exclusively on the services referred to in that provision or on all the organisation's activities.

17 According to the Netherlands Government, only the specific services referred to in that provision of the Sixth Directive should be considered. Otherwise unreasonable results might occur and fraud or abuses could be encouraged. That approach, in its view, is consonant with the general scheme of the common system of VAT, which always looks at the specific transaction and not at the person of the supplier.

18 On this point, it must be observed, as both the United Kingdom Government and the Commission point out, that it is clear from the wording of Article 13A(1)(m) of the Sixth Directive that the provision explicitly relates to certain 'services... supplied by non-profit-making organisations' and that none of the language versions of that provision contains wording which might suggest, owing to its ambiguity, that the expression 'non-profit-making' refers to services and not to organisations.

19 Moreover, all the exemptions listed in Article 13A(1)(h) to (p) of the Sixth Directive cover organisations acting in the public interest in a social, cultural, religious or sports setting or in a similar setting. The purpose of the exemptions is

therefore to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes.

20 The interpretation advocated by the Netherlands Government, whereby only services provided for the abovementioned purposes should be taken into consideration, would mean, as the Advocate General points out in paragraph 23 of his Opinion, that commercial undertakings, normally acting with a view to profit, could in principle seek exemption from VAT when, exceptionally, they provide services to which the qualifying adjective 'non-profit-making' could be attached. Such a result could not, however, be consonant with the wording and aim of the provision in question.

21 If the categorisation of an organisation as 'non-profit-making' must be based on the nature of the organisation itself and not on the services which it provides in the form of those specified in Article 13A(1)(m), it follows that, in order to determine whether such an organisation meets the conditions for application of that provision, account must be taken of all its activities, including those which it provides by way of extension to the services covered by that provision.

22 The answer to be given to part (a) of the first question must therefore be that Article 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that the categorisation of an organisation as 'non-profit-making' must be based on all the organisation's activities.

23 In view of that reply, it is not necessary to reply to part (b) of the first question.

The third question

24 By its third question, which it is appropriate to examine before the second question owing to its close link to the first question, the national court is asking, essentially, whether Article 13A(1)(m) of the Sixth Directive, read together with the first indent of paragraph (2)(a) of that provision, is to be interpreted as meaning that an organisation may be categorised as 'non-profit-making' even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services.

25 Whilst the Finnish and United Kingdom Governments, and also the Commission, submit that the most important consideration is whether the organisation in question aims to make a profit and not the fact that it actually makes a profit, even if it does so habitually, the Netherlands Government, on the other hand, contends that the VAT exemption should not be granted when profits are made systematically. In its submission, the exemption is applicable only where surpluses are achieved occasionally or merely incidentally.

26 On that point, it must be observed first of all that it is clear from Article 13A(1)(m) of the Sixth Directive that an organisation is to be classed as being 'non-profit-making' for the purposes of that provision by having regard to the aim which the organisation pursues, that is to say that the organisation must not have the aim, unlike a 'commercial undertaking', of achieving profits for its members (see, as regards the exemption provided for in Article 13A(1)(n) of the Sixth Directive, the judgment given today in Case C-267/00 *Commissioners of Customs & Excise* v *Zoological Society of London* [2002] ECR I-3353, paragraph 17). The fact that it is the aim of the organisation which is the test of eligibility for the VAT exemption is clearly borne out by most of the other language versions of Article 13A(1)(m), in which it is explicit that the organisation in question must not have a profit-making aim (see besides the French version, the German version — 'Gewinnstreben', the Dutch version — 'winst oogmerk', the Italian version — 'senza scopo lucrativo' and the Spanish version — 'sin fin lucrativo').

27 It is for the competent national authorities to determine whether, having regard to the objects of the organisation in question as defined in its constitution, and in the light of the specific facts of the case, an organisation satisfies the requirements enabling it to be categorised as a 'non-profit-making' organisation.

28 Where it is found that this is indeed the case, the fact that an organisation subsequently achieves profits, even if it seeks to make them or makes them systematically, will not affect the original categorisation of the organisation as long as those profits are not distributed to its members as profits. Clearly, Article 13A(1)(m) of the Sixth Directive does not prohibit the organisations covered by that provision from finishing their accounting year with a positive balance. Otherwise, as the United Kingdom points out, such organisations would be unable to create reserves to pay for the maintenance of, and future improvements to, their facilities.

29 The referring court is also unsure whether this interpretation can be maintained in cases where the achievement of surpluses is systematically sought by an organisation. It refers in this regard to the first indent of Article 13A(2)(a) of the Sixth Directive which would seem to suggest that the VAT exemption is to be disallowed where an organisation systematically seeks to make profits.

30 As far as that provision is concerned, it must be observed at the outset that it lays down an optional condition that the Member States are at liberty to impose as an additional condition for the grant of certain exemptions set out in Article 13A(1) of the Sixth Directive, amongst which figures the exemption covered by that same provision, under (m), which concerns the present case. The Netherlands legislature seems to require compliance with that optional condition before the benefit of that exemption can be granted.

31 As far as the interpretation of that optional condition is concerned, the Netherlands Government maintains that the exemption must be refused where an organisation systematically seeks to achieve surpluses. The Finnish and United Kingdom Governments, as well as the Commission, on the other hand, submit that systematic pursuit of profits is not of decisive importance where it is clear from both the circumstances of the case and the kind of activity actually carried on by an organisation that it is acting in accordance with the objects set out in its constitution and that these do not include any profit-making aim.

32 It must be observed, with regard to this point, that the first condition set out in the first indent of Article 13A(2)(a) of the Sixth Directive, namely that the organisation in question must not systematically aim to make a profit, clearly refers, in the French version of that provision, to 'profit', whilst the two other conditions set out there, namely that no profits should be distributed and that any profits be assigned to the continuance or improvement of the services that supplied, refer, in the French text, to 'bénéfices'.

33 Although that distinction is not to be found in any of the other language versions of the Sixth Directive, it is borne out by the objective of the provisions contained in Article 13A thereof. As the Advocate General points out in paragraph 57 to 61 of his Opinion, it is not profits ('bénéfices'), in the sense of surpluses arising at the end of an accounting year, which preclude categorisation of an organisation as 'non-profit-making', but profit ('profit') in the sense of financial advantages for the organisation's members. Consequently, as the Commission also points out, the condition set out in the first indent of Article 13A(2)(a) essentially replicates the criterion of non-profit-making organisation as contained in Article 13A(1)(m).

34 The Netherlands Government argues that such an interpretation does not take account of the fact that the first indent of Article 13A(2)(a) must, as an additional condition, necessarily have a content extending beyond that of the basic

provision. In response to that argument, it suffices to observe that that condition does not refer only to Article 13A(1)(m) of the Sixth Directive but also to a large number of other compulsory exemptions which have a different content.

35 Consequently, the answer to be given to the third question must be that Article 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that an organisation may be categorised as 'non-profit-making' even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services. The first part of the optional condition set out in the first indent of Article 13A(2)(a) of the Sixth Directive is to be interpreted in the same way.

The second question

36 By part (a) of its second question, the national court is asking, essentially, whether Article 2(1) of the Sixth Directive is to be interpreted as meaning that annual subscription fees of the members of a sports association can constitute the consideration for the services provided by the association, even though the members who do not use or do not regularly use the association's facilities must still pay their annual subscription fee.

37 The Hoge Raad refers in this context to the case-law of the Court, in particular paragraph 12 of the judgment in *Apple and Pear Development Council*, in which the Court held that the concept of supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive presupposes the existence of a direct link between the service provided and the consideration

received. The Hoge Raad is doubtful whether such a direct link exists in circumstances such as those of the present case.

38 According to the Netherlands Government, in circumstances such as those in the present case, there is no direct link between the subscription fee paid by members of the association and the services which it provides. Article 2(1) of the Sixth Directive, as interpreted by the Court, requires that a specific service be paid for directly, which is not the case where certain members of a sports club do not avail themselves of the services which it offers and nevertheless pay their annual subscription fee.

39 In that regard, according to the case-law of the Court, the basis of assessment for a provision of services is everything which makes up the consideration for the service provided and a provision of services is taxable only if there is a direct link between the service provided and the consideration received (*Apple and Pear Development Council*, paragraphs 11 and 12, and Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 13). A supply of services is therefore taxable only if there exists between the service provider and the recipient a legal relationship in which there is a reciprocal performance, the remuneration received by the provider of service constituting the value actually given in return for the service supplied to the recipient (*Tolsma*, paragraph 14).

40 As the Commission argues, the fact that in the case before the national court the annual subscription fee is a fixed sum which cannot be related to each personal use of the golf course does not alter the fact that there is reciprocal performance

between the members of a sports association such as that concerned in the main proceedings and the association itself. The services provided by the association are constituted by the making available to its members, on a permanent basis, of sports facilities and the associated advantages and not by particular services provided at the members' request. There is therefore a direct link between the annual subscription fees paid by members of a sports association such as that concerned in the main proceedings and the services which it provides.

41 Moreover, as the United Kingdom Government rightly points out, the Netherlands Government's approach would make it possible for practically any service provider to escape VAT by recourse to all-inclusive charges and thus to set aside the taxation principles which constitute the basis of the common system of VAT established by the Sixth Directive.

42 The answer to be given to part (a) of the second question must therefore be that Article 2(1) of the Sixth Directive is to be interpreted as meaning that the annual subscription fees of members of a sports association such as that concerned in the main proceedings can constitute the consideration for the services provided by the association, even though members who do not use or do not regularly use the association's facilities must still pay their annual subscription fees.

43 In view of that reply, it is no longer necessary to answer the second part of part (a) of the second question or part (b) of that question.

Costs

44 The costs incurred by the Netherlands, Finnish and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action/proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 3 May 2000, hereby rules:

1. **Article 13A(1)(m) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment is to be interpreted as meaning that the categorisation of an organisation as 'non-profit-making' must be based on all the organisation's activities.**

2. Article 13A(1)(m) of Directive 77/388 is to be interpreted as meaning that an organisation may be categorised as 'non-profit-making' even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services. The first part of the optional condition set out in the first indent of Article 13A(2)(a) of Directive 77/388 is to be interpreted in the same way.

3. Article 2(1) of Directive 77/388 is to be interpreted as meaning that the annual subscription fees of the members of a sports association such as that concerned in the main proceedings can constitute the consideration for the services provided by the association, even though members who do not use or do not regularly use the association's facilities must still pay their annual subscription fees.

Jann von Bahr Timmermans

Delivered in open court in Luxembourg on 21 March 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber