TC02574

Appeal number: TC/2011/6591

VAT – whether building intended for use solely for a relevant charitable purpose – charity with objects of educating young people in water activities – construction of training centre – whether construction services zero-rated – whether charity carrying on a business/economic activity – no – Items 2 and 4 of Group 5 of Schedule 8 to VATA 1994 – Notes (6) and (10) to Group 5 – Articles 2, 9, 132 and 133 of VAT Directive – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LONGRIDGE ON THE THAMES **Appellant**

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER
NIGEL COLLARD

Sitting in public at Bedford Square on 3 – 5 December 2012 and 10 January 2013

Roger Thomas, counsel, for the Appellant

Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Longridge on the Thames, a charity ("the Appellant") against a decision of The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") that the supplies made to the Appellant in relation to the construction of a building on its premises are not zero-rated supplies. That decision is made in a letter from the Commissioners to the Appellant dated 4 April 2011, and it was upheld upon review by the Commissioners as confirmed by them in their letter to the Appellant dated 15 November 2011.

2. In summary, the Appellant carries on its charitable purposes by the provision of boating and other water-based courses, activities and facilities for young people at its premises on the banks of the River Thames. Certain of those courses, activities and facilities are also provided to adults. The Appellant, in order to improve its facilities, engaged a contractor to build on the Appellant's site a building ("the Training Centre") comprising, on the ground floor, toilet, changing and shower facilities, and on the upper floor, an area to be used primarily for training courses and meetings. The Training Centre was constructed during 2010. The Appellant considered that the supplies made by the contractor in constructing the Training Centre should be zero-rated under Items 2 and 4 of Group 5 of Schedule 8 to the Value Added Tax Act 1994 ("VATA 1994"), on the grounds that the building was intended for use solely for relevant charitable purposes within the meaning of Note (6) to Group 5, and approached the Commissioners for confirmation that such was the case to enable the Appellant to issue the necessary zero-rating certificate to the contractor.

3. The Commissioners took the view that the nature of the Appellant's activities are such as to amount, in whole or in part, to business activities, and that accordingly the Training Centre was not intended for use solely for relevant charitable purposes (that is, it was not intended to be used otherwise than in the course or furtherance of a business). It is against the Commissioners' decision to that effect that the Appellant appeals, in its notice of appeal dated 1 August 2011. The grounds of its appeal are that the Training Centre is used in the fulfilment of the charity's core objects, and that although it charges fees for the courses and other facilities it provides in pursuing those objects, such courses and facilities are substantially subsidised by donation income received by the Appellant and also by the time and skills provided to the Appellant by the large volunteer body which supports the Appellant.

4. The issue we have to decide, therefore, is whether or not, at the time when the relevant supplies were made in the course of the construction of the Training Centre, that building was intended for use solely for a relevant charitable purpose, that is to say, for use by the Appellant otherwise than in the course or furtherance of a business carried on by it.

5. We are asked to give a decision in principle on this issue. The charge made by the contractor for constructing the core and shell of the Training Centre was £760,000, exclusive of VAT, and it appears that the Appellant incurred further costs in fitting out the building, the supplies for which may also be zero-rated if the

Appellant succeeds with its appeal. Therefore the amount of VAT in issue is in the order of at least £135,000.

6. Our decision is that the Training Centre was intended for use by the Appellant solely for a relevant charitable purpose. Accordingly the Appellant's appeal is allowed.

The relevant statutory provisions

7. It is necessary to consider both the European Union Directive provisions and the domestic statutory provisions which give effect to the Directive in the UK in so far as those respective provisions are relevant to this appeal. The Directive is European Community Council Directive 2006/112/EC, and references in this decision to an Article are references to an Article of that Directive.

8. Article 2 provides, so far as relevant, that "*the supply of goods for consideration within the territory of a Member State by a taxable person acting as such*" shall be a transaction which is subject to VAT.

9. Article 9 is concerned with "taxable persons". Its significance to this case is that it introduces the concept of a person carrying on an "economic activity" (or "business" in the UK legislation, as we shall see) – such a person is a "taxable person", and hence within the scope of VAT. Article 9 paragraph 1 provides:

> *1 "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.*
>
> *Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.*

10. Articles 132 and 133 are headed "Exemptions for certain activities in the public interest". The significance of these provisions, as is discussed below, is that the Commissioners contend that, by reason of the exemption afforded to certain transactions (including transactions which closely accord with those carried out by the Appellant), it can be inferred as a matter of construction that such transactions are in principle an "economic activity" for the purposes of the Directive.

11. Article 132, so far as relevant, provides:

> *1 Member States shall exempt the following transactions:*
>
> *...*
>
> *(h) the supply of services and goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social wellbeing;*

> *(i) the provision of children's or young people's education, school or university education; vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;*
>
> *...*
>
> *(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.*

12. Article 133 permits a Member State at its discretion, to qualify, or make subject to certain specified conditions, the exemption which otherwise it is mandatorily required by Article 132 to apply to certain of the transactions specified in that Article. It provides, so far as relevant:

> *Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points ...(h), (i) ...(m)... of Article 132(1) subject in each individual case to one or more of the following conditions:*
>
> *(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;*
>
> *(b) ...*
>
> *(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;*
>
> *(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.*

13. Section 4, VATA 1994 implements within the UK the terms of Articles 2 and 9. It provides:

> ***4 Scope of VAT on taxable supply***
>
> *(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.*
>
> *(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.*

A "taxable person" is a person who is required to be registered for VAT purposes (broadly, a person whose supplies on which VAT is chargeable exceed in value the registration threshold).

14. We learn from section 94(1), VATA 1994 that: *In this Act "business" includes any trade profession or vocation.* It is now settled law that the concept of "business" as it appears in and is to be understood for the purposes of the UK VAT legislation accords with the concept of "economic activity" as it appears in and is to be understood for the purposes of the Directive.

15. Section 30, VATA 1994 provides for certain supplies by a taxable person to be taxable at the zero rate. Schedule 8 to VATA 1994 specifies such supplies, and Group 5 of Schedule 8, headed *Construction of Buildings, etc* is relevant for this appeal, and in particular Items 2 and 4:

> *2 The supply in the course of the construction of –*
>
> *(a) a building ... intended for use solely for ... a relevant charitable purpose; or*
>
> *(b) ... ,*
>
> *of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.*
>
> *4 The supply of building materials to a person to whom the supplier is supplying services within item 2 ... of this Group which include the incorporation of the materials into the building (or its site) in question.*

16. The Notes to Group 5 make further provision, and for this appeal Notes (6), (10) and (12) are relevant:

> *(6)Use for a relevant charitable purpose means use by a charity in either or both the following ways, namely –*
>
> *(a) otherwise than in the course or furtherance of a business;*
>
> *(b) as a village hall or similarly in providing social or recreational facilities for a local community.*
>
> *(10)Where –*
>
> *(a) part of a building that is constructed is ... intended for use solely for a ...relevant charitable purpose (and part is not); or*
>
> *(b) ...*
>
> *then in the case of –*
>
> *(i) a grant or other supply relating only to the part so ... intended for that use (or its site) shall be treated as relating to a building so ...intended for such use;*
>
> *(ii) a grant or other supply relating only to the part [not] so ... intended for such use (or its site) shall not be so treated; and*

(iii) any other grant or other supply relating to, or to any part of, the building (or its site), an apportionment shall be made to determine the extent to which it is to be so treated.

(12)Where all or part of a building is intended for use solely for a ... relevant charitable purpose –

(a) a supply relating to the building (or any part of it) shall not be taken for the purposes of items 2 and 4 as relating to a building intended for such use unless it is made to a person who intends to use the building (or part) for such a purpose; and

(b) a grant or other supply relating to the building (or any part of it) shall not be taken as relating to a building intended for such use unless before it is made the person to whom it is made has given to the person making it a certificate in such form as may be specified in a notice published by the Commissioners stating that the grant or other supply (or a specified part of it) so relates.

17. With regard to Note (12)(b), the Appellant failed to give the relevant certificate to the person making the construction supplies before those supplies were made, but the Commissioners take no point against the Appellant by reason of such failure.

The evidence and the findings of fact

18. We had in evidence before us a lever arch file of documents comprising the letter and email correspondence between the parties; the Memorandum of Association of the Appellant; a plan of the site occupied by the Appellant; various brochures describing the activities provided by the Appellant and pricing lists for those activities; extracts from the Appellant's website at various times; financial statements and other information analysing the financial performance, receipts, costs and charges of the Appellant as attributed to its different activities and the consequences of accounting for the contribution of its volunteers; spreadsheets showing the use of the facilities provided by the Appellant and also the use of the Training Centre, together with charges made to users; the planning consent given for the construction of the Training Centre; papers relating to the funding of the construction of the Training Centre by grant-making and charitable institutions; and the construction contract and itemised building costs for the Training Centre.

19. There were two witnesses who appeared before us for the Appellant, Amanda Foister and Julian Fulbrook. Both witnesses had prepared a witness statement, and at the hearing they gave further evidence in chief. Both witnesses were cross-examined by Mr Jones, who appeared for the Commissioners. No witnesses appeared for the Commissioners.

20. Miss Foister is the chief executive officer of the Appellant, and has held that position since January 2010. Her responsibilities are to manage the Appellant as directed by its board of trustees. Miss Foister's evidence related to the following matters: the Appellant's premises, including the Training Centre; the financing of the construction of the Training Centre; the nature of the facilities provided by the

Training Centre and the use made of the building and its facilities (both as to the activities carried on there and the identity of the persons using the building); the financial arrangements of the Appellant and its accounting policies; the prices charged by the Appellant for the different activities it provides and the extent to which different classes of users are subsidised by the Appellant; the extent to which corporate and adult users make use of the Appellant's facilities generally and the Training Centre in particular, and the charges made to such users; the significance to the Appellant and to its activities of donation income and of the contributions of time and skills by volunteer instructors and others; and the comparison between the charges made by the Appellant and those charges for similar activities and facilities made by local authorities and commercial organisations.

21. Mr Fulbrook is a former Dean of Graduate Studies at the London School of Economics and Political Science. He is a trustee of the Appellant and has acted as a volunteer canoe coach and aquatic first aid instructor for the Appellant (and before that for the predecessor organisation which provided activities at the premises). Mr Fulbrook's evidence related to the following matters: the history of the provision of water activities at the Longridge site; the acquisition of the site and premises by the Appellant in 2005; his contributions as a volunteer coach and as a trustee; the reasons for the construction of the Training Centre and the trustees' intentions as to the use of the Training Centre; the layout of the Training Centre and the facilities it provides; the actual use made of the Training Centre; the principles and subsidies applied by the trustees in setting the prices and fees which the Appellant charges for use of its facilities and the courses it provides; the significance to the Appellant's activities and financial standing of the contributions made by volunteers; the significance of donations for meeting operational costs and funding capital projects; and the running of the Appellant in a financially sound and prudent manner in accordance with guidance published by the Charity Commission.

22. Both witnesses were credible, and we accept their evidence. As the case developed in the course of the hearing a great deal of attention was directed at the financial information exhibited to Miss Foister's evidence, particularly with regard to the cost of certain activities provided by the Appellant, the extent of subsidy provided the Appellant, and the financial effect of contributions made by volunteers who support the Appellant by providing their time and skills. Miss Foister had not, it appeared, compiled all of this financial information herself, and she had some difficulty in explaining the detail of certain parts of this evidence. Although this presented us with some difficulty in our understanding of what we regard as an area of crucial significance to the case, and although the Appellant's case may have been better served had it led witness evidence more directly concerned with these matters, the financial information as exhibited to Miss Foister's witness statement was nevertheless adequate to enable us to reach a conclusion as to the broad effect and extent of the subsidy provided by the Appellant and of the value to it in carrying out its activities of the time and skills contributed by its volunteers.

23. Our findings of fact from the evidence are set out in the following paragraphs [24] to [56].

24. The Appellant is a company limited by guarantee and not having a share capital. It is a registered charity. It was formed in 2007 as the successor to a charitable trust which in September 2005 acquired by purchase from the Scout Association the Longridge site (then used as a scout campsite and centre for water activities).

25. The objects of the Appellant are:

(1) To safeguard and promote Longridge as a centre of excellence for the advancement of education in water, outdoor and indoor activities for young people generally, and for purposes related thereto such as coaching, leadership and training in water and other activities; and

(2) To promote the development of young people in achieving their full physical, intellectual, social and spiritual potential as individuals, as responsible citizens and as members of their local, national and international communities.

26. Included in the powers of the Appellant is the power "to acquire by purchase the freehold interest in Longridge from The Scout Association and to hold it in trust as an activity centre primarily for young people and to improve such property or any interest therein".

27. The Longridge site is on the banks of the River Thames near Marlow in Buckinghamshire. On the site there are areas for campsites; a games field; a ropes course, climbing wall and "Jacob's ladder"; an area for go-karting; a "giant swing"; waterfront landing stages; and buildings for storing craft and equipment for the various water-based activities provided by the Appellant. There is a building which provides overnight accommodation for young people's groups visiting the site and taking courses provided by the Appellant; a youth club; a reception area; and a cafe. There is also the Training Centre.

28. When the Longridge site was acquired from the Scout Association, the trustees saw the need to bring its facilities and infrastructure up to modern standards. A particular and urgent need was to provide toilets, showers and changing rooms for girls as well as for boys, and to provide such facilities to a standard compliant with legislation requiring provision for persons with disabilities.

29. The trustees decided to add training and meeting rooms to the proposed toilet and shower block, in part to provide a building more attractive to potential donors and in part to meet the requirements of the planning authority, which was unwilling to permit an increase in the buildings "footprint" on the site. Thus the Training Centre comprises the toilet, shower and changing room facilities on the ground, or lower, floor and the training and meeting room facilities on the first, or upper, floor. Various outbuildings on the site previously used for training purposes were demolished.

30. Notwithstanding that the primary purpose of constructing the lower floor toilet and shower facilities was to provide such facilities for their use by children and young people attending courses provided by the Appellant, at the time that the Training Centre was commissioned and built, the trustees' intention was that anyone on the Longridge site would be able to use those toilet and shower facilities. As mentioned

below, in practice these facilities have proved to be usable only by children and young people.

31. The trustees' intention was that the upper floor should provide indoor space to be used as an adjunct to the various courses and activities provided on the site by the Appellant – for example the training, theory or de-briefing part of boating courses; first aid courses; or as shelter for campers in very wet weather. The building includes at upper floor level a covered balcony which provides at ground floor level a large roof overhang area giving outdoor shelter for some land-based activities. Since February 2012 the upper floor has been divided into three rooms, but the Appellant did not have sufficient funds to complete it. In particular, the upper floor has no heating, so that outdoor clothes are required by those using it during significant parts of the year.

32. Prior to the construction of the Training Centre the Appellant had advertised on its website that, in conjunction with two nearby hotels, it could provide residential conferences and product launch events for corporate users. The Appellant's current website and promotional literature includes a photograph of the upper floor room space and speaks of "a beautiful space that will comfortably hold 120 people sitting, up to 200 standing" which is available for hire "for larger parties, conferences, meetings and receptions". This promotion of the upper floor followed a booking of the space by a corporate user for such purpose in March 2011 (shortly after the Training Centre was opened), and following that event there had been some hope that the upper floor would generate income from corporate and adult users which would help subsidise the activities provided for young people, but that has not transpired: during the months when the upper floor could be used for such purposes it is fully used for youth activities. In any event, apart from that one occasion, no enquiries have been received for possible use of the upper floor for corporate hospitality purposes. Details of actual usage of the upper floor are set out below.

33. Planning permission for the construction of the Training Centre was given on 13 August 2009. Conditions included in the planning permission stipulated that the rooms on the upper floor should be used "solely for purposes which are incidental to the use of Longridge; namely, briefing and training sessions associated with boating activities and water-based activities at Longridge; storage space associated with boating activities and water-based activities at Longridge."

34. The cost of the construction of the Training Centre was entirely met by donations and grants: this was a requirement of the trustees, who did not wish that any part of the construction costs should be met out of charges (or increased charges) made by the Appellant for the activities it provides. A principal donor was Sport England.

35. The construction contract is dated 16 December 2009, with the Appellant as the employer and Blue Forest (UK) Ltd as the contractor. It is a "design and build" contract for the provision by the contractor of a "new training centre including wcs, shower, changing and meeting rooms" at the Longridge site. The Appellant is

required to pay the contractor for the works the sum, exclusive of VAT, of £760,000. The date for completion of the works is 30 June 2010.

36. The Appellant provides a wide range of day and residential courses and activities principally (but not exclusively) based on water-borne activities, for schools and colleges, scout, guide, cadet and youth groups, individual young people, families and birthday party groups, and adults (individually, in groups, or by corporate use). Corporate use takes place when the facilities are not being used by young people or families. In addition, on occasion during the summer the Appellant organises special day events. The principal water activities are dinghy sailing, kayaking, canoeing, rowing and sculling, bell-boating and dragon boating, and rafting. For all courses and most activities the Appellant provides an appropriately qualified instructor (either a paid employee or contractor, or a volunteer). Courses for adults include coaching courses. Courses are accredited by a range of organisations.

37. Accommodation is provided in the form of space for camping, bunk-house accommodation, some single rooms and a building which can be used as a dormitory. Meals are provided at the cafe on the site.

38. All activity "packages" and courses are provided at specified prices set out in the extensive price list published by the Appellant each year. These charges are set each year by the trustees having regard to the charitable objects of the Appellant; the affordability of charges for young people and their families; and the need for the Appellant to cover its operational costs after taking account of donated income and the services provided by volunteers. The aim of the trustees is to try to get young people, at a subsidised cost, interested and occupied in boating activities. All capital projects undertaken by the Appellant are paid for from donated income, and not out of charges made to persons for activities and courses.

39. A person or group booking an activity or course does so subject to the Appellant's terms and conditions. The conditions as to payment require payment in full on booking (or a 30% deposit in the case of larger groups and school parties, with full payment not later than six weeks prior to the event). Cancellations made by a customer in the six week period prior to the event result in forfeiture of the fee paid, and a cancellation prior to that period results in forfeiture of any deposit paid.

40. In the case of those activities or courses which are available for young people, families and adults there will typically be a three tier pricing structure. Thus, by way of example, the 2012 pricing brochure lists kayaking with an instructor (equipment provided, and based on a group of 8 persons), for which the charge is £70 for youth groups, £80 for families, and £100 for adult groups (including those who come as a "corporate" group). In the case of youth groups the Appellant may offer discounts to the published price, or waive the charge entirely. This is the case, for example, with groups of young people with physical disabilities or other special needs. Campsite and other accommodation charges are also subsidised. Certain adult users will also be offered discounts on the published price (students, disabled persons, volunteer supporters of the Appellant, and those categorised as not in education, employment or training). The charges made for families also include an element of discount for

adults in the family group as well as children: this is in recognition of the fact that children attending in a family group will require supervision by the adult members of the family group.

41. There are local authority and commercial organisations which provide activities and courses comparable to those provided by the Appellant. Their charges for activities equating to kayaking provided for youth groups (for which the Appellant charges no more than £70) range between £80 and £128 (local authority) and £90 and £95 (commercial organisations).

42. In the case of kayaking provided for youth groups, the actual operational costs to the Appellant of running the activity amount to £80, so that the Appellant is required to subsidise from donated income or from any surplus arising from charges to adult groups, the deficit (against charges of £70 or less) of £10 (or more in cases where a further discount is given by the Appellant).

43. In the case of kayaking provided for adult groups, where the charge is £100, the actual operational costs to the Appellant of running the activity amount to £90, giving a surplus of £10.

44. A substantial number of volunteers contribute without charge their time and skills to the Appellant for the purposes of the courses and activities it provides. Such volunteers are mainly acting as instructors (who are in addition to the paid full time instructors engaged by the Appellant), but there are also volunteers who assist with maintenance of premises and equipment and in administration and financial accounting.

45. An objective of the Appellant in providing activities and courses for adults is to provide an opportunity whereby some of those attending may be encouraged to become volunteers: the Appellant regards such matters as part of its charitable purpose of providing coaching, leadership and training in water and other activities in relation to the advancement of education in water and related activities for young people.

46. The Accounting Standards Board, in its Interpretation for Public Benefit Entities of the Statement of Principles for Financial Reporting issued in May 2007, provides recommendations for the accounting treatment by charities and other public benefit entities of "donated services" such as those comprising volunteers' time. Its recommendation is that provided such services can be reliably measured, their estimated value (to the extent they would normally otherwise have been purchased) should be recognised in the financial statements of the charity as donated income and also as expenditure of an equal amount.

47. The Appellant does not follow this recommendation, but it calculates that if, in respect of kayaking for youth groups and for adult groups, it added to the actual operational costs (£80 and £90 respectively) the expense (on this recommended basis) of the value of volunteers and of donated equipment, the resulting cost of providing those activities would increase from £80 to £114 (youth groups) and from £90 to £124

(adult groups). The matching income item required by the Accounting Standards Board recommendation for such donated services and goods would be brought into account as donated income (and not as charges for the activities provided).

48. The Appellant's financial statements show that for each year from and including its 06/07 year, the Appellant has shown a deficit on its operating activities, ranging from £95,400 in 2007/08 to £16,630 in 2010/11 (in some years depreciation of capital assets and the costs of redundancies have increased further the deficit on all activities). In each year donated income for ongoing activities (that is, disregarding donations for capital projects) has at least equalled the deficit accruing on activities.

49. As mentioned, the Appellant does not account for the value of volunteer contributions in accordance with the recommendation of the Accounting Standards Board. We infer from the information before us (including the limited exercise of accounting for volunteer services which the Appellant carried out for the purposes of its reporting to Sport England) that if the Appellant followed that recommendation the re-stated financial statements would show an increase in the deficit on its operating activities with a corresponding increase in donated income. The surplus each year, after taking into account donated income, would remain the same.

50. An analysis of the Appellant's financial statements for its year 2010/11shows that total income from all its subsidised activities (that is, all young people's activities, family activities, and those adults for whom a discount on the published price is given) was £580,883, and that the cost of providing those activities (disregarding the value of volunteer time) was £655,498. That analysis also shows that the total income from activities provided to all other adults (including those participating as a "corporate team") was £61,998 and that the cost of providing those activities was £53,476 (this figure also disregards the value of volunteer time – the evidence was that in the case of activities provided for adults, a higher proportion of instructor/training input would be by way of paid instructors, but that where volunteers were used, they would be the more experienced volunteers – and hence have a higher "value").

51. An analysis of those who took part in the range of activities and courses provided by the Appellant during the period from 1 January 2012 to 25 November 2012 shows that 27,119 individuals took part, of whom 17,895 were young people who paid no charge or a charge discounted by 20% or more; 7,786 were young people who paid a charge discounted by up to 20%; 1,111 were adults who paid a discounted charge, and 327 (1.21%) were adults who paid a charge without any discount.

52. As to the specific use of the Training Centre, a schedule of users of the upper floor for the period from 16 October 2010 to 26 June 2012 shows that during that period 5,806 persons used the upper floor of whom 240 were persons comprising "corporate teams" (4.13% of total users). All other users were individuals or groups whose activities are subsidised by the Appellant, being youth groups, school groups, volunteers supporting the Appellant, and, on five occasions, family groups. The use by volunteers ranged from use for training purposes to use for social activities.

53. Corporate use of the upper floor of the Training Centre took place on three occasions. On one occasion (as mentioned in [32] above) 120 people used the Training Centre for a corporate hospitality event (for which the Appellant charged £250); on the second occasion 60 people used the Training Centre as part of a "team day" using the other facilities provided by the Appellant (for the use of the Training Centre the Appellant charged £50); and on the third occasion 60 people used the Training Centre as storage space for their belongings whilst they used the other facilities provided by the Appellant (for the use of the Training Centre the Appellant charged £80).

54. For approximately 40% of the occasions on which the upper floor of the Training Centre was used during this period the Appellant made no charge to the users of the Training Centre. Where a charge was made it was usually made for a nominal amount (£50 or less). Total charges for use during the period were £2,455, of which £380 (15.48% of the total) comprised the charges for the three occasions of corporate use.

55. The principal objective of the lower floor of the Training Centre was to provide adequate and modern toilet, shower and changing room facilities for children and young people participating in the activities provided by the Appellant. It was originally intended that there would be some use of such facilities by adults, and limited separate provision was made for adults. However, once the facilities came into use it proved impractical for adults to use the lower floor facilities: there are issues of maintaining separation of adults from children for child protection purposes; and (given the constant presence of mud which characterises most of the activities which children and young people undertake on the Appellant's premises) the facilities cannot be maintained to a standard which adults are prepared to accept. Adults are therefore directed to use other facilities on the Appellant's site (in particular, those included with the residential accommodation). It is the case that adults are not prevented from using the lower floor facilities: but it is very unlikely that they would do so. For corporate teams which use the Appellant's premises special arrangements are made for them to use facilities at a nearby hotel.

56. No record is maintained of users of the lower floor of the Training Centre, but as a general statement they will be children and young people who are attending courses provided by the Appellant or otherwise taking part in the activities available on the site. Use of the lower floor is a distinct matter from use of the upper floor: there may be some overlap (for example, if the instruction part of a course on the site is carried out on the upper floor).

The Appellant's submissions

57. Mr Thomas appeared for the Appellant.

58. The Appellant argued in its principal submission that the Training Centre, as an integral part of the site, is used to further its charitable activities in terms of providing facilities which enable those activities to be better carried out. The predominant purpose of its activities is not to receive consideration for providing those activities,

but to fulfil its charitable objects of promoting the development and welfare of young people through their education in water-based activities and related purposes including coaching, training and leadership. Therefore, by reference to the European and UK jurisprudence, the Appellant is not carrying an "economic activity" (in the terms of the Directive) or making a supply "in the course or furtherance of any business" (in the terms of VATA 1994).

59. The Appellant also rejected any argument that, even if its activities generally are "non-business", particular use of the upper floor of the Training Centre shows that the building was not intended to be used solely for a relevant charitable purpose.

60. In making the Appellant's principal submission Mr Thomas referred first to the European cases on what constitutes an "economic activity" for the purposes of Articles 2 and 9 of the Directive. Those cases show, he argued, that if a supply is provided for a consideration, that in itself does not mean that the supply is by way of an economic activity – it is necessary to determine the predominant concern of the activity. To determine that predominant concern it is necessary to look at the nature of the item exploited; the context in which the activity is performed; and the manner in which the activity is performed.

61. Thus in *Floridienne SA and another v Belgian State* (Case C-142/99) [2000] STC 1044 the Court of Justice held that a loan by a holding company to a subsidiary may be an economic activity (that is, the exploitation of property for the purposes of obtaining income therefrom on a continuing basis, in the language of Article 9), but only where such activity "is carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment." (at [28]). In *Banque Bruxelles Lambert SA (BBL) v Belgian State* (Case C-8/03) [2004] STC 1643 in his opinion Advocate General Maduro cites the *Floridienne* case as authority for the proposition that: "'economic activity' must therefore be construed as meaning an *activity* likely to be carried out by a private undertaking on a market, *organised* within a professional framework and generally performed in the interest of generating profit."

62. Mr Thomas also relied on the earlier case of *European Commission v French Republic* (Case 50/87) [1988] ECR 4797, where the issue was whether the lessor of property let at a rent reduced by subsidy was entitled to recover input tax. The Court of Justice held that the leasing of premises in such circumstances did not constitute an economic activity within the meaning of the Directive (at [21]).

63. The Appellant argued that the UK cases are consistent with this approach. We were referred to *Customs & Excise Commissioners v Lord Fisher* [1981] STC 238 and the discussion of that case in the House of Lords decision in *Institute of Chartered Accountants in England and Wales v Customs & Excise Commissioners* [1999] STC 398. There is reference to the six indicia suggested as the test to determine the question of whether an activity amounts to a business (Mr Thomas argued that the use of such indicia was not approved by the House of Lords, but he accepted that subsequent cases have used them as a convenient means to approach that question). Those indicia, as summarised by Lord Slynn in the *ICAEW* case are whether the

activity is: a serious undertaking earnestly pursued; pursued with reasonable continuity; substantial in amount; conducted regularly on sound recognised business principles; predominantly concerned with the making of taxable supplies to consumers for a consideration; and such as consisted of taxable supplies of a kind commonly made by those who seek to make profit from them.

64. The Appellant placed particular reliance on two cases where, in effect, the issue was whether a charity which made some charges for the services it provided in furtherance of its charitable activities was using a building in the course or furtherance of a business which it carried on. Thus in both *Customs & Excise Commissioners v Yarburgh Children's Trust* [2002] STC 207 and *Customs & Excise Commissioners v St Paul's Community Project* [2005] STC 96 the charity's purpose was to provide, at the most affordable cost possible, nursery or playschool places to children, and it charged fees only to the extent required to meet its costs after taking account of grants and donated income. In both cases it was held not to be carrying on a business since, having regard to the wider enquiry which must be made in such cases, the predominant purpose or concern, or the context in which it charged fees, was to fulfil its charitable purposes, rather than to make taxable supplies for a consideration. The judgments in both cases drew on the European jurisprudence, and in particular the *Floridienne* and *French Republic* cases.

65. Turning to the circumstances of the Appellant in the present case, Mr Thomas argued that, in different ways, both the upper floor and the lower floor of the Training Centre were intended to be used (and in fact are used) as part and parcel of the facilities provided by the Appellant in the pursuit of its charitable activities, as required by the conditions attached to the planning consent for the building. Where charges have been made for the use of the upper floor (and in all but a few cases there is no charge, or a nominal charge only) it cannot be said that there is an aim to seek a return on capital invested, or any other hallmark of economic activity.

66. As to the contention that the Appellant, in charging for the activities it is providing, is carrying on a business or economic activity, the evidence establishes that all its courses and activities for children and young people and for family groups are provided at a loss, in that the charges made fall short of the actual expense to the Appellant of providing the courses. In less than 1.5% of cases (courses supplied to adults where there is no discount (and this includes "corporate team" users), who in any event do not use the facilities of the Training Centre) the actual costs of the courses and activities are met or exceeded by charges made. Moreover, if there is proper accounting for volunteer time as recommended by the Accounting Standards Board it is the case that the true cost of providing all activities exceeds the charges which the Appellant makes – the resulting deficit is made good by the value of donated volunteer time and by donated income and grants.

67. It is not a characteristic of a business activity, so the Appellant submits, that it should be dependent upon time devoted by volunteers and funds donated by supporters. Even if the other five indicia derived from the *Lord Fisher* case could be said to be satisfied, the key factor, that of a predominant purpose or concern of making supplies to consumers for a consideration, is not satisfied in the Appellant's

case. The predominant concern of the Appellant in providing its courses and activities, of which the Training Centre forms part, is to fulfil its charitable purposes. Accordingly the supplies made in the course of the construction of the Training Centre were made in the course of the construction of a building intended for use solely for a relevant charitable purpose, being otherwise than in the course or furtherance of a business.

68. The Appellant's secondary submission is that even if some use of the upper floor comprises use by corporate users outside the scope of the charitable purposes of the Appellant, such use (if it is properly characterised as business use) is to be disregarded by the application of the *de minimis* rule, since the number of such users is less than 5% of the total number of persons using the upper floor in the period since it was constructed. The recent case of *Wakefield College v HMRC* [2012] STC 642 demonstrates that the *de minimis* rule is a rule of statutory interpretation, so that in construing item 2 of Group 5 of Schedule 8 to VATA 1994 (which refers to the construction of a building intended for use *solely* for a relevant charitable purpose) any *de minimis* use is to be disregarded.

69. Mr Thomas referred us to Note (10) to Group 5. Given the different respective functions of the upper and lower floors, if the tribunal were to find that the upper floor was used in the course of a business, but the lower floor was not (because its use is effectively restricted to children and young people), the provisions of Note (10) would allow an appropriate apportionment to be made with regard to the construction supplies.

The Commissioners' submissions

70. Mr Jones appeared for the Commissioners.

71. The Commissioners' principal submission related to the activities of the Appellant. Mr Jones argued that its activities, notwithstanding that for the most part they were in pursuit of the Appellant's charitable purposes, comprised an "economic activity", or the carrying on of a business, so that the use of the Training Centre, whether by young people or adults, and whether in relation to courses or extraneous matters such as corporate events, was use in the course of a business. Accordingly, the construction supplies made to the Appellant in relation to the Training Centre were not eligible for zero-rating.

72. Mr Jones had an alternative submission in relation to the actual use made of the Training Centre, and in particular the upper floor. He submitted that since it was intended that, in order to subsidise the Appellant's other activities, the Training Centre should be used, in part, by those who would pay a commercial rate for such use (adult and business users), it was intended that it should be used in the course of a business carried on by the Appellant.

73. With regard to his principal submission, Mr Jones referred to Article 9(1) of the Directive, pointing out that in determining whether any activity is an "economic activity" it is necessary, first, to look to the activity and then to determine objectively

(in the terms of Article 9(1), "whatever the purpose or results of that activity") whether that activity has the characteristics of a business: *Commission of the European Communities v Kingdom of the Netherlands* (Case 235/85) [1987] ECR 1471.

74. There is a presumption that any supply of goods or services in return for a consideration amounts to an economic activity, and this is so even if there is no intention to make a profit, or where services are subsidised: *Riverside Housing Association Ltd v HMRC* [2006] STC 2072; *Customs & Excise Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1; and *Rompelman v Minister van Financiën* (Case 268/83) [1985] ECR 655.

75. Further support for this presumption is found within the terms of the Directive itself, in Mr Jones's submission. Article 132 sets out a number of supplies which Member States are required to exempt from tax: most relevantly for the present case, supplies which are linked to welfare and social security work; the provision of education for children and young people; and the supply of services closely linked to sport or physical education by non-profit-making organisations. Moreover, Article 133 permits Member States to restrict the application of those exemptions to bodies which do not aim to make a profit or which charge prices below the commercial rate. As is noted in the *Riverside Housing Association* case, there would be no need to provide for such exemption (or an exemption restricted as provided in Article 133) if activities of that kind were not inherently to be regarded as an "economic activity".

76. Therefore the onus is on the Appellant to show that the nature of its activities is such that it is not carrying on an economic activity, notwithstanding that it is supplying services for a consideration. On the facts the Appellant is acting in a business-like manner: it is active on a considerable scale; it has sophisticated and commercial terms of business; it is professionally managed by a full-time CEO and fundraiser who operates within a business plan; in the most recent years operating income of the Appellant has been between 80% and 98% of operating expenses (disregarding the effect of volunteer donated time, which the Appellant did not account for); it seeks out customers beyond its charitable remit whose fees will subsidise the provision of activities to those within its charitable remit; and the type of activities it provides, and the way in which it provides them, are consistent with those provided (and the way they are provided) by commercial providers.

77. Therefore, if one applies the indicia derived from the *Lord Fisher* case the only conclusion on the facts is that the Appellant's activities comprise a business: its activities comprise a serious undertaking earnestly pursued; those activities are pursued on a continual basis; the activities are of commercial substance in terms of the charges made and the extent to which those charges go towards meeting the costs of providing the courses and activities; the activities are conducted on recognised business principles with care and prudence as to financial management; viewed objectively, the Appellant's activities comprise the provision of services to consumers for a consideration – it is irrelevant that this is done in pursuance of the Appellant's charitable objectives, since the activity must be assessed "whatever the purpose or

results of that activity"; and the supplies made by the Appellant are of a kind similar to those made by commercial operators.

78. It is therefore the case that the Appellant provides services to consumers in return for a consideration, and does so in a business-like manner. It is irrelevant that its motive for doing so is to fulfil its charitable objectives: whatever its objectives, its activities, in the manner in which it chooses to carry them out, and whether or not they are recreational or educational in nature, comprise an "economic activity".

79. Mr Jones was prepared to accept that the Appellant used the services of volunteers, but he questioned the reliability of certain of the financial information put forward in evidence by the Appellant with regard to the identifiable costs of carrying out individual activities and in particular the "true cost" calculated by reference to the value of time donated by volunteers – he characterised that evidence as little more than a rough and ready reckoning of such costs. The evidence based on the audited accounts (where there is no accounting for the value of volunteer donated time) is that the Appellant does to a limited extent subsidise the costs of providing courses and activities for children and young people, but does not do so for courses and activities provided to adults (charges for which are about ten per cent of all charges, by reference to the 2010/11 financial statements).

80. In the Commissioners' submission the Appellant cannot rely on the *Yarburgh* and *St Paul's Community Project* cases, where the facts were quite different, with co-operative ventures run by beneficiaries (and in the *St Paul's Community Project* case, the nursery undertaken for the social reasons of providing nursery education for disadvantaged and difficult children). Those cases (in the High Court) are concerned only with whether the tribunal could reasonably reach the conclusion that it did on the facts, and to the extent that they decide that a charity is not carrying on a business if its predominant concern in carrying on a particular activity is to pursue its charitable purposes, then they are wrongly decided: the question is whether the activities objectively are of a business nature, regardless of the purpose for which they are undertaken. In neither of those cases was the court directed to Articles 132 and 133 of the Directive.

81. As to the Commissioners' alternative submission, there is evidence (particularly from the website) that the intention of the Appellant, when it entered into the construction contract for the Training Centre, was that the upper floor would attract adult and corporate users, providing a source of income which would help in the subsidy of activities within the Appellant's charitable remit. It is the case that, as it turned out, there was little by way of such use of the upper floor, but the question for the tribunal is to determine the intention of the person to whom the construction supplies are made at the time of those supplies. The Commissioners argue that the tribunal should find, with regard to the upper floor, that there was an intention to use that part of the Training Centre for a business use, so that, applying the apportionment provisions, supplies attributable to the construction of the upper floor should be taxed at the standard rate.

Discussion and conclusions

82. The issue to be determined is whether or not, at the time when the relevant supplies of construction were being made to the Appellant, the Appellant intended to use the Training Centre solely for a relevant charitable purpose, that is, otherwise than in the course or furtherance of a business carried on by it. We are required to look to the intention as to use at the time the construction supplies were made, not actual use once the building is constructed: *HMRC v Fenwood Developments Ltd* [2006] STC 644: we consider, however, that actual use will give some guidance as to the use intended in the absence of unequivocal evidence as to intention at the time the supplies were made.

83. The principal matter argued by the parties was the question of whether, in carrying out its activities generally, the Appellant was carrying on a business. If it is assumed that the Training Centre was intended to be used only for the purpose of enabling the Appellant to carry out its activities (an assumption which is the subject of the secondary submissions of the parties, which we deal with below), then the Appellant can succeed only if it can establish that those activities do not comprise an economic activity, that is to say, the carrying on of a business for VAT purposes.

84. The Appellant is a charity, and in relation to most of its activities the parties are agreed that its activities are by way of direct promotion of its charitable objectives (set out in paragraph [25] above). We were not given the figures for the period when the trustees were planning to construct the Training Centre, but there is no reason to conclude that matters were materially different from how they stood in the period 1 January 2012 to 25 November 2012, for which we were given the figures. These show (see paragraph [51] above) that 94.5% of those using the Appellant's facilities were young people. Of the 1,438 adults comprising the remaining 5.5%, 1,111 were adults whose use was subsidised, and 327 were adults who paid a charge without discount (for the most part they were "corporate users"). As to income, for the Appellant's financial year 2010/11 the adults who paid a charge without discount accounted for just under 10% of total income from courses and other activities provided by the Appellant (see paragraph [50] above); that figure is a reflection upon the extent of the subsidy provided to all other users.

85. The Appellant claims that even in those cases where it is providing courses or activities to adults, such provision is in large part in pursuance of its charitable objects, since the provision of coaching, leadership and training courses to adults (where that is to the end of educating young people in water and similar activities) is within its stated purposes. It argues that where there is no training element in the activities it provides to adults, an objective is to seek out and encourage potential volunteers for the Appellant's work. Whilst accepting this is the case, we further conclude that the Appellant also regarded adult groups (especially those attending as "corporate users") as a source of income obtained when its facilities were not otherwise likely to be used by young people and which would give rise to a surplus, after operational expenses, which would be available by way of subsidy of its work with young people.

86. Therefore, if it were crucial to decide the issue before us, we would have to find that whilst by far the greater part of the Appellant's activities is directly by way of carrying out its charitable objectives, a small part is not, although they do further those objectives by raising funds to subsidise the Appellant's charitable work (at least, if the value of volunteer contributions are ignored, as we mention below). That some limited part of the Appellant's activities are seemingly for the purpose of raising funds for such subsidy rather than to carry out directly its charitable objects may shed some light on the question of whether the Appellant is engaged in an economic activity, as we mention below, but it is not a determining factor.

87. This is so because, as Mr Jones rightly points out, in deciding whether a person is engaged in an economic activity, that judgment is to be made objectively, without reference to "the purpose and results of that activity", as Article 9(1) specifies, and as the Court of Justice confirmed in the case of *Kingdom of the Netherlands*. Mr Jones gave us the example of two institutions providing private education, one established as a charity and the other not. The fact that one of them is carrying out its charitable purposes cannot be the determining factor in deciding the question of whether it is engaged in an economic activity. What is required is to have regard to the nature of the activity, not the motive for it. For the same reason, the question is not determined by whether the purpose, or a purpose, of the activity is to make a profit – if by its nature the activity is an economic activity, the absence of a profit motive does not of itself result in it becoming something other than an economic activity: see, for example the case of *Morrison's Academy Boarding Houses Association*. This objective approach ensures that there is tax neutrality as between activities which are inherently the same in character, even if they are differently motivated.

88. Mr Jones also argues that in determining the nature of an activity, there is a presumption that if the activity comprises a supply of goods or services for consideration, then the activity amounts to an economic activity. There may be such a presumption by reason of Article 2 and also implicit in the terms of Article 9(1), but it is no more than a presumption, and is not the defining characteristic in determining the nature of an activity. As Patten J says in the *Yarburgh Trust* case (at [22]): "It seems to me that the balance of authority is against treating a transaction or activity as economic or as part of a business merely because it results in a consideration or produces income." He later says (at [23]) that the fact that a service was provided at a price "is the beginning not the end of the inquiry" as to whether activities comprise an economic activity.

89. It is worth quoting in further detail from [23] of Patten J's judgment in the *Yarburgh Trust* case, since he there sets out the approach which the tribunal should take in determining the nature of the activities carried out by the person who it is claimed is making taxable supplies:

> [23] I accept Miss Whipple's [counsel for the Commissioners] submission that the motive of the person who makes a supply of goods or services is not relevant to and more particularly cannot dictate the correct tax treatment of that transaction. For that reason I would not adopt the precise reasoning of the tribunal contained in para 54 of its

> decision. But the exclusion of motive or purpose in that sense does not require or in my judgment allow the tribunal to disregard the observable terms and features of the transaction in question and the wider context in which it came to be carried out. This is because the transaction if looked at in isolation will not usually enable the court to decide whether it was carried out in the course or furtherance of a business which is the test under s 4(1) of the 1994 Act or to use the language of the Sixth Directive whether it was a supply of services effected for consideration by a taxable person acting as such, i e by a person who is carrying out some form of economic activity (see arts 2 and 4(1)). This test necessitates an inquiry by the tribunal into the wider picture. It will need to ascertain the nature of the activities carried on by the person alleged to be in business, the terms upon which and manner in which these activities (including the transaction in question) were carried out and the nature of the relationship between the parties to the transaction. This is not intended to be an exhaustive or particularised list."

90. It is made clear later in his judgment that such inquiry into the "wider picture" should take into account the fact that the activities in question are charitable activities, even though the charitable purpose or motive of the activities cannot alter the nature of those activities for VAT purposes (see [29]). Likewise, the absence of a profit motive does not lead to the conclusion that the activities are not an economic activity, but it is a factor to be taken into account when discerning objectively the nature of the activities in question (see [30]).

91. This approach was followed in the *St Paul's Community Project Ltd* case. In the course of his judgment reviewing all the authorities Evans-Lombe J said as to the approach to be taken by the tribunal in determining whether an activity is or is not a business (at [51]):-

> "I accept that the overall policy of the Sixth Directive requires that the word 'business' must be given a very wide meaning so that it is not confined to profitable enterprises or enterprises intended to be conducted at a profit at some point. The intention, or apparent intention, of those conducting the enterprise in question must be disregarded. It is the intrinsic nature of the enterprise, as established by evidence of what is actually being performed in order to advance it, that is important in arriving at a conclusion whether or not a particular undertaking constitutes a business."

92. Mr Jones invited us to disregard both the *Yarburgh Trust* and the *St Paul's Community Project Ltd* cases on the grounds that in each case the strict *ratio* is that the findings of the respective tribunals (that the activities of the two enterprises – providing nursery and playgroup facilities with fees set at a level to meet the shortfall in grant and donated income against operating expenses – were not economic activities) could not be impugned on *Edwards v Bairstow* grounds. He went so far as to say that they were wrongly decided, at least to the extent that they are authority for the proposition that a person engaged in carrying out a charitable purpose is not engaged in an economic activity.

93. We take a different view. First, whilst it is the case that the narrow point for decision in both cases is whether the tribunal's findings were reasonable, in both cases (and especially *Yarburgh Trust*) there is a full review and analysis, following extensive argument and reference to authorities, of the principles derived from both the European and the United Kingdom cases and the law as it is to be understood in the light of those principles. We regard the conclusions reached on those matters, which are expressly stated to be by way of direction to the tribunal as to the nature of the enquiry it should make, as binding on us. In any event, we see no basis for questioning those conclusions. In particular, it seems clear to us that they do not hold that a charitable activity cannot be an economic activity where a supply is made for a price. They do hold that an activity whereby a supply is made for a price is not necessarily an economic activity; that it is necessary to identify in objective terms what the activity is in order to determine whether it is an economic activity; and that to identify what in truth that activity is it is necessary to look, not at purpose or results, but at the entirety of what it is and the context in which it is carried out. Those propositions, we respectfully consider, are entirely consistent with the relevant case law.

94. An approach used in the United Kingdom cases to identify the intrinsic nature of an enterprise for the purpose of ascertaining whether it amounts to the carrying on of a business is to apply six criteria which are indicative of a business, derived from propositions first advanced on behalf of the Commissioners in *Lord Fisher's* case. We agree with Mr Thomas that these indicia do not comprise a legal test – at best they assist as a tool in the task of analysing the character of an activity. Lord Slynn in the *ICAEW* case summarises the six indicia in these terms (at p 404e):

> "...was [the activity] (a) a 'serious undertaking earnestly pursued'; (b) pursued with reasonable continuity; (c) substantial in amount; (d) conducted regularly on sound and recognised business principles; (e) predominantly concerned with the making of taxable supplies to consumers for a consideration; and (f) such as consisted of taxable supplies of a kind commonly made by those who seek to make profit from them."

95. Turning to the Appellant's activities (and having an eye to those six indicia), in ascertaining the nature of those activities for the purpose of deciding whether they comprise the carrying on of a business, we have regard to the following factors and features.

96. First, the Appellant is indisputably providing services for a consideration. It provides courses and activities to (mostly) young people, and it (mostly) charges them for doing so. It has an extensive and reasonably sophisticated system of pricing which is reviewed annually by the trustee body, although it is prepared to depart from that by providing discounts greater than those inherent in the published prices, and in some cases it makes no charges at all. It therefore must be presumed, unless and until other factors establish otherwise, that the Appellant is engaged in an economic activity.

97. The type of activities which the Appellant is engaged upon are provided by some commercial enterprises, who presumably make profit from them.

98. The Appellant runs its activities, and manages its financial affairs, in a professional and "business-like" manner. In its trustee body and full-time employed chief executive it has an appropriate governance structure. It prepares budgets and forecasts with the aim of endeavouring to ensure continuing financial solvency and to provide a framework whereby its financial position can be monitored and its activities sustained. It has programmes for seeking grants and for raising donations to support its work, and in matters such as planning for and funding the construction of the Training Centre it is looking to continue and develop its activities over the long term. Where it charges for the courses and activities it contracts with its "customers" on terms and conditions which a commercial organisation would recognise. Its turnover (including donated income) is approximately £1 million and its net assets approximately £2 million (most of which is accounted for by the value of the site it occupies). In our view its conduct of its activities, and in particular its financial management, is as one would expect – and almost certainly as charity regulation would require – of a charity of this size and nature.

99. As we have already mentioned, by far the greater part of the Appellant's activities are directly carrying out its charitable activities – its principal charitable objective is to provide "a centre of excellence for the advancement of education in water, outdoor and indoor activities for young people" and that objective is achieved by the facilities, courses and activities it provides. For this reason, as the evidence of Mr Fulbrook made clear, the charges which the Appellant makes are determined by the trustees each year with a view to a range of factors balancing the desire to provide those facilities, courses and activities at the lowest cost possible with the need to maintain financial prudence for the long-term viability of the Appellant for the benefit of future generations of young people. The following are the most significant of those factors: charges are set with a view to their affordability for the young people the Appellant wishes to benefit; charges are set with a view to covering operational expenses after taking account of donated income and taking account also of the contributions of volunteers; discretion is given to permit reducing or waiving charges in particular cases where pursuit of the charitable objects is especially desirable; and all capital projects (with the exception of the Appellant's original acquisition of the site, which was partly funded by borrowing) are financed by donations and grants, so that no part of the charges is directly or indirectly expended on the acquisition or funding of capital assets.

100. In our view these are not factors which are indicative of a business, even if certain of those factors may demonstrate a degree of financial care and prudence aimed at ensuring that the Appellant can continue to carry out its activities. It is not consistent with a business activity that charges are set to meet operational costs to the extent that donated and grant income is not available to meet such costs; nor is it consistent with a business activity that the necessary capital costs of the activity are met by donations and grants so that no part of such costs, or the funding of such costs, is met by those to whom the Appellant provides its activities. The readiness by the Appellant to reduce or waive charges, undertaken not with a view to increasing

business, but to ensure that its facilities and activities are made more widely available, is not consistent with a business activity. All these matters inform as to the true nature of the activity carried on by the Appellant, not merely its purpose in carrying that activity.

101. Most significantly in our view is the issue of volunteers whose time and services are donated to the Appellant, and who are essential to the way in which the Appellant carries out its activity. The importance of such volunteers was made clear by Mr Fulbrook, who spoke as an active and committed volunteer engaged with the Appellant since its inception. It is clear that the Appellant could not carry out its activities in the way it operates without the services of the corps of volunteers available to it. Some indication of their financial significance was apparent from Miss Foister's evidence: we have already indicated that the evidence in relation to this matter was not as clear as it could perhaps have been, but it was sufficient for us to see that the scale and effect of volunteer contributions of services is such as to amount to a significant subsidy to the cost of the Appellant's operations. As we record at paragraphs **[**42**]** to [47**]** above, taking into account the value of donated volunteer services, the true cost of providing a group kayaking course for a youth group is £114 (against a charge made of £70 or less) and for an adult group is £124 (against a charge of £100). The nature, scope and materiality of this feature of the Appellant's activity indicates, in our judgment, that the Appellant is engaged in an activity different in kind from that of a business or economic activity.

102. Taking these various factors together – in Patten J's words, "the observable terms and features" of the Appellant's activity and "the wider context in which they are carried out" – we conclude that the intrinsic nature of the Appellant's activity or enterprise is not that of a business, even though it is making supplies for a consideration. The intrinsic nature of its activity is providing courses and activities in furtherance of its stated charitable objectives, which it does by raising funds to meet its capital costs, by seeking out, training, and deploying volunteers who bear a significant burden of staffing those courses and activities, by raising funds to defray some of its operational costs, and by making a charge (with a published tariff, but which may be reduced or waived as the Appellant sees fit in particular circumstances and having regard to its aims) to cover its remaining actual operational costs.

103. Expressing the point by reference to the *Lord Fisher* case indicia, it is the case that the Appellant's activity is a serious undertaking earnestly pursued with reasonable continuity; and that the enterprise is substantial in size and value, and the supplies it makes (or something similar) are made by commercial enterprises; and that it adopts and applies prudent financial management. However, there are features of its activities which are not consistent with sound business principles (most obviously its use and reliance upon volunteers and its reliance upon donations to meet part of its operational costs and to meet all its capital costs); and its predominant concern is not to make taxable supplies to consumers for a consideration, but to carry out its activities in a manner which furthers its charitable objectives. The making of supplies for a consideration is incidental to its predominant concern of furthering its charitable objectives in that it is one means (admittedly an important one) by which its predominant concern is achieved.

104. We consider this to be the case notwithstanding that the Appellant provides some courses and activities for adults (usually in the form of corporate team motivational events).

105. In such cases the charge made exceeds the actual operational cost to the Appellant of providing the course, although volunteers are engaged in such courses and the evidence is that, were the Appellant to account for the value contributed by such volunteers, the true cost would exceed the charges made. In actual cost terms such courses subsidise the courses provided to young people; in true cost terms it appears that the Appellant is itself subsidising courses of this nature provided to adults. We also note that in terms of numbers, for the period for which information was available, adults attending such courses accounted for only 1.21% of the total number of persons for whom the Appellant provided courses or other activities. In the 2010/11 financial statements of the Appellant such adults accounted for just under 10% of income derived from charges. Those two relative percentages indicate the extent to which (even disregarding the value of volunteers) the overwhelming majority of persons are subsidised by the Appellant.

106. There is a case to be argued that this aspect of the Appellant's activities has more of the characteristics of an economic activity. The Appellant argues that such activities are part of its wider remit of seeking potential volunteers. Our conclusion is that this aspect of the Appellant's activities does not change the essential nature of the Appellant's activities when those activities are viewed as a whole. In part this is because of scale – depending on the basis of measurement (headcount or income) it is between 1.5% and 10% of the Appellant's overall activities. It is also because the Appellant delivers its courses and activities to these adults in the same way (using volunteers; using capital assets and facilities funded by donations; and, taking account of true cost, at a subsidy) as it delivers courses and activities to its other "customers". The only points of difference are its purpose, and the level of charges it makes, neither of which is a determining factor, and which, when taken into account in the wider enquiry which has to be made, do not change the essence of the Appellant's activities and the way in which it carries them out.

107. As we have noted, the Commissioners place some reliance upon Articles 132 and 133, which exempt from VAT certain supplies by way of activities in the public interest (including those related to physical education and sport where the supplies are by non-profit-making organisations), and permit Member States to restrict that exemption to cases which meet one or more specified conditions, such as the case where there is no aim to make a profit, or where prices are charged at levels below those charged by commercial enterprises. The Commissioners' case is that if such activities were not inherently economic activities for the purposes of the Directive (and hence otherwise taxable supplies), there would be no reason for conferring an exemption in such cases.

108. This argument appears to have been put forward by the Commissioners in the *Yarburgh Trust* case, but does not appear to have commended itself to the judge, who reaches his decision without reference to it. It was also raised in the *Riverside*

Housing case, where Lawrence Collins J notes (at **[**85**]**) that it is implicit from these Directive provisions that the supplies in question may be economic activities.

109. Mr Thomas referred us to two Court of Justice decisions relating to the corresponding provisions in the earlier (Sixth) Directive, *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (Case C-174/00) [2002] STC 502 and *Kingscrest Associates Ltd and another v Customs and Excise Commissioners*(Case C-498/03) [2005] STC 1547. He pointed out that neither of those cases, nor the directly relevant *French Republic* case, had been cited in the *Riverside Housing* case. He submitted that the *Kennemer* and *Kingscrest Associates* cases show that the exemption provisions in question in the Directive are directed at the narrow question of whether the enterprise making the supplies has the aim of making a profit for distribution to its members, not at the nature of the activity. On this basis the exemption provisions tell us nothing as to whether certain activities are in their nature economic activities. Mr Jones argues (seeking support from remarks in the Advocate General's opinion in the *Kennemer* case) that the exemptions apply to non-commercial enterprises carrying out specified activities, with the clear implication that such persons carrying out those activities are carrying out economic activities.

110. On the facts this may not be a relevant issue, in that the Commissioners were not able to confirm that the supplies made by the Appellant would be regarded as falling within the exemptions provided for by these Articles (in the form of their United Kingdom enactment) – we understand that that remains an open issue. But in any event we are of the view that the Commissioners cannot place too much reliance on the point. A non-profit-making organisation may be engaged in an activity which by its intrinsic nature is an economic activity, so that the exemption is relevant; but if the activity is not intrinsically an economic activity when its nature is examined in the wider context, then the existence of the exemption is irrelevant. The profit-making or otherwise characteristic of the organisation, or the fact that it charges at less than a commercial rate for the supplies it makes, may have some bearing on whether the activity it undertakes is an economic activity, but those factors do not in themselves determine the question. The enquiry as to whether a person is carrying on an economic activity has to be made, and a conclusion reached, without regard to the scope of possible exemptions. If the activity is an economic activity, so that supplies in carrying out that activity are taxable, then it is relevant to examine the scope of possible exemptions.

111. We are not therefore persuaded that Articles 132 and 133 are relevant to the question we have to decide, and for the reasons we have given we conclude that the Appellant is not engaged in carrying on a business or in an economic activity.

112. We now have to consider the intended use of the Training Centre. Having concluded that the Appellant is not, in providing courses and its facilities, engaged in an economic activity, the question is whether it intended using the Training Centre for such courses and related activities (in which case it will have the intention of using the Training Centre solely for a relevant charitable purpose). If it intended using the Training Centre for some unrelated activity, the issue is whether that unrelated activity is a business (if so, the Appellant's claim fails).

113. The first factual point to note is that the Training Centre is, in terms of its use at least, two distinct buildings. As Mr Fulbrook described it, the need was for modern changing, shower and toilet facilities (now the lower floor) – the site already had adequate buildings for indoor training purposes, but in part to meet the requirements of the planning authority, and in part to have an asset which was a more attractive proposition to put to potential donors and grant-making bodies, the building was designed to house an indoor training facility on the upper floor.

114. In these circumstances, in determining use, or intended use at the time of the building contract, it is necessary to have regard to the separate parts – lower and upper floor – of the Training Centre. The apportionment provisions of Note (10) of Group 5 of Schedule 8 to VATA1994 allow for such an approach.

115. We can deal with the lower floor of the Training Centre shortly. The Appellant's intention was to provide the facilities it houses in the lower floor principally for use by young people attending its courses. It also intended to provide limited toilet facilities for adults attending its courses (although such use soon became impractical). It is clear therefore that the Appellant intended to use the lower floor in the course and for the purpose of its activity which we have concluded was not the carrying on of a business. We cannot see that there is any case that there is a distinct use of the lower floor separate from the Appellant's general activity.

116. We therefore conclude that the lower floor of the Training Centre is a building intended for use solely for a relevant charitable purpose within the terms of Items 2 and 4 of Group 5 of Schedule 8 to VATA 1994.

117. The position with regard to the upper floor of the Training Centre is more complex.

118. We had detailed evidence as to actual use of the upper floor for the period from mid October 2010 to the end of June 2012, and our findings are set out in paragraphs **[**52**]** to **[**54**]** above. On a headcount basis more than 95% of the use of the upper floor was by persons (young people, family groups, volunteers, adults whose activities were subsidised) who were attending courses or otherwise taking part in the activities provided by the Appellant – that is, use which is in the course and for the purpose of the Appellant's activity which we have concluded was not the carrying on of a business. On a charges basis the percentage for such "core" use falls to 85%. We consider, however, that the headcount basis provides a better method of determining the proportions of different usage in circumstances where in a substantial number of cases no charge was made to users of the upper floor. (These figures assume that the three occasions of corporate use were unrelated to courses provided by the Appellant, although it appears that on two of those occasions the use made of the upper floor was connected with courses attended by the corporate team members – such use would fall within the "non-business" activity of the Appellant, as we have found that to be.)

119. We conclude that, on an actual use basis, and having regard to the *de minimis* rule, the upper floor has been used solely for a relevant charitable purpose within the relevant VAT provisions. We are, however, required to look at intended, rather than

actual, use. On the issue of intention we had three matters of evidence: the witness evidence of Mr Fulbrook as to the plans and intentions of himself and his fellow trustees; the terms of the planning consent given for the Training Centre; and entries on the Appellant's website both before and after the Training Centre was constructed.

120. Mr Fulbrook was clear that the trustees of the Appellant intended that the upper floor should be used to provide indoor space which could be used for those course activities ("classroom" training, de-briefing, first aid training, etc) which benefited from such a facility. The intention was to replace (as indeed the planning authority required) existing indoor training space. This is consistent with the conditions on which planning consent was granted, which were quite specific in restricting use to the Appellant's principal activities (see paragraph **[**33**]** above).

121. The Appellant's website before the Training Centre was constructed referred to the Appellant's ability to host product launch events, and after construction, and following a successful letting of the upper floor for a corporate reception, the facilities of the upper floor were advertised on the website (see paragraph **[**32**]** above). It is not clear whether the earlier website page was posted with the upper floor in mind, and since it refers to corporate events held in conjunction with nearby hotels it is also unclear as to quite what facilities of its own the Appellant was promoting by this means.

122. We prefer to rely on the evidence of Mr Fulbrook and of the planning consent, taking account also of the usage which actually occurred as some indication of what was a realistic expectation of how the upper floor could be used. We note also that when construction began the contract did not extend to installing a heating system or internal walls (the latter have since been constructed, but there is as yet no heating in the upper floor), so that it could not reasonably have been thought at that time that the premises would provide a very attractive corporate events venue.

123. We therefore conclude that it was intended that the upper floor should be used by the Appellant in the course and for the purpose of its activity which we have concluded was not the carrying on of a business. Therefore the upper floor of the Training Centre also is a building intended for use solely for a relevant charitable purpose within the terms of Items 2 and 4 of Group 5 of Schedule 8 to VATA 1994.

124. For these reasons we allow the Appellant's appeal.

Right to apply for permission to appeal

125. 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.

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 28 February 2013

Authorities referred to in skeletons and not referred to in the decision:

Lennartz v Finanzamt München III (Case C-97/90) [1995] STC 514

BLP Group plc v Customs and Excise Commissioners (Case C-4/94) [1995] STC 424

Apple and Pear Development Council v Customs and Excise Commissioners (Case C -101/86) [1988] STC 221

Edward Harrison v HMRC First-Tier Tribunal TC 1205