[2015] UKFTT 0378 (TC)

TC04560

Appeal number: TC/2014/02531

VAT – zero-rating – construction by a football club of a clubhouse on a sportsground – whether intended for use "as a village hall or similarly in providing social or recreational facilities for a local community" – VATA Sch 8, Group 5, item 2 and note 6(b) – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CAITHNESS RUGBY FOOTBALL CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR LESLIE BROWN

Sitting in public at Edinburgh on 25 June 2015

Philip Simpson QC, instructed by BBM Solicitors, for the Appellant

Julius Komorowski, Advocate, instructed by the Office of the Advocate General for Scotland, for the Respondents

DECISION

Introduction

1. The Caithness Rugby Football Club (the "Appellant" or "Appellant club") appeals against a decision of the Respondent ("HMRC") dated 17 December 2013, upheld in a review decision dated April 2014, by which HMRC decided that supplies made in the course of construction of a clubhouse did not attract zero-rating.

2. The Appellant contends that the supplies fall to be zero-rated for the reason that the building was intended to be used "as a village hall or similarly in providing social or recreational facilities for a local community". HMRC disputes this.

Background facts

3. On the evidence, the Tribunal is satisfied on a balance of probability of the following background facts.

4. The Appellant, a registered charity, is a members' club affiliated to the rules of the Scottish Rugby Union. It is not registered for VAT. The Appellant is the tenant of a lease granted by the Highland Council, for a peppercorn rent, over some 3.8 hectares of land in Thurso. The playing fields used by the club are located on this site. In about 2012, the Appellant embarked on a project to construct a new clubhouse on the grounds. In July 2013, the Appellant submitted a written request to HMRC to enquire whether the construction project would qualify for VAT zero-rating. In a letter dated 29 August 2013, HMRC responded they did not see scope for zero-rating save those works that suit the condition of disabled people. After further correspondence between the parties, HMRC advised the Appellant in a letter dated 17 December 2013 that the project would be ineligible for VAT zero-rating. That is the decision against which the Appellant now appeals. The Appellant requested a review of this decision, which HMRC upheld in a review decision dated 8 April 2014.

5. Some £300,000 was required to build the clubhouse, of which 50% came from Sports Scotland. Other contributions came from the Robertson Trust, the Community Landfill Fund and the Caithness and North Sunderland Fund. The remaining sum of £95,000 had to be raised by the club through fundraising events.

6. The clubhouse comprises four changing rooms which occupy about half of the building, a main hall area, a kitchen area that doubles as a bar area when functions are held and which can be shuttered off from the hall area, and toilets. There is also an officials' room, a store room and a boiler room. The main hall area, kitchen and toilets occupy about 40 per cent of the building.

Applicable legislation

7. Section 30(2) of the Value Added Tax Act 1994 ("VATA") provides that a supply of goods or services is zero-rated if the goods or services are of a description for the time being specified in Schedule 8 VATA.

8. Item 2 in Group 5 of Schedule 8 VATA specifies:

> The supply in the course of the construction of—
>
> (a) a building … intended for use solely for … a relevant charitable purpose …
>
> 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.

9. Paragraph 6 of the notes to Group 5 of Schedule 8 VATA ("Paragraph 6") states:

> 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.

The evidence

The witness evidence

10. The sole witness to give evidence was Mr Frank Stephen, president of the Appellant club.

11. In his witness statement, Mr Stephen stated as follows.

12. One clause of the constitution of the club stipulates that the club provides a community benefit, and the clubhouse is seen as an opportunity to better fulfil that aim. Caithness has a population of approximately 25,000, of which approximately a third live in Wick, a third in Thurso, and a third in the landward county area. The club has 57 full (playing) members, 45 friend (non-playing) members, and 263 junior members. Like the population of Caithness generally, approximately a third of the members live in Wick, a third in Thurso, and a third in the landward county area. There are no benefits of being a non-playing member, but non-playing members join in as a way of supporting the club knowing the high travel costs associated with living in a remote area. The building of a clubhouse had been under discussion for some 20 years. On applying for funding, support was garnered from other sports clubs within the county who were seen as potential users of the facility. As the facility was built the club realised that other community groups would benefit from being able to use the clubhouse. As the clubhouse was being built, the club assumed that it would be VAT exempt. Towards the completion of the project, HMRC advised that VAT would be payable.

13. The clubhouse is used extensively by the community. Approximately 85% of the usage is by residents of Thurso or the immediate surrounding area. A dance school meets at the clubhouse each Wednesday. Boxercise classes take place on a weekly basis. A cancer choir meets every Friday afternoon. A multiple sclerosis

society has enquired about using it twice a week. A community association uses it on an almost monthly basis for activities for pre-school children. The North Highland Harriers use the clubhouse and one of the dressing rooms when they train. A big band uses the clubhouse on Sunday nights for band practice. A disability sport association uses it for boccia, and have booked it for one night a week for a 6 month period for bowling. The clubhouse is used for social events and fundraising events unconnected with the Appellant club. If booked for a social event such as an adult's birthday party, it is staffed by volunteers from the club. It is applying for a premises liquor licence.

14. The club is rented out to these groups at reasonable rates to encourage its use by the wider community. There are no favourable rates for club members wishing to book the clubhouse.

15. Once fixtures for the rugby club come out, the rugby club books its required slots. It may sometimes be necessary to rearrange fixtures, but if the clubhouse is already booked the rugby does not take precedence. In the past, in such situations kick-off time has been brought forward in order to respect previous booking commitments.

16. Since Thurso town hall was converted to a museum a few years ago, there has been a lack of suitable hall type facilities in Thurso, and the Appellant's clubhouse has been helping to fill that gap. The programme notes for the game on 11 January 2014 stated that "The club very much sees the new facility as a community venture. Any groups or individuals interested in using it should contact the club".

17. In his evidence in chief, Mr Stephen said as follows.

18. The grounds were previously a council playing field, for the upkeep of which the Highland Council was responsible. By leasing the grounds to the club for a peppercorn rent, the Council divested itself of responsibility for the upkeep, allowing it to make savings. The Council has the final say on how the grounds are used, and the club is required to make the grounds available for certain uses, including Highland Games and certain charity and gala events. The clubhouse, which is on part of the leased land, can be used for any purpose that the club decides.

19. It was never intended that the clubhouse would be used solely by the Appellant club, and it was always intended that it would be available to others. Some of the subsequent usage was not predicted, but it was always intended that the clubhouse could be used by whoever wanted to use it. A cleaner is employed for 3 hours once a week, and otherwise users of the clubhouse clean up after themselves. The Institute of Engineers used the clubhouse hall on one occasion when a local hotel was not available, and may use it again in the future. Some 90% of the usage of the hall is by clubs or groups other than the Appellant club. The change rooms are used 80% by the Appellant club and 20% by others (although one of the change rooms is used 95% for storage).

20. In cross-examination, Mr Stephen said as follows.

21. To be a member of the executive committee of the Appellant club, it is necessary to be a club member. The membership of the executive committee is elected at the annual general meeting of the club, at which only full (playing) members of the club can vote. Therefore, members of other clubs using the hall cannot be on the executive committee unless they are full members of the Appellant club. There is no charge to the Appellant club for use of the clubhouse (for instance, for executive committee meetings held there). It is hoped that eventually the clubhouse will become self-funding.

22. Much of the use of the clubhouse could not have been anticipated at the time that it was constructed. The figures in the funding application form, envisaging 60-65% use of the clubhouse by the Appellant club and 20% by schools, bear no relation to the current reality. The person who completed the funding application forms was unable to attend the hearing to give evidence, and Mr Stephen was unable to comment on what she specifically had in mind when using particular wording or giving specific figures. It was accepted that there was no reference to non-sporting activities in the funding application forms, and that the extent of use by non-sporting clubs was not foreseen, although it was always intended that the clubhouse would be available for use by other clubs. If demand for the use of the clubhouse by others got to a level that it interfered with the Appellant club's own required use of the clubhouse, something would have to give. However, the question of what would happen is at present hypothetical, and so far it has been possible to accommodate the various demands. Rugby has priority, so that it would not be possible for another user to book a series of Saturdays when rugby is played.

23. In response to a question from the Tribunal, Mr Stephen said as follows. The closest community hall is in Scrabster, 3 miles away. It is used quite extensively since the town hall in Thurso closed, but it is less popular as a car is needed to get there.

24. In re-examination, Mr Stephen said as follows. The Highland Council is aware of the uses to which the clubhouse is being put. An extension to the clubhouse has been considered.

The documentary evidence

25. The documentary evidence included the following.

26. The lease by which the Highland Council has leased the grounds to the Appellant club contains a clause which states that the Appellant shall use the grounds "for the provision of playing fields for the sports of rugby football and soccer and for the events detailed in Clause Eighth hereof and for no other purpose whatsoever without the prior written consent of the landlord (which consent shall not be unreasonably withheld)". Clause Eighth states that the playing fields shall be made available on an annual basis for local gala events and other charity events, and for the circus, Highland Games and such other events as may be agreed between the tenants and the landlord from time to time.

27. Both the 2008 and 2013 versions of the club's constitution contain a clause stating that the objects of the club include the following:

> - to promote community participation in Sport, providing facilities for the sport of rugby football and such other sporting activities as the Club shall from time to time decide;
>
> -- to promote for the benefit of the public and in particular for the inhabitants of Caithness, the provision or assistance in the provision of facilities in the interests of social welfare for recreation or leisure time occupation so that their conditions of life may be improved …

28. An application by the club to Sportscotland for funding for building the clubhouse described the proposed building as a "4 changing room rugby pavilion with associated facilities". In the section dealing with the primary purpose of the proposed building it stated that modern facilities would enable the club to cope with its increasing membership and would "allow the club to have a real home which will further enhance our rugby community". In a section asking what other sports would also benefit significantly from the proposed building, it listed football, cricket and athletics. A section of the form dealing with use of the proposed facility indicated that in future there would be "public use—by booking or casual entry", "bookings in advance by individuals", "single bookings by any club" and "regular bookings by any club". It contained a statement that the Highland Council ward manager was "happy that the proposed new facilities complies with the Council's desire to improve leisure facilities in the area and encourage more children into sport". It contained statement that "we intend to make the facility available to other sports" and "The new facility will permit greater use by other sports".

29. Applications for funding made by the club to the Robertson Trust and to the Landfill Communities Fund stated that "In addition the facility would be used by other sports", mentioning cricket and football clubs.

30. The documentary evidence included a list of bookings showing the various diverse clubs and societies that have used the hall to September 2014.

The parties' submissions

31. The submissions on behalf of the Appellant were as follows.

32. The evidence of Mr Stephen should be accepted. A village hall will have a number of definite users and an unlimited number of others who may want to use it, which is the case here. The Appellant club is registered on the Scottish Charity Register. The legislation requires only that the clubhouse be used "similarly" to a village hall. The word "similarly" implies that some features will be different to a village hall. The legislation requires that it be used "for a local community". Some 85% of users of the clubhouse are from Thurso or the immediately surrounding area, and these represent a reasonable cross-section of the community. The legislation requires that the building be used "in providing social or recreational facilities", but does not limit who may provide those facilities. The fact that the facilities are provided by a rugby club is therefore immaterial. The rugby club is not the

predominant user, but there is in any event no reason why there might not be a predominant user of a town hall. The evidence is that in practice, all users have been accommodated.

33. The submissions of HMRC are as follows.

34. The burden of proof is on the Appellant to establish on a balance of probabilities the intended use of the building. It is the intention at the time of construction that is material. The best evidence of this will be expressions of intention made at the time of construction or before, since later statements may be *ex post facto* rationalisations. As the Appellant bears the burden of proof, it is the Appellant's problem if the person who completed the funding application forms was not available to give evidence. These application forms did not indicate an intention that the building would be for broader community use when they could have done so. The application forms suggest that only some 5% of use by others was envisaged. The evidence indicates that use by other groups was something that just took off in an unanticipated way after the building was completed. If this kind of usage was actually intended at the time of construction, as opposed to being mere wishful thinking, it is implausible that it would not have been included in the funding applications.

35. In sub-paragraph (b) of Paragraph 6 ("Paragraph 6(b)"), "village hall or similarly" is a requirement that is separate and additional to the requirement of "social or recreational facilities for a local community". The fact that social or recreational facilities are provided to a local community is therefore not of itself sufficient. To meet the additional requirement of "village hall or similarly", the building must in some sense be at the disposal of the community, that is, subject to the direction of the local community as to how it is used. In determining whether this requirement is met, relevant factors include the nature of the building, the nature and extent of any commercial activity, whether control is exercised by a person other than the local community, and whether use of the building is at the direction of the local community. These questions should be considered decisive or at the very least highly relevant.

36. The correct approach is to construe the legislation, not the HMRC guidance. The statutory words have to be construed in the detailed context of specific cases. In particular, the question is whether what was contemplated was something which was owned, organised and administered by the local community in the sense of providing equitable access and, so far as desired, participation. It is necessary that the building be subject to the direction of the local community in relation to how it is used.

37. In this case, equitable access and participation are missing. The Appellant holds the lease and can grant and deny access as it chooses. Only full members of the rugby club can be elected to the executive committee that is responsible for managing the clubhouse. Other users are secondary users. No other user would be given priority over the Appellant club's own required use. The changing rooms, which comprise some 47% of the clubhouse are not "social or recreational facilities" but are used in preparation for or after recreation. The majority of other users do not use the changing rooms.

38. Some users appear to be commercial organisations. The Appellant does not pay a fee for its own use of the clubhouse but other users are charged a fee. There is an expectation of profit from the bar and kitchen sales. Thus, other users are financially supporting the rugby club, rather than the rugby club supporting the community. The clubhouse was not conceived as something similar to a village hall, run by the local community for the local community.

The case law

39. The parties in their submissions referred in some detail to the following authorities concerning the meaning of the words "use … as a village hall or similarly in providing social or recreational facilities for a local community".

40. In *Ormiston Charitable Trust v Commissioners of Customs and Excise* [1994] (VAT decision 13187), it was found that a sports pavilion built and used by a charity to provide sports and out-of-school activities for children did not fall within that wording. The Tribunal in that case considered that the word "similarly" in Paragraph 6(b) refers to similarity of function rather than some kind of architectural test. The Tribunal also said that the words "social *or* recreational" indicate that "a mix of social and recreational activities of the kind commonly associated with a village hall is not essential and the relief extends to buildings, like the cricket pavilions and changing rooms mentioned in the Commissioners' leaflet, providing recreational facilities rather than social facilities".

41. However, the Tribunal considered that something more than this was required, and said that "some such criteria as set out in [counsel for the Revenue's] final submission have to be applied". The final submission alluded to appears to have been a submission that the provision applies to "something which is owned, organised and administered by the community for the benefit of the community". The Tribunal concluded in that case that:

> Whether the facilities provided by the Centre are provided for the benefit of a local community … is … certainly not clearly established. The children, who are the primary object of the Centre's activities are in small part drawn from those nearby and pupils from the schools on the same site, but the greater part come from the previous area and some from other parts of Colchester.

42. Thus, the decision in that case appeared to turn on the conclusion that the body of persons who used the facilities in question came from too broad a geographic area to be characterised as a local community.

43. In *Jubilee Hall Recreation Centre Ltd v Customs and Excise Commissioners* [1999] STC 381, the Tribunal found that two different buildings each failed to fall within the wording of Paragraph 6.

44. In that case, Sir John Vinelott (with whom the other members of the Court of Appeal agreed) considered that Paragraph 6(b) applies to "the case where a local community is the final consumer in respect of the supply of the services … in the

sense that the local community is the user of the services … and in which the only economic activity is one in which they participate directly". He considered that it is insufficient simply that members of the local community benefit in some way, for instance in a case where the building is let out for a profit to persons outside the local community and the profits are applied for the benefit of the local community (at 389-390).

45. Sir John Vinelott was critical of the submission by counsel for the Revenue in that case that the words apply only to "something which is owned, organised and administered by the community". He considered that this formulation "adds a gloss to the words used which may be too restrictive". He considered that the words were "intended to cover economic activities which are an ordinary incident of the use of a building by a local community for social, including recreational, purposes" (at 390).

46. Sir John Vinelott also suggested (but did not decide) that social or recreational facilities could not be said to be provided to a "local community" if the users of the facility are drawn from too broad an area. (He suggested that a "neighbourhood" in London comprising W1, SW1, WC1 and EC4 would not qualify as a "local community"). (At 390.) He also suggested that facilities might not be said to be provided to a "local community" if they were provided not merely to those who lived locally, but also to "the daily influx on working days into an area of the people to staff its offices and shops and to attend its colleges" (at 391).

47. Sir John Vinelott further concluded that the wording did not apply to a sports centre constructed primarily for use as one of the facilities of a fee-paying school, with secondary use for community purposes. He considered that pupils at the school benefitted "not as members of the local community, but as pupils on whose behalf fees were paid to the school", and that the sports facility was therefore not "intended for use solely for the purpose of 'providing social or recreational facilities for a local community'". (At 394).

48. Beldam LJ (with whom Thorpe LJ agreed) also said that the concept of the "village hall" was "intended to equate the activities with the kind of use ordinarily made of a village hall and thus to introduce considerations of scale and locality" (at 396).

49. In *South Molton Swimming Pool Trustees v Commissioners of Customs and Excise* [2000] (VAT decision 16495), a charitable trust had been formed to build a swimming pool in a town of some 11,000 inhabitants. A pool run by the district council had closed some years earlier, and the district council was unable or unwilling to build a new pool. The Tribunal found that the pool did not fall within the wording of Paragraph 6(b).

50. The Tribunal said at [32]:

> Although a village hall may be owned by trustees the activities which take place in it are normally organised by the community. In the present appeal all the activities are organised by the Trustees. Further, a village hall is usually available for letting to groups in the community

> for their own purposes; although that is also possible with the swimming pool such use is ancillary to the main use which is the provision of activities by the Trustees. In addition we find that the swimming pool was 'a well-organised commercial operation' and was run according to a business plan. … This scale of activity is not similar to the use of a village hall".

51. The Tribunal also said at [39] that the words "local community" meant something on the scale of a village. It considered that the community using the swimming pool in this case extended to Barnstaple, some 23 miles away, which could not be characterised as a "local community".

52. The Tribunal further expressed the view that Paragraph 6(b) does not require both "social" and "recreational" activities to be provided, and that one or the other would be sufficient (at [34]). The Tribunal considered it irrelevant that a swimming pool does not look like a village hall (at [41]-[43]).

53. In *Sport In Desford v Customs and Excise* [2005] UKVAT V18914, the Tribunal found that the construction of a clubhouse on grounds containing various sporting facilities did fall within Paragraph 6(b). The Tribunal considered the issue to be one of fact, such that other cases were of limited precedential value (at [78] and [93]). However, the Tribunal did articulate the following legal principles:

(1) The test of similarity to a village hall does not relate to the physical description of the building (at [104]).

(2) Only "social *or* recreational" facilities need be provided (at [105]).

(3) To be provided for a "local community", the benefit must be to members of that community as such, in their capacity as such. The persons who are able to benefit must not be too narrow a section of that community. The persons who benefit must not inhabit or work in an area too large and populous to be sensibly described as a local community. In a rural area, there is no difficulty in regarding various parishes within a six mile radius as a local community. (At [105].)

54. The Tribunal concluded at [104]:

> It is not necessary for the activities to encompass the same mix of activities as one would expect to find in a village hall. The essence of the test of similarity is to distinguish between, on the one hand, community buildings where the supply in reality is to the community as such, and, on the other hand, buildings which are commercial operations. This is ultimately a question of fact. We find that the key factors point to the fact that the Clubhouse is a community building where the supply is really to the community as such, with a high degree of community and voluntary involvement in the running of the building, a desire to promote the use of the facilities by members of the community, a great emphasis on the needs of and benefits to the participants and not aimed at commercial profits.

55. The main considerations leading the Tribunal to its conclusion were:

(1) A high degree of sporting use does not make the use dissimilar to the use of a village hall (at [98]).

(2) Membership was not restricted to playing members of the various sports. Some 10 per cent of members were non-playing. There was a substantial club room available for non-sporting activities. (At [99].)

(3) Some 95 per cent of the users lived within the radius of six miles from the clubhouse, and the management of the Clubhouse was carried out by residents of the village, and there was a substantial degree of involvement by the local community in the planning and construction (at [100]).

(4) The degree of community involvement in running the building was high and the clubhouse was not run as a commercial venture and had never sought to make a profit from the provision of the facilities (at [101]).

(5) The leases to the club were from the local council at peppercorn rents (at [102]).

(6) The sporting facilities were provided at low cost, and there was a very high level of volunteer activity in the running and management of the club (at [103]).

(7) Membership was open to all sections of the community (at [103]).

56. In *Hanbury Charity v Revenue & Customs* [2007] UKVAT V20126, the Tribunal found that the construction by a charity of a community hall in a village did fall within Paragraph 6(b). HMRC advanced a number of arguments that Paragraph 6(b) did not apply, all of which were rejected by the Tribunal.

57. First, the Tribunal rejected an argument by HMRC that the actual use of the facility must be relevant to the charitable purpose of the charity providing the facilities (at [36]). The Tribunal considered that the charitable purpose of the charity was not material to the question whether, in fact, the requirements of Paragraph 6(b) were satisfied.

58. Second, the Tribunal rejected an argument by HMRC that Paragraph 6(b) was restricted to small scale charities that organise and administer a hall (at [37]-[38]).

59. Third, the Tribunal rejected an argument by HMRC based on EU law (at [39]-[42]).

60. Fourth, the Tribunal rejected an argument by HMRC that the charity itself did not intend to use the hall as a village hall (at [43]-[45]).

61. Fifth, the Tribunal rejected an argument by HMRC that as the Appellant retained ownership of the hall, it could terminate at any time the use of the hall by the local community (at [46]-[48]).

62. In *Jeanfield Swifts Football Club v Revenue & Customs* [2008] UKVAT V20689, the Tribunal found that Paragraph 6(b) applied to the construction by a non-profit football club of a new pavilion on an area of ground leased from a local authority for

the purposes of a football pitch. The club in that case let pitches out to other teams and allowed other various community associations to use the clubhouse from time to time. HMRC argued in that case that the building was there to provide football facilities, that the additional space for other members of the community was a secondary object, and that "A single issue football club was not a body which fell within the statutory definition". The reasoning of the Tribunal was brief, but it had no hesitation in finding that Paragraph 6 applied, and indeed, the Tribunal expressed "surprise that this matter should ever have got as far as it has".

63. In *The New Deer Community Association v Revenue & Customs* [2014] UKFTT 1028 (TC), the question was whether Paragraph 6(b) applied to the construction of a new pavilion, new car park and pitch at a park. The grounds previously already contained a village hall with a small committee room, a large committee room, and kitchen facilities used for coffee mornings, meetings and clubs (at [24]). The new pavilion comprised changing rooms with adjoining shower areas, referee rooms with showers, an entrance and foyer area, toilets, a meeting and kitchen room that could seat 6-8 people, and adjacent storage/garage areas to which there was no internal access (at [23]). The Tribunal in that case ultimately found that only the meeting and kitchen room in the new pavilion, comprising some 4.4% of the surface area of the new pavilion, fell within Paragraph 6, and that the remainder fell to be taxed at the standard rate (at [174]).

64. In terms of applicable legal principles, the Tribunal in that case (at [141]) considered that there were four questions to be addressed, namely:

(1) Were the facilities provided for the local community?

(2) Was the facility owned, organised and administered by the local community?

(3) Were social or recreational facilities provided or reasonably capable of being provided?

(4) Was the use similar to the use of a village hall?

65. The Tribunal in *New Deer* answered the first question affirmatively in relation to the whole of the new facilities (at [142]-[143]). The fact that the facilities were provided mainly for sporting activities was not material, as was confirmed by HMRC guidance. The facilities were available for the whole community and a wide variety of clubs other than football clubs had expressed interest in using them.

66. The Tribunal in *New Deer* answered the second question affirmatively in part in relation to the whole of the new facilities (at [144]-[147]). Bookings were on a first come first serve basis, but the football club alone was responsible for cleaning and maintenance. The Tribunal in that case considered that in the case of use like a village hall, each user would be responsible for cleaning and the community as a whole would be responsible for maintenance.

67. The Tribunal in *New Deer* considered the third and fourth questions together (see [148]). The Tribunal in that case appeared to consider that the answer to these

questions was one of fact, and that previous cases could be distinguished on the facts (at [158]). It considered that although there is no architectural test as such, architecture cannot be ignored as the design of a building may dictate the kinds of uses to which it can reasonably be put (at [161]). The Tribunal in that case also appeared to consider that in order for these questions to be answered affirmatively, it was necessary that the facilities be capable of multiple uses (at [162], [164], [169]). The Tribunal in that case also considered that it was relevant that there was in that case already a previously existing village hall which more closely served the functions of a village hall (at [166]). The Tribunal in that case dismissed the appeal in relation to parts of the new pavilion other than the meeting and kitchen room, apparently on the basis that the other parts were not suitable for any purpose other than their designed purpose of changing room, storage area and showers (at [167]).

68. The Tribunal was advised that *New Deer* is subject to a pending appeal.

The Tribunal's findings

69. One of the requirements of Paragraph 6 is that there must be use by "a charity" of the building in question. It is uncontentious that the Appellant is a charity.

70. The Appellant does not rely on sub-paragraph (a) of Paragraph 6, so that the only issue is whether Paragraph 6(b) is satisfied. Paragraph 6(b), read together with Item 2 in Group 5 of Schedule 8 VATA, requires that the building be "intended for use solely … as a village hall or similarly in providing social or recreational facilities for a local community".

71. The words "intended for use" refer to the intention at the time of construction of the building.

72. Much of the evidence in the case concerns the use to which the building has been put since it was constructed. HMRC contend that the actual use of a building following its construction may not necessarily be the use that was intended at the time of construction. The Tribunal accepts that this is so. However, the subsequent use of a building may nevertheless be a factor to be considered when determining the intention at the time of construction. In particular, where a building has been used in a certain way from the time it was built, this may lead to a strong inference that this was the intended use at the time of construction, absent evidence pointing to the contrary.

73. HMRC contend that in this case there is evidence to the contrary, namely the Appellant's applications for funding for the project. HMRC argue that these documents are contemporaneous evidence of the intention at the time of construction, and therefore the best evidence of that intention. HMRC also argue, and the Tribunal accepts, that the fact that the person who prepared these documents did not give evidence at the hearing should not prejudice HMRC or alter the fact that the Appellant bears the burden of proof. The Tribunal has given due weight to the contents of the funding applications, but still needs to consider these together with all of the other evidence in the case.

74. The Tribunal found Mr Stephen to be a credible witness and in general accepts his evidence. According to him, some 90% of the usage of the hall is by clubs or groups other than the Appellant club. A document has been put in evidence showing details of usage by other clubs. Mr Stephen acknowledged that the extent of use by non-sporting clubs was not foreseen, but he said that it was always intended that the clubhouse would be available for use by other clubs. That general intention is in fact supported by the funding applications (paragraphs 28 and 29 above), and appears consistent with the club's constitution (paragraph 27 above). Mr Stephen's evidence was that as early as January 2014, the clubhouse was being advertised as a "community venture" available for use by "any groups or individuals" (see paragraph 16 above).

75. When any building is constructed with an intended use of "village hall or similar", it will often be impossible to know in advance exactly which groups will use it to what extent, especially over the long term future. At the time of construction there will commonly be no more than a general intention that the building will be available for use by unspecified groups in the community who may wish to use it.

76. The funding applications give percentage figures for envisaged use of the clubhouse by different users and for different purposes. HMRC argue that according to these figures, at the time of construction intended usage by groups other than the Appellant was minimal. However, on its consideration of the evidence as a whole, the Tribunal is satisfied that the funding applications do not demonstrate an intention at the time of construction to limit the use of the clubhouse by other groups, or to reserve the principal usage of the clubhouse to the Appellant's own activities. The Tribunal is satisfied on the evidence as a whole that the actual usage of the clubhouse following its construction is consistent with what was intended at the time of construction, even if the actual amount of usage by other groups was not foreseeable in all its detail and may have significantly exceeded expectations.

77. The question is whether this intended use meets all of the requirements of Paragraph 6(b). This is ultimately a question of fact. Although previously decided cases may be of some assistance in identifying general approaches that have been taken in applying Paragraph 6(b), the decision in each case will depend on its own particular combination of circumstances. The burden of proof is on the Appellant to establish, on a balance of probability, that each of the separate requirements of Paragraph 6(b) is satisfied.

78. One requirement of Paragraph 6(b) is that the building must be used in providing "social or recreational facilities". To meet this requirement, it is sufficient that either "social" *or* "recreational" facilities are provided. A sporting facility is a "recreational" facility. Thus, even if the clubhouse were used for nothing other than rugby playing, it would still satisfy the definition of "social or recreational facilities". However, on the evidence, the clubhouse is in fact also used for a wide variety of other sporting, recreational and social activities.

79. A second requirement of Paragraph 6(b) is that the facilities must be provided to a "local community". The Tribunal accepts that where facilities are provided to people

over too large an area, it will not be possible to say that they are provided to a "local community". However, in a rural area the geographic size of a "local community" may be significantly larger than in an urban area. In a very remote and sparsely populated area, it may be larger still. The evidence of Mr Stephen was that although the membership of the Appellant club itself is spread across the whole of Caithness, when other users of the clubhouse are taken into account, approximately 85% of the usage of the clubhouse is by residents of Thurso or the immediate surrounding area. His evidence was that some rugby teams travel long distance to use the clubhouse facilities, but presumably in some cases this would be in order to play against a team local to Thurso. The extent to which the clubhouse is used for matches between two teams, both of which have travelled from afar to play against each other in Thurso, was not explored in the evidence. In any event, the Tribunal also considers that minor usage of facilities by persons from outside the local community will not of itself prevent the "local community" requirement from being satisfied.

80. Having regard to the geography of Caithness and the circumstances as a whole, the Tribunal is satisfied that the facilities in this case are provided to a "local community".

81. The remaining requirement of Paragraph 6(b) is that the facilities must be used as a "village hall or similarly". This is a separate requirement that must be met in addition to the two discussed above. In determining whether it is met, the Tribunal has taken into account in particular the following considerations.

(1) The clubhouse is used by a significant number of diverse community groups. The clubhouse is advertised as a "community venture" available for use by "any groups or individuals" (see paragraphs 16 and 74 above).

(2) The clubhouse was constructed by and is managed by a members' club on a non-commercial basis. The clubhouse is let out to other groups for modest rates, on the basis that users are responsible for their own cleaning.

(3) At the time of construction, the town hall in Thurso had recently ceased to be available for use as such, and the Appellant's clubhouse has played a role in filling that gap (compare paragraph 67 above).

(4) The clubhouse is located on council-owned land, which has been rented to the Appellant club for a peppercorn rent, on the basis that this will save the council the cost of maintaining the grounds, while ensuring that the grounds continue to be available for the Highland Games, charity, gala and other events unconnected to the Appellant club. Thus, even before the clubhouse was constructed, the Appellant club played a role in maintaining the publicly owned land on which the clubhouse is located for community use.

(5) A sporting pavilion or clubhouse is capable of being used as a "village hall or similarly" (see paragraphs 53 and 62 above).

(6) The Tribunal does not consider it decisive that the clubhouse is managed by one of the groups that use it, or that only members of the Appellant

club can be elected to its executive committee, which is ultimately responsible for management of the clubhouse. HMRC argue that a "village hall" must be "at the direction of the local community", whereas in this case the Appellant club can as it chooses grant or deny others access to the clubhouse. However, the Court of Appeal has rejected the suggestion that a "village hall" must be "owned, organised and administered by the local community" (see paragraph 45 above). Any charity managing a "village hall"-type building will normally have the legal right to admit or exclude others, but that is not determinative.

(7) However, the Tribunal takes into account that the Appellant club also uses the clubhouse for its own activities, and that its own needs were the motivation for building the clubhouse in the first place. Furthermore, the Appellant club gives priority to its own needs, in that bookings are made for rugby matches as soon as the fixtures for a season are published and others cannot book the clubhouse for those times. The Tribunal does consider this to be a material consideration weighing against the characterisation of the clubhouse as a "village hall or similar". However, this needs to be weighed together with all other considerations. The Tribunal takes into account that the needs of all users have been accommodated in practice. The Tribunal also takes into account that in practice bookings once made by others are honoured, even where they conflict with subsequent needs of the Appellant club.

(8) Given that 90% of the usage of the hall is by clubs or groups other than the Appellant club, it cannot be said that the majority of activities at the clubhouse are organised by the Appellant club itself (compare paragraph 50 above), or that use by groups other than the Appellant are merely secondary or ancillary (compare paragraphs 47 and 50 above). The direct users of the clubhouse are people (individuals and groups) from the local community.

(9) HMRC argue that the Appellant does not pay itself for its own use of the clubhouse, but charges others, with the consequence that the others are financially supporting the Appellant rather than *vice versa*. The Tribunal does not accept that argument. The Appellant club is not making a commercial profit from letting out the clubhouse. The Appellant club itself is ultimately financially responsible for all of the expenses of operating the clubhouse, and paid a significant part of the costs of construction. Those costs are defrayed to a degree by the amounts paid by others. There is no evidence that the others contribute an amount that is disproportionate to their use of the facility. Members of the Appellant club when letting the clubhouse for private purposes get no preferential rate.

(10) HMRC submit that the clubhouse has been let to a commercial company for an event. This may be a reference to the evidence that an Institute of Engineers used the clubhouse on one occasion when a local hotel was not available, and is interested in using the hall again. Presumably this was for a business event, rather than for a social or recreational event, although

the evidence is not clear about this. The document listing individuals and groups who have used the hall also indicates that on a few occasions a plumbing supplier has held "trade nights" at the clubhouse. The Tribunal considers that any village hall may on occasion be let to a commercial or professional entity for an event. This fact of itself does not alter its character.

(11) The Tribunal does not consider that there is any basis for reaching a different conclusion in relation to the changing room areas of the clubhouse. The Tribunal rejects the HMRC argument that changing rooms cannot be considered part of a "recreational facility". Furthermore, these are inherently capable of use by sporting clubs other than the Appellant club, for any kind of sport. The evidence is that one changing room is also used by a non-sporting group, and that one changing room is used mainly for storage. The fact that some parts of a village hall are hardly used, or even not used at all, would not of itself mean that they must be treated as not part of the village hall for purposes of Paragraph 6(b).

82. On the basis of the considerations above, the Tribunal finds that the facilities are used, and were at the time of construction intended to be used, as a "village hall or similarly".

83. The Tribunal therefore finds that all of the requirements of Paragraph 6(b) are satisfied in this case.

Conclusion

84. For the reasons above, this appeal is allowed.

85. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 05 AUGUST 2015