[2015] UKFTT 0421 (TC)

TC04598

Appeal number: TC/2014/04519

VAT – zero-rating – construction services – item 2 Group 5 Schedule 8 VATA 1994 – whether supply for relevant charitable purpose– whether supply to registered community amateur sports club made to a charity– appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WITNEY TOWN BOWLS CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE ASHLEY GREENBANK
MR JULIAN SIMS

Sitting in public at Oxford on 9 June 2015

Mr Alan Scholan for the Appellant

Mr Jonathan Davey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Witney Town Bowls Club (the "Club") against a decision of the respondents ("HMRC") contained in a letter dated 13 May 2014 that the supply to the Club of services relating to the construction of a new clubhouse were not zero-rated for value added tax ("VAT") purposes and, in particular, that the supply of those services did not fall within item 2 of Group 5 of Schedule 8 to the Value Added Tax Act 1994 ("VATA 1994").

Evidence

2. An agreed bundle of documents was produced for the hearing.

3. We also heard oral testimony on oath from Mr Brian Bloomfield. Mr Bloomfield is the current Captain of the Club, a member of its Management Committee and a former President of the Club. Mr Bloomfield was cross-examined by Mr Davey on behalf of the respondents. We found Mr Bloomfield to be a credible and reliable witness and we accepted his evidence.

4. On the basis of the documents and the oral testimony of Mr Bloomfield, we find the facts as set out below.

Facts

The Club

5. The appellant is a bowls club. The Club has been in existence for over 100 years. It is situated at The Leys Recreation Ground, Witney, Oxfordshire. It is registered as a community amateur sports club ("CASC") under section 658 of the Corporation Tax Act 2010.

6. The Club is not registered as a charity under the Charities Act 2011. When the Club registered as a CASC in 2006, the Club considered whether or not to apply for charitable status. At the time, the Club took the view that the benefits of CASC status – principally reduced business rates and the availability of gift aid relief on contributions – were the main benefits that the Club wished to obtain. The additional benefits of being a charity did not, in the Club's view, justify the additional administrative burden that charitable status would entail.

7. The objectives of the Club are set out in its constitution, which states:

> "The Club is constituted to provide facilities for and to promote participation of the whole community in playing and the organisation of club and competitive bowls."

8. The constitution provides that, in order to become a member, a person must be proposed and seconded by an existing member. Although this provision remains in the Club's constitution, the process is not used. In practice, prospective members simply apply. Membership is open to anyone irrespective of ability.

9. The Club currently has approximately 120 members. They are divided into playing members and social members. Social members are entitled to use all of the facilities of the Club except that they do not play. The distinction is maintained in order to identify those members in respect of whom the Club has to pay affiliation fees to sporting bodies, such as Sport England and the English Short Mat Bowling Association.

10. Mr Bloomfield estimated that 80% of members are playing members and 20% of members are non-playing or social members. These proportions have changed significantly in recent years. In particular, the proportion of social members has significantly increased following the construction of the clubhouse. In previous seasons, the proportion of playing members was higher, probably of the order of 95%.

11. Almost all of the members are drawn from the local community. Most of the members are resident within a 7 to 8 mile radius of Witney.

12. Playing members pay an annual subscription. The fee for full membership is currently £65 per annum; there are reduced fees for membership for the indoor season and for junior members. This subscription entitles members to use the facilities throughout the year. Members also pay match fees as a contribution to the refreshments that are available during matches and competition fees to participate in club and inter-club competitions.

13. Members can invite visitors to play, for which there is a nominal charge. In addition, as the bowls club is located in a public park, members of the public can use the outdoor greens at a price of £2.40 for a one hour session.

14. The club is a not for profit organization. It has an annual income of over £25,000, but its fees are set at a rate to ensure a small annual surplus. Any surplus is retained for the benefit of the club. No distributions are made to members.

15. No payment is made to any officer of the club or to any of the staff. The club is run entirely by volunteers.

16. The Club is supported significantly by Witney Town Council. Witney Town Council owns the property on which the clubhouse is built. The club leases the property for a nominal rent. In addition, the Town Council maintains the outdoor bowling greens. For this service, it charges the Club a fee, but that fee is substantially less than the commercial cost of that service.

The building of the new clubhouse

17. In the mid 2000's, the club began to consider the possibility of replacing its existing clubhouse. The club had expanded its membership and was in need of larger

and improved facilities, in particular, for indoor bowls. The old clubhouse had been built in the 1980's. It was of wooden construction and badly insulated. The kitchen and toilet facilities were poor and the building itself was in need of significant and costly repairs. Grants which might be available from the various funding bodies were generally not available for repairing the existing structure.

18. For all of these reasons, the club began to explore the possibility of constructing a new clubhouse. The project was run by the Club's Management Committee which arranged the finance and instructed architects and planning consultants. However, it engaged with other local groups as part of that process.

19. The Town Council was very much involved in the project. The Club approached the Council at an early stage as it needed more land in order to construct the larger facilities that it required. It also sought the Council's views as to whether or not the new clubhouse would be acceptable to the planning authorities as the facilities were located in an existing conservation area. The Council was generally supportive of the project and even provided some funding for the project in the form of an interest free loan.

20. The Club also sought the support of other local community groups. Various groups were asked for indications of their support for the project as part of the planning process and to indicate whether or not they might be willing to hire the facilities once they had been completed.

21. The design of the building reflected the fact that its principal purpose was to act as a clubhouse for the Club. It was important, for example, that the floor area was sufficiently large to accommodate indoor bowling. The new pavilion also included male and female changing facilities, toilets, a kitchen, a bar and storage space. However, the design also sought to permit flexible use of the building. This is apparent from the planning application and design statement. In particular, the building can be divided so that a meeting room can be created, but access can be maintained to the changing rooms and toilets while matches are played on the outdoor greens. Various applications for grant funding refer to the possibility of use of the building by other community groups. In addition, the Club sought and obtained amendments to its lease to enable the clubhouse to be hired out to other groups.

22. The planning process and applications for grants took several years. Mr Bloomfield referred to at least one planning application which had lapsed because the Club had not received the grants for which it had applied within the required timeframe.

23. The total cost of the project was £273,039: of this amount approximately £120,000 was raised by the Club from its own funds or directly from members, £70,000 was raised in the form of loans and grants from sporting bodies such as Sports England and Bowls England and the balance was raised from loans and grants from the District Council and Town Council.

24. The final planning permission was received in late 2013. The old clubhouse was demolished in January 2014 and work began on the construction of the new building. The construction work was undertaken by Cooper Construction Limited of Witney. We have seen invoices from Cooper Construction Limited dated 13 March 2014, 31 March 2014 and 2 April 2014 in respect of the early stages of the project. VAT is charged on these invoices.

25. On 2 April 2014, the Club issued a certificate for zero-rated building work in the form prescribed by HMRC in HMRC VAT Notice 708 for the purposes of Note 12 of Group 5 of Schedule 8 to VATA 1994. In that certificate, Mr Scholan on behalf of the Club certified that the building was to be used for a relevant charitable purpose namely by a charity "as a village hall or similarly in providing social or recreational facilities for a local community".

26. The building work was completed in August 2014. The Club took possession of the new clubhouse on 15 August 2014.

Use of the new clubhouse

27. The clubhouse is available all year round. It is open 7 days a week from 10.30am to 11pm other than on Christmas Day. It has been used on every day since it was completed.

28. The Club's Management Committee handles any bookings of the facilities. The clubhouse is primarily used for the Club's sporting and social activities. However, the facilities are also used by other groups. There are two regular bookings for several hours each week. Other bookings have been made on an ad hoc basis.

29. The Club charges a fee to those who hire the clubhouse. The cost of hiring the clubhouse is £30 for a morning or afternoon session and £50 for the evening. There are separate charges for the use of the bar and the kitchen facilities.

30. Mr Davey, for HMRC, raised the question as to whether the Club's events were given priority over those of other groups. Mr Bloomfield assured the Tribunal that no priority was given to the Club or its members in booking the clubhouse. We doubt, given that the building is primarily used for the Club's activities, that a Club event would be cancelled in order to accommodate an external booking. However, we do accept Mr Bloomfield's evidence that the issue has not arisen in practice and that, if there were to be a clash between a Club event and a potential external booking, efforts would be made to adjust timings to accommodate both.

Background

Applicable law

31. Section 30 VATA 1994 provides, in part:

> "30 **Zero-rating**
>
> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section -
>
> (a) no VAT shall be charged on the supply; but
>
> (b) it shall in all other respects be treated as a taxable supply;
>
> and accordingly the rate at which VAT is treated as charged on the supply shall be nil.
>
> (2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified."

32. Item 2 of Group 5 of Schedule 8 to VATA 1994 includes:

> "The supply in the course of the construction of:
>
> (a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or 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."

33. There are a number of notes to Group 5. Note 6 provides:

> "(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."

34. And Note 12 provides:

> "(12) Where all or part of a building is intended for use solely for a relevant residential purpose or 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."

Agreed issues

35. The parties agreed that the supplies made by Cooper Construction Limited to the Club were supplies made in the course of construction of a building for the purpose of item 2 of Group 5. We are therefore concerned only with whether or not the building was "intended for use solely for a relevant charitable purpose" within paragraph (a) of Item 2.

36. The parties' submissions proceeded on the assumption that it is necessary for the Club to show that it was a "charity" for VAT purposes if zero-rating is to apply. The point was not argued before the Tribunal, but, in any event, we take the view that the combined effect of the requirement in Note 6 that use for a relevant charitable purpose means use "by a charity" in one of the ways specified in Note 6 and the requirement in Note 12(a) that the supply must be made to the person who intends to use the building for that purpose means that the relevant supply must be made to a charity.

37. Note 12 also contains a requirement, in paragraph (b), that a supply should not be taken as relating to a building intended for use for a relevant charitable purpose unless the recipient of the supply has given a certificate in the form specified by HMRC to the person making the supply stating that the supply relates to such a building. In the present case, the certificate was not issued to Cooper Construction Limited until 2 April 2014 and so was not issued before the supply was made. This point was argued before the Tribunal. The Appellants referred to paragraph 17.6 of HMRC VAT Notice 708 which sets out circumstances in which HMRC might allow a supplier to adjust its VAT charge on receipt of a belated certificate. HMRC has subsequently confirmed that HMRC would be willing to exercise its discretion in accordance with VAT Notice 708 to allow the Club's supplier to adjust its VAT charge if the Tribunal were to decide that the Club is a charity and that the requirements of item 2 of Group 5 to Schedule 8 to VATA 1994 were otherwise met. No decision is therefore required from the Tribunal on that issue.

Issues for the Tribunal

38. The issues before us were therefore:

(a) whether the Club is a "charity" for the purpose of item 2 of Group 5 of Schedule 8 to VATA 1994;

(b) if the Club is a "charity", whether the new clubhouse was intended for use by the Club either: (i) "otherwise than in the course or furtherance of a business" within paragraph (a) of Note 6 to Group 5 of Schedule 8; or (ii) as "a village hall or similarly in providing social or recreational facilities" for a local community within paragraph (b) of Note 6 to Group 5 of Schedule 8.

Is the Club a Charity?

Applicable law

39. The first question is whether the Club is a charity for VAT purposes. We have set out below the main provisions to which we were referred.

40. Paragraph 1 of Schedule 6 to the Finance Act 2010 provides:

> "1 **Definition of "charity" etc.**
>
> (1) For the purposes of the enactments to which this Part applies "charity" means a body of persons or trust that:
>
> (a) is established for charitable purposes only,
>
> (b) meets the jurisdiction condition (see paragraph 2),
>
> (c) meets the registration condition (see paragraph 3), and
>
> (d) meets the management condition (see paragraph 4).
>
> (2) For the purposes of the enactments to which this Part applies:
>
> "charitable company" means a charity that is a body of persons;
>
> "charitable trust" means a charity that is a trust.
>
> (3) Sub-paragraphs (1) and (2) are subject to any express provision to the contrary.
>
> (4) For the meaning of "charitable purpose", see section 2 of the Charities Act 2011 (which:
>
> (a) applies regardless of where the body of persons or trust in question is established, and

(b) for this purpose forms part of the law of each part of the United Kingdom (see sections 7 and 8 of that Act)).”

41. Paragraph 3 of Schedule 6 to the Finance Act 2010 provides:

“3 **Registration condition**

(1) A body of persons or trust meets the registration condition if -

(a) in the case of a body of persons or trust that is a charity within the meaning of section 10 of the Charities Act 2011, condition A is met, and

(b) in the case of any other body of persons or trust, condition B is met.

(2) Condition A is that the body of persons or trust has complied with any requirement to be registered in the register of charities kept under section 29 of the Charities Act 2011.

(3) Condition B is that the body of persons or trust has complied with any requirement under the law of a territory outside England and Wales to be registered in a register corresponding to that mentioned in sub-paragraph (2).”

42. Paragraph 7 of Schedule 6 to the Finance Act 2010 provides, in part:

“7 **Enactments to which this Part applies**

The enactments to which this Part applies are the enactments relating to:

(a)…

(b)…

(c)…

(d) value added tax;”

43. Paragraph 33 of Schedule 6 to the Finance Act 2010 provides:

“(1) Part 1 is treated as having come into force on 6 April 2010.

(2) But the definitions of “charity”, “charitable company” and “charitable trust” in that Part do not apply for the purposes of an enactment in relation to which, on that date, another definition applies until such time as that other definition ceases to have effect on the coming into force of provision made by or under Part 2.”

44. Section 1 of the Charities Act 2011 provides:

“1 **Meaning of “charity”**

(1) For the purposes of the law of England and Wales, "charity" means an institution which -

(a) is established for charitable purposes only, and

(b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.

(2) The definition of "charity" in subsection (1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment."

45. Section 6 of the Charities Act 2011 provides:

"6 **Registered sports clubs**

(1) A registered sports club established for charitable purposes is to be treated as not being so established, and accordingly cannot be a charity.

(2) In subsection (1), "registered sports club" means a registered club within the meaning of Chapter 9 of Part 13 of the Corporation Tax Act 2010 (community amateur sports clubs)."

46. Paragraph 5 of the Finance Act 2010, Schedule 6, Part 1 (Further Consequential and Incidental Provision etc.) Order (SI 2012/735) provides:

"5 **Definition of "charity" for the purposes of value added tax**

(1) The definition of "charity" in section 1(1) of the Charities Act 2011 ceases to apply for the purposes of enactments relating to value added tax to which it would otherwise apply.

(2) Accordingly, by virtue of paragraph 33(2) of Schedule 6 to the Finance Act 2010, the definition of "charity" in Part 1 of that Schedule applies for the purposes of those enactments."

47. We also refer to certain other provisions of the Charities Act 2011 in the course of this decision. For ease of reference, these other provisions are set out in the Appendix to this decision.

The parties' arguments

48. Mr Scholan submitted, on behalf of the Club, that it is not necessary for the Club to be a registered charity in order to qualify for zero-rating under item 2 of Group 5 of Schedule 8. He referred to previous decisions of the VAT and Duties Tribunal in *Jeanfield Swifts Football Club* (VAT Decision 20689) and *Sport in Desford* (VAT Decision 18914). In *Jeanfield Swifts*, the appellant was a CASC and was not a registered charity. In *Sport in Desford*, the appellant was neither a CASC nor a registered charity. In both cases, the appellants successfully appealed against decisions that construction services could not be zero rated.

49. Mr Scholan submitted further that it was only necessary for the Club to meet the test under the general law that the Club be acting for charitable purposes. He referred once again to the decision of the VAT and Duties Tribunal in *Jeanfield Swifts.* In that case, the Tribunal relied on the decision of the House of Lords in *Special Commissioners of Income Tax v Pemsel* [1891] AC 531 and the statement of the four principal divisions of "charity" as set out in the judgment of Lord Macnaghten where he said (at page 583)

> ""Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

50. He submitted that the Club should fall within the head applicable to organizations for "other purposes beneficial to the community".

51. Mr Scholan acknowledged that the Club would also have to demonstrate that its purpose was directed to the public benefit. In this respect, Mr Scholan referred to a passage from the textbook, Piccarda, *Law and Practice Relating to Charities* (4th edition, 2010) pages 29-37. He noted that to meet this test the Club had to demonstrate two things: that its activities provided "a benefit"; and that benefit was available to the public at large. He argued that the Club met these requirements. Its purpose was to promote the advancement of sport which brought health and well-being benefits to its participants. The Club was available to all who wanted to participate.

52. Mr Scholan also referred to the Charity Commission publication, "Charitable Status and Sport" (2003). He pointed in particular to the references in that paper to the concept of a "charitable CASC" (for example, in paragraph 34) in support of his submission that it was possible to be both a CASC and a charity for VAT purposes.

53. At the hearing, Mr Davey, on behalf of HMRC, made a simple submission that the Appellant is a CASC and by virtue of section 6 of the Charities Act 2011 a CASC cannot be a charity. We asked Mr Davey to clarify this part of his submissions. He did so in the form of written submissions made after the hearing. The Club had an opportunity to comment on those submissions.

54. Mr Davey says that the definition of "charity" that applies for VAT purposes is that set out in paragraph 1 of Schedule 6 to the Finance Act 2010. That definition applies for the purpose of enactments relating to VAT by virtue of paragraph 7(1) of Schedule 6.

55. Although most of Part 1 of Schedule 6 to the Finance Act 2010 (which includes paragraph 1) is treated as having come into force on 6 April 2010, the definition of "charity" in paragraph 1 did not come into force for VAT purposes until 1 April 2012. That is the effect of paragraph 33 of Schedule 6 which provides that the definition does not apply for the purposes of enactment if on 6 April 2010 another definition applies. In that case, the old definition continues to apply until it ceases to have effect

on the coming into force of a provision made under Part 2 of Schedule 6 to the Finance Act 2010.

56. Prior to 1 April 2012, Mr Davey says the relevant definition was found in section 1(1) of the Charities Act 2011. It ceased to apply for VAT purposes with effect from 1 April 2012 as a result of paragraph 5 of the Finance Act 2010, Schedule 6, Part 1 (Further Consequential and Incidental Provision etc.) Order (SI 2012/735) (the "2012 Order"). The 2012 Order is made under paragraph 29 of Schedule 6 to the Finance Act 2010, a provision which is within Part 2 of that Schedule. So, by virtue of paragraph 33(2) of Schedule 6, the definition in paragraph 1(1) of Schedule 6 took effect for the purposes of enactments relating to VAT from that date.

57. Mr Davey then refers to section 6(1) of the Charities Act 2011, which provides that a registered sports club (which includes a CASC) established for charitable purposes is to be treated as not so established and accordingly cannot be a "charity".

58. He submits that section 6(1) does not define the term "charity". Instead it is necessary to refer to the definition of "charity" in section 1(1). However, section 1(2) provides that the definition in section 1(1) does not apply for the purposes of an enactment if a different definition applies by virtue of that or any other enactment. Mr Davey says that VATA 1994 is an enactment to which a different definition applies (namely, the definition in paragraph 1 of Schedule 6 to Finance Act 2010) and accordingly when section 6(1) states that a registered CASC cannot be a charity that includes a charity within the meaning of VATA 1994.

59. For this reason, Mr Davey submits the Club cannot be a charity for VAT purposes and its appeal must fail. If and to the extent that the decisions in *Jeanfield Swifts* and *Sport in Desford* were good law, that is no longer the case. They were decided against a different statutory background to that which applied when the construction services were supplied to the Club. For similar reasons, it is no longer possible to be a "charitable CASC".

60. In the alternative, Mr Davey submitted that, even if section 6(1) of the Charities Act 2011 did not apply, the Club is still not a charity within the meaning of the definition in Schedule 6 to the Finance Act 2010. In order to be a charity within the terms of that definition, the Club had to meet the four conditions set out in sub-paragraphs (a) to (d) of paragraph 1. They are that: the Club has to be established for charitable purposes only (the "charitable purpose condition"); the Club must meet the jurisdiction condition (set out in paragraph 2); the Club must meet the registration condition (set out in paragraph 3) and the Club must meet the management condition (set out in paragraph 4).

61. Mr Davey says that the Club did not meet the charitable purpose condition in paragraph 1(1)(a). Paragraph 1 of Schedule 6 to Finance Act 2010 refers to the definition of "charitable purpose" in section 2 of the Charities Act 2011. Section 2 requires a charity to have a purpose which falls within section 3 of the Charities Act 2011 and which is for the public benefit. Mr Davey questioned whether the club would be regarded as having a purpose falling within section 3. He noted that the

most likely purpose to apply to the Club was that of the advancement of amateur sport in section 3(1)(g). However, he doubted whether the Club could be said to be established for charitable purposes *only* as required by section 1(1)(a) given the level of social membership of the Club.

62. In any event, Mr Davey argued, the Club could not be regarded as being for the public benefit within section 4 of the Charities Act 2011. Public benefit was determined by reference to the general law. The Club had to show that there was a benefit to the public at large or to a significant section of the public. The Club did not meet these case law tests. It was a private members' club: it required new members to be proposed and seconded by an existing member; membership was not free; and members had to pay match fees in order to play.

63. Furthermore, the Club did not meet the registration condition in paragraph 1(1)(c). This condition requires that most UK charities had to be registered under the Charities Act 2011. The only exceptions to the requirement to register are set out in section 30(2) of the Charities Act 2011. The Club was not excluded from the requirement to register under any of those conditions. In particular, the income of the Club exceeded £5,000 and so the Club was not excluded from the requirement to register under paragraph (d) of section 30(2) of the Charities Act 2011.

Discussion

64. We agree with Counsel for HMRC that "charity" in Note 6 to Group 5 of Schedule 8 to VATA 1994 has the meaning given in paragraph 1 of Schedule 6 to the Finance Act 2010. That definition has effect for enactments relating to VAT by virtue of paragraph 7 of Schedule 6 to the Finance Act 2010. That definition applied at the time of the provision of the construction services to the Club.

65. For completeness, we should add that, as Counsel for HMRC described, the definition in paragraph 1 of Schedule 6 to the Finance Act 2010 has applied since 1 April 2012 as a result of the interaction of paragraph 33 of Schedule 6 and the 2012 Order. Paragraph 33 of Schedule 6 provides that that definition does not apply for the purposes of an enactment if on 6 April 2010 another definition applies, in which case, the former definition continues to apply until it ceases to have effect on the coming into force of a provision made under Part 2 of Schedule 6 to the Finance Act 2010. The definition of "charity" that applied for the purposes of VATA 1994 on 6 April 2010 was that contained in section 1(1) of the Charities Act 2006 which came into effect on 1 April 2008. That definition was replaced by the definition in section 1(1) of the Charities Act 2011, which then ceased to apply for VAT purposes with effect from 1 April 2012 when paragraph 5 of the 2012 Order took effect.

66. The definition of "charity" in paragraph 1 of Schedule 6 to the Finance Act 2010 requires that a "charity" must fulfil four conditions: the charitable purpose condition, the jurisdiction condition, the registration condition and the management condition. But before we turn to the relevant conditions in paragraph 1(1) of

Schedule 6, we will address the first argument made by Mr Davey, namely that regarding the application of section 6(1) of the Charities Act 2011.

67. Section 6(1) provides that a CASC established for charitable purposes "is to be treated as not being so established and accordingly cannot be a charity". Mr Davey's argument is essentially that, when applying section 6 for these purposes, the term "charity" in section 6(1) has to be given the meaning that it has for the purposes of VAT (by virtue of paragraph 1 of Schedule 6 to the Finance Act 2010) and so a registered CASC, even if it is otherwise charitable, cannot be a charity for VAT purposes.

68. We do not agree that section 6(1) of the Charities Act 2011 applies in quite the manner suggested by Mr Davey. The Charities Act 2011 is not "an enactment relating to the value added tax". It is an enactment relating to the regulation and registration of charities. Paragraph 7 of Schedule 6 to the Finance Act 2010 does not therefore apply and so the definition in paragraph 1 of Schedule 6 does not apply. In our view, the term "charity" in section 6(1) bears the meaning given in section 1(1) of the Charities Act 2011.

69. That does not mean that section 6(1) of the Charities Act 2011 is not relevant to this case. If the Club is to meet the charitable purpose condition in paragraph 1(1)(a) of Schedule 6 to the Finance Act 2010, it must be established "for charitable purposes only". "Charitable purposes" has the meaning given in section 2 of the Charities Act 2011 (see paragraph 1(4) of Schedule 6). Section 2, in turn, requires a charity to have a purpose which falls within section 3 and which is for the public benefit as described in section 4.

70. Section 6(1) of the Charities Act 2011, however, provides that a registered CASC is to be treated as not being established for "charitable purposes" within the meaning of section 2 of the Charities Act 2011. The question is whether or not section 6(1) should apply when applying the definition in section 2 for the purposes of paragraph 1 of Schedule 6 to the Finance Act 2010. We think that it should.

71. Part 1 of Schedule 6 to the Finance Act 2010 provides a new definition of "charity" for most tax purposes. It adopts many of the concepts of the definition in the Charities Act 2011 (and previously in the Charities Act 2006), but it differs from that definition in in two important respects: first, it permits a charity established under the laws of another jurisdiction to be treated as a "charity" for tax purposes and so qualify for UK tax reliefs; second, it introduces a new requirement that the managers of the charity must be "fit and proper persons" if the charity is to remain eligible for those reliefs.

72. Subject to those two points, it seems to us that the intention was to align the definition of "charity" for most tax purposes with that in the Charities Act. For the purpose of the Charities Act 2011, a CASC is treated, by virtue of section 6(1) of that Act, as not being established for charitable purposes and so cannot be a charity. The position was the same under the Charities Act 2006, which contained (in section 5(4))

a provision equivalent to that in section 6(1) of the 2011 Act. We cannot discern any intention in the scheme of the legislation for the position to be any different for tax purposes as a result of the introduction of the definition in paragraph 1 of Schedule 6 to the Finance Act 2010. Indeed, the legislation preserves the distinction between a registered charity and a registered CASC.

73. It follows, in our view, that, even if the Club could show that it is established for charitable purposes, it must be treated as not being so and so the Club cannot meet the charitable purpose condition in paragraph 1(1)(a) of Schedule 6. As a result, the Club cannot be a charity for the purpose of Note 6 to Group 5 of Schedule 8 to VATA 1994.

74. In any event, in our view, the Club is not established for charitable purposes only and so does not meet the charitable purpose condition. As Counsel for HMRC pointed out in his submissions, in order to meet that condition, a charity has to have a purpose which falls within section 3 of the Charities Act 2011 and which is for the public benefit.

75. We accept that the Club is established for the purpose of the advancement of amateur sport (as set out in section 3(1)(g) of that Act). However, we doubt that the Club could be said to be established for charitable purposes *only* as required by paragraph 1(1)(a) of Schedule 6 given the proportion of social members that it now has. The social functions of the Club are not part of a charitable purpose. In this respect, we note that the Charity Commission in its publication "Charitable Status and Sport" (2003) to which we were referred, states (at paragraphs 32 and 33):

> "32. The provision of facilities for use by members intending only to take advantage of the club's social facilities is not charitable, so the club's constitution could not include a 'social' membership category.
>
> 33. This does not mean, though, that a charitable CASC cannot include social facilities, such as a bar, on its premises. It simply means that activities of this nature must be operated by a separate non-charitable organisation, such as a social club, to be run on an arm's length basis from the charity."

76. This suggests that, even if our interpretation of the scheme of the legislation is not correct, the Club would need to reorganize its activities if it were to be treated as being established for charitable purposes only and so meet the charitable purpose condition.

77. We take some support, however, for our reading of the scheme of the legislation from the other conditions in paragraph 1 of Schedule 6 to the Finance Act 2010 and, in particular, the registration condition (paragraph 1(1)(c)).

78. The registration condition is set out in paragraph 3 of Schedule 6. It is divided into two parts. An institution which is a charity within section 10 of the Charities Act 2011, must meet "Condition A". Condition A is that the institution has complied with any requirement to be registered in the register of charities kept under section 29 of the Charities Act 2011. Other institutions must meet "Condition B". Condition B is

that the institution has complied with any requirement under the law outside England and Wales to be registered.

79. The definition of charity in section 10 of the Charities Act 2011 is essentially the definition in section 1(1) of the Act, but excluding certain ecclesiastical bodies. Section 1(1) of the Charities Act 2011 defines a "charity" simply as an institution that is established for charitable purposes only and which is subject to the jurisdiction of the High Court. Paragraph 3 of Schedule 6 therefore allows the registration condition to be satisfied by an institution which is under the jurisdiction of the High Court if it meets Condition A and by an institution which is established in another jurisdiction if it meets Condition B.

80. The Club, whose constitution is governed by English law, would be subject to the jurisdiction of the High Court and it would therefore have to satisfy Condition A if it were to meet the registration condition. Condition A is set out in paragraph 3(2) and requires the institution to have "complied with any requirement to be registered in the Register of Charities kept under section 29 of the Charities Act 2011".

81. The requirement to register is set out in section 30 of the Charities Act 2011. It requires every charity to register unless it falls within the one of the exceptions set out in sub-section (2) of that section. Section 30 sets out a series of exceptions, none of which, with the possible exception of that in paragraph (d), can apply to the Club. Paragraph (d) is an exception for small charities whose "gross income" does not exceed £5,000. The Club's income exceeds £5,000 so it cannot meet this test.

82. The Club is not registered under the Charities Act 2011 and so does not meet the registration condition.

83. For the reasons that we have given above, in our view, the Club is not a charity within the definition in paragraph 1 of Schedule 6 to the Finance Act 2010 and so cannot be a charity for the purposes of Note 6 to Group 5 of Schedule 8 to VATA 1994. It follows that this appeal must fail. If, however, we are not correct on that matter, we have set out our views on the other maters that were raised before us.

Is the Clubhouse intended for use "otherwise than in the course or furtherance of a business"?

Applicable law

84. The second question before the Tribunal was whether the clubhouse was intended for use "otherwise than in the course or furtherance of a business" within paragraph (a) of Note 6 to Group 5 of Schedule 8 VATA 1994.

85. Note 6 to Group 5 Schedule 8 VATA 1994 provides, in part:

> "(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) ..."

86. Section 94 VATA 1994 provides, in part:

"94 **Meaning of "business" etc.**

(1) ……..

(2) Without prejudice to the generality of anything else in this Act, the following are deemed to be the carrying on of a business -

(a) the provision by a club, association or organisation (for a subscription or other consideration) of the facilities or advantages available to its members; …."

The parties' arguments

87. Mr Scholan, on behalf of the Club, submitted that the clubhouse is intended to be used by the Club "otherwise than in the course or furtherance of a business". In support of his submission, he referred to the fact that the Club is run by volunteers, that the rates that it charges by way of subscription and green fees to its members are a fraction of the commercial costs, that the Club could not operate without the support of the Town Council and that the profile of the Club's collection of fees and subscriptions does not follow any logical commercial pattern. Mr Scholan referred to the judgment of Gibson J in *Customs & Excise Commissioners v Lord Fisher* [1981] STC 238 in support of his arguments.

88. In response, Mr Davey referred to section 94 VATA 1994. Sub-section (2) of that section provides that the "provision by a club association or organisation (for a subscription or other consideration) of the facilities or advantages available to its members" are deemed to be the carrying on of a business for VAT purposes. He says that the Club's activities fall full-square within the provisions of section 94(2). Under section 94(2), the Club is treated as carrying on a business and the clubhouse is intended to be used in the course of that business. He cited, by way of example, in support of his submission, the decision of the VAT and Duties Tribunal in the case of *Hunmanby Bowling Club* (VAT Decision 12136).

Discussion

89. We agree with Counsel for HMRC. The Club is treated as carrying on a business for VAT purposes by virtue of section 94(2) VATA 1994. It provides facilities for its members who pay a subscription. The fact that those subscriptions are, in effect, subsidised by the Town Council and that the Club does not seek to make a profit does not affect the analysis. The clubhouse is used for the purpose of that deemed business and so the construction services cannot fall within paragraph (a) of Note 6 to Group 5 of Schedule 8 to VATA 1994.

Is the clubhouse intended for use as "a village hall or similarly in providing social or recreational facilities for a local community"?

Applicable law

90. The final question before the Tribunal was whether the clubhouse was intended for use as "a village hall or similarly in providing social or recreational facilities for a local community" within paragraph (b) of Note 6 to Group 5 of Schedule 8 to VATA 1994.

91. Note 6 to Group 5 of Schedule 8 to VATA 1994 provides, in part:

> "(6) Use for a relevant charitable purpose means use by a charity in either or both the following ways, namely -
>
> (a) …….;
>
> (b) as a village hall or similarly in providing social or recreational facilities for a local community."

The parties' arguments

92. On this issue, Mr Scholan argued that the building was intended for use in a similar manner to a village hall for the benefit of the local community. Other community groups either use or plan to use the facilities and changes were made to the design of the building to ensure that it was flexible enough to accommodate use by other community groups.

93. He referred to two cases in support of his argument. The first was *Sport in Desford*, to which we have referred above. In that case, the Tribunal states, at paragraph 104 of its decision:

> "In relation to whether the use is similar to the use of a village hall, the test of similarity does not relate to the physical description of the building. It is not necessary for the activities to encompass the same and 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 is in reality to the community as such, and, on the other hand, buildings which are commercial operations. This is ultimately a question of fact."

94. Mr Scholan points to the involvement of other community groups. In this respect, he argues that the supply is in reality made to the local community and not to a commercial operation.

95. Mr Scholan also referred to the decision of the Court of Appeal in *Jubilee Hall Recreation Centre Limited v Customs & Excise Commissioners* [1999] STC 381. He referred in particular to the passage in the decision of Vinelott J at page 390:

> "In this context, the plain purpose of sub-para (b) was in my judgement to extend the relief in sub-para (a) to the case where a local community is the

> final consumer in respect of the supply of the services, including the reconstruction of a building, in the sense that the local community is the user of the services (through a body of trustees or a management committee acting on its behalf) and in which the only economic activity is one in which they participate directly."

96. Again, Mr Scholan submitted that the local community was the intended end-user of the clubhouse and that was the intention from the early days of the project. He accepted that that intention may not yet have come to fruition in that the Club, through its Management Committee, remains the manager of the clubhouse and its facilities, but it was always intended that the clubhouse was for use of the local community.

97. Mr Davey says that the wording of paragraph (b) indicates that it is not only what services are provided at the building, or to whom they are provided, that is important, but manner in which the services are provided. The word "similarly" qualifies the nature of the services provided. It is not sufficient that the building is intended to provide social and recreational facilities; it is a question of how the building is run.

98. He refers to the decision of the VAT and Duties Tribunal in *Ormiston Charitable Trust v Commissioners of Customs and Excise* (VAT Decision 13187) [1995] VATDR 180 in which the Tribunal Chairman states:

> "In my judgment, when an enactment uses the adverb 'similarly', as here, it is both limiting or qualifying the scope of that provision and indicating that there is a model against which whatever it is that is sought to bring within the provision is to be examined."

and later:

> "It is not enough that by using the building the charity provides (say) recreational facilities and these are for the benefit of the community: something more is required unless the word 'similarly' is to be deprived of all content."

99. He cites in support of his argument the same passage from the *Jubilee Hall* case as Mr Scholan, but he emphasises the reference in that passage not only to the local community being the user of the facilities, but that it should do so through some form of management committee or body of trustees acting "on its behalf" i.e. on behalf of the local community.

100. Mr Davey says the clubhouse does not meet these criteria: the clubhouse is managed by the Club's Management Committee on behalf of the Club not on behalf of the local community; the project was conceived by the Club principally to provide the Club with better facilities; the project was managed by the Club's officials for the benefit of the Club; the vast majority of the funding was provided by sports-related bodies in order to provide improved sporting facilities; the Club's use of the building,

dwarfs any use by other groups for their activities; and the prices charged to other groups for use of the facilities are not nominal.

Discussion

101. In the course of argument, we have been referred to various cases in which the courts and tribunals have sought to apply the test in Note 6(b). There are several other authorities that have not been mentioned that we have also reviewed. We do not intend to embark on a widespread review of those authorities in the decision. We will however identify those cases from which we have gleaned some assistance in the application of Note 6 to the facts of this case.

102. The one case to which we should refer at the outset is the judgment of the Court of Appeal in the *Jubilee Hall* case to which both the Appellants and HMRC referred in this case. The parties both referred to a particular passage from the judgment of Vinelott J in which he describes the purpose of Note 6(b) as being to extend the relief to cases where the local community is the final consumer. By way of general guidance on the application of sub-paragraph (b) of Note 6, we also refer to a later part of the judgment, where the judge says (also at page 390):

> "Sub-paragraph (b) is 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. The village hall is the model or paradigm of that case"

103. We also refer to the judgment of Beldam LJ in that case where he says (at page 396):

> "The introduction of the concept of the village hall seems to me to have been 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."

104. The case law suggests that the phrase "social or recreational facilities", even when qualified by the reference to use being similar to a village hall, does not preclude the use of a building primarily for sporting activities. It is not necessary for the building to provide facilities for the same mix of activities as a traditional village hall. The passage that we have quoted above from the Tribunal's decision in the *Sport in Desford* case is a good example of this. Other examples can be found in the Tribunal decisions in *Ormiston Charitable Trust* (see above), *Bennachie Leisure Centre Association v Customs and Excise Commissioners* (1996) (VAT Decision 14276). Other cases, place some weight on the design of a building making it suitable for mixed use: *The New Deer Community Association v Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT 1028 at [161] to [163], and *Ledbury Amateur Dramatic Society* (2000) (VAT Decision 16845)

105. That having been said, the clubhouse in this case is clearly intended to be used for social or recreational facilities. The clubhouse has been designed to accommodate

indoor bowls and is used primarily for that purpose, but it is capable of being adapted and is used to provide meeting space for other local community groups.

106. The other aspect of paragraph (b) of Note 6 is whether the facilities are provided "for a local community". Some of the appeals in the earlier decisions to which we have referred have failed on the basis that the facilities were not provided for an identifiable local community (as in the *Jubilee Hall* case) or because the provision of facilities for a local community was a secondary objective (as in *Commissioners for Customs and Excise v St Dunstan's Educational Foundation* [1999] STC 381). In the present case, we have little doubt that the facilities are intended for use by an identifiable local community. The members of the Club are drawn from Witney and the surrounding area. The clubhouse is used by other local groups for meetings and events.

107. The issue in this case is whether the requirement that the facilities be provided for a local community in a manner similar to those of a village hall adds anything further to that requirement. The case law suggests that it does and, in particular, that the manner in which the building is managed and run should involve, and be for the benefit of, the local community. We should not be prescriptive about the precise manner in which this might be achieved but it may, for example, involve a management committee drawn from members of the local community or from local councils (as in the *Sport in Desford* case or the *Bennachie Leisure Centre* case) or a body of trustees that is bound by the terms of its trust or its agreements with, for example, a local authority (as in the *Ledbury Amateur Dramatic Society* case). The question is whether the effect is to make the local community the "final consumer" in the sense used by Vinelott J in the *Jubilee Hall* case.

108. In the present case, on balance, the Club does not, in our view, meet that test. The project for the construction of the clubhouse was driven by the Club. The clubhouse is managed by the Club's Management Committee on behalf of the Club and for the benefit of the Club. There is no involvement in the management from other representatives of the local community. The clubhouse is used by some other local groups, but it is primarily used for the purposes of the Club. The income from the hiring of the venue to other groups and users accrues for the benefit of the Club.

109. For this reason, in our view, although the clubhouse is intended for use in providing social or recreational facilities for a local community, it is not intended for such use as "a village hall or similarly" within paragraph (b) of Note 6 to Group 5 of Schedule 8 to VATA 1994.

Decision

110. For the reasons that we have given above, we dismiss this appeal.

Right to appeal

111. 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.

APPENDIX

1. Sections 2 to 4 of the Charities Act 2011 provide:

"2 **Meaning of "charitable purpose"**

(1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which-

(a) falls within section 3(1), and

(b) is for the public benefit (see section 4).

(2) Any reference in any enactment or document (in whatever terms)

(a) to charitable purposes, or

(b) to institutions having purposes that are charitable under the law relating to charities in England and Wales,

is to be read in accordance with subsection (1).

(3) Subsection (2) does not apply where the context otherwise requires.

(4) This section is subject to section 11 (which makes special provision for Chapter 2 of this Part onwards).

3 **Descriptions of purposes**

(1) A purpose falls within this subsection if it falls within any of the following descriptions of purposes -

(a) the prevention or relief of poverty;

(b) the advancement of education;

(c) the advancement of religion;

(d) the advancement of health or the saving of lives;

(e) the advancement of citizenship or community development;

(f) the advancement of the arts, culture, heritage or science;

(g) the advancement of amateur sport;

(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

(i) the advancement of environmental protection or improvement;

(j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;

(k) the advancement of animal welfare;

(l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;

(m) any other purposes -

(i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,

(ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub¬paragraph (i), or

(iii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

(2) In subsection (1) -

(a) in paragraph (c), "religion" includes –

(i) a religion which involves belief in more than one god, and

(ii) a religion which does not involve belief in a god,

(b) in paragraph (d), "the advancement of health" includes the prevention or relief of sickness, disease or human suffering,

(c) paragraph (e) includes –

(i) rural or urban regeneration, and

(ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities,

(d) in paragraph (g), "sport" means sports or games which promote health by involving physical or mental skill or exertion,

(e) paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph, and

(f) in paragraph (l), "fire and rescue services" means services provided by fire and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004.

(3) Where any of the terms used in any of paragraphs (a) to (l) of subsection (1), or in subsection (2), has a particular meaning under the law relating to charities in England and Wales, the term is to be taken as having the same meaning where it appears in that provision.

(4) In subsection (1)(m)(i), "the old law" means the law relating to charities in England and Wales as in force immediately before 1 April 2008.

4 **The public benefit requirement**

(1) In this Act "the public benefit requirement" means the requirement in section 2(1)(b) that a purpose falling within section 3(1) must be for the public benefit if it is to be a charitable purpose.

(2) In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit.

(3) In this Chapter any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

(4) Subsection (3) is subject to subsection (2)."

2. Sections 29 and 30 of the Charities Act 2011 provide:

"29 **The register**

(1) There continues to be a register of charities, to be kept by the Commission in such manner as it thinks fit.

(2) The register must contain -

(a) the name of every charity registered in accordance with section 30, and

(b) such other particulars of, and such other information relating to, every such charity as the Commission thinks fit.

(3) In this Act, except in so far as the context otherwise requires, "the register" means the register of charities kept under this section and "registered" is to be read accordingly.

30 **Charities required to be registered: general**

(1) Every charity must be registered in the register unless subsection (2) applies to it.

(2) The following are not required to be registered –

(a) an exempt charity (see section 22 and Schedule 3),

(b) a charity which for the time being –

(i) is permanently or temporarily excepted by order of the Commission, and

(ii) complies with any conditions of the exception, and whose gross income does not exceed £100,000,

(c) a charity which for the time being –

(i) is, or is of a description, permanently or temporarily excepted by regulations made by the Minister, and

(ii) complies with any conditions of the exception, and whose gross income does not exceed £100,000, and

(d) a charity whose gross income does not exceed £5,000.

(3) A charity within –

(a) subsection (2)(b) or (c), or

(b) subsection (2)(d),

must, if it so requests, be registered in the register.

(4) In this section any reference to a charity's gross income is to be read, in relation to a particular time –

(a) as a reference to the charity's gross income in its financial year immediately preceding that time, or

(b) if the Commission so determines, as a reference to the amount which the Commission estimates to be the likely amount of the charity's gross income in such financial year of the charity as is specified in the determination."

ASHLEY GREENBANK
TRIBUNAL JUDGE

RELEASE DATE: 27 August 2015