[2015] UKUT 604 (TCC)

Appeal number: UT/2015/0058

VAT – Zero rating – Use for relevant charitable purpose – New building constructed by charitable community association comprising mainly changing room facilities and equipment storage area — Whether used as a village hall or similarly in providing social or recreational facilities – VATA 1994, Schedule 8, Group 5, Item 2, Note (6)(b) – Appeal refused.

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

NEW DEER COMMUNITY ASSOCIATION

Appellant

v

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: LORD TYRE

Sitting in public at George House, 126 George Street, Edinburgh on 12 October 2015

Charles Rumbles, CKR VAT Consultancy Ltd, for the Appellant (New Deer Community Association)

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

LORD TYRE:

Introduction

1. The appellant is a charitable community association whose purpose is the advancement of community development for the benefit of the residents of New Deer and Parish, Aberdeenshire. Its objects include maintaining and managing the New Deer Village Hall and Pleasure Park for activities promoted by it and its constituent members. The village hall is a Victorian style of building used for a variety of sporting and other community activities. The pleasure park is a sports pitch on which there was, until recently, a small hut providing changing facilities.

2. In about 2008 the appellant decided that the changing hut was unsatisfactory and the pitch was often unusable because of the weather. A proposal was put forward to obtain funding for the construction of (as phase 1) a "new pavilion" and (as phase 2) an all-weather surface and car park. Planning permission was granted in 2008 and extended in 2013. Work on the new building commenced. On 12 June 2013, the appellant's representative requested confirmation by the respondents that construction of the new building would be zero rated for VAT purposes, and sought permission to issue a VAT zero rating certificate to the contractor. The respondents refused to treat the works as zero rated. The appellant appealed to the First-tier Tribunal ("FtT") who upheld the respondents' decision and refused the appeal. The appellant now appeals, with the leave of the FtT, to this tribunal.

The new building

3. The new building comprises an entrance area and foyer; four changing rooms, each with an adjoining shower area and WC; two smaller "referee rooms", each with a shower; three WCs, including one disabled WC, accessed from the foyer; and a meeting room/kitchen accessed from the entrance area. There is also an adjacent equipment storage area/garage with no access from the interior of the building. The total floor area of the building is 295 square metres, of which the entrance and foyer comprises about 65 square metres (22% of the total footprint) and the meeting room/kitchen comprises about 13 square metres (4.4% of the total footprint).

4. The building is used by persons participating in sports activities on the adjacent pitch, including the New Deer Football Club who are responsible for cleaning and maintaining the building. There was evidence, which the FtT appears to have accepted, from the chairperson of the appellant's All Weather Facility Sub-committee that the building has been used for play groups and meetings of the British Legion, and for eight birthday parties. Use of the building would normally be allocated to one body or group of individuals, so that a play group using the foyer would not have football players passing on their way to and from the changing rooms.

The legislative context

5. In terms of Item 2 of Group 5 in Schedule 8 to the Value Added Tax Act 1994, zero rating applies *inter alia* to the supply of services in the course of construction of a building intended for use solely for a "relevant charitable purpose". Note (6) to Group 5 provides as follows:

> "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 appellant relies only on Note (6)(b).

The decision of the First-tier Tribunal

6. The FtT asked itself four questions:

   (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?

   The Tribunal answered the first question in the affirmative and the second question in the affirmative in part, having regard to the fact that only the football club had responsibility for cleaning and maintaining the building. The Tribunal then addressed the third and fourth questions together, under reference to various previous decisions, mostly by first instance tribunals, as to the proper interpretation of Note (6)(b). It considered that previous decisions were distinguishable on their facts and that the use of the building was critical and a matter of fact to be determined on the evidence. The issue was whether the uses that could reasonably be carried out within the building, given its design and construction, took it within the description of use as a village hall or similarly in providing sporting or recreational activities for the local community.

7. The FtT held that the building did not fall within this description. The Tribunal noted that it was clearly built as a replacement sports pavilion, primarily to replace the changing room facilities but also to provide a store for equipment. The small committee

room/kitchen could have multiple uses, but the larger entrance/foyer area could not be used as a space similar to a village hall. It had WC doors opening on to it and was the means of access to the changing rooms. The changing rooms themselves had open shower areas and were not conducive to other uses. The building had very limited internal storage. Consequently, the Tribunal did not accept that the building was used in a way that was similar to the use of a village hall. The fact that there was a reasonably substantial village hall already in existence was also significant. At paragraph 169 of its decision, the Tribunal stated:

> "The Tribunal took the view that, as stated in [*Ormiston Charitable Trust*], that the inclusion of the words village hall must have some purpose and it would be extending the definition of "as a village hall or similarly" to an unacceptable length to suggest that any room could be used for social or recreational activities in such a way. To use the words of [Sir John Vinelott in *Jubilee Hall Recreation Centre Ltd v C&E Commrs*], 'to do so, all meaning would be removed from the words'. The Tribunal agreed with the terms of HMRC's revised Notice that to meet the legislation test a principal feature would be a large multipurpose hall where members of different households could meet to undertake shared activities. The NDC facility had no such hall or space capable of use as such. Such a hall did exist at New Deer and was within the existing village hall."

8. The FtT did, however, find that the meeting room/kitchen was "capable for use by the whole community for social or recreational facilities, such use being similar to a village hall". The appeal was allowed in part by allowing zero rating of the area represented by that room, which represented 4.4% of the total area, with the remainder of the construction costs charged to VAT at the standard rate.

Argument for the appellant

9. On behalf of the appellant, it was submitted that the FtT had erred in law in its construction of Note (6)(b). By requiring a large multipurpose hall as a principal feature, the Tribunal had unduly restricted the scope of the statutory provision. The Tribunal had also erred in holding that only the meeting room/kitchen was capable of use similar to a village hall in providing social or recreational facilities for the local community. Even if the only use of the changing rooms was for changing, that of itself constituted use for a social or recreational purpose because sports activities on the pitch could not take place unless changing facilities were provided for players and referees. The word "similarly" in Note (6)(b) encompassed use for such a purpose. The presence of the existing village hall was irrelevant to the question whether the new building fell within the scope of zero rating.

Argument for the respondents

10. On behalf of the respondents, it was submitted that the appellant had identified no error of law in the reasoning of the FtT. Note (6)(b) was concerned with the nature of the use of a building in providing social or recreational facilities for a local community. Physical appearance, including the existence of a multipurpose hall, could not be disregarded as it gave an indication of the range of practicable uses. One approach, which the respondents considered to be the correct one, was that the use of the building had to be controlled by the local community or its representatives. Another approach was to treat the matter entirely as one of fact and degree, having regard to the totality of the circumstances, comparing the use of the building in question with uses ordinarily made of a village hall. Either way, the Tribunal had not erred in attaching weight to the physical attributes of the building. The appellant's argument based on use in connection with social and recreational activities taking place on the pitch failed to give content to the requirement in Note (6)(b) that the use of the building be similar to use of a village hall. Although the respondents had decided not to seek leave to cross-appeal against the Tribunal's decision that 4.4% of the building cost qualified for zero rating, they did not accept that that decision had been correct.

Interpretation of Note (6)(b)

11. Note (6)(b) has been examined in a number of tribunal decisions and in one decision of the Court of Appeal. I need not list all of them but the following are of assistance in addressing the circumstances of the present appeal.

12. The decision of the VAT Tribunal in *Ormiston Charitable Trust* (1994, Decision No 13187) concerned the construction of an out-of-school community sports centre. The Commissioners of Customs & Excise submitted that the activities at the centre were not those expected to be carried on in a village hall. One had to look at what a village hall did: what was in contemplation was something which was owned, organised and administered by the community for the benefit of the community. That submission was accepted by the Tribunal (Mr R K Miller) who observed:

> "In my judgment [where] 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… As [the appellant's representative] pointed out, the definition refers to the provision of 'social *or* recreational' activities (emphasis added). So 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. But it follows from that, it seems to me, that it must be some other characteristic of the model to which one must look to find the

necessary similarity. In my judgment some such criteria as set out in [the Commissioners'] submission have to be applied. 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."

13. In *Jubilee Hall Recreation Centre Ltd v C&E Commrs* [1999] STC 381, the Court of Appeal considered whether a provision in the same terms as Note (6)(b) applied to a sports and fitness centre operated on a commercial basis by a charity on the first floor of a listed building in London. Reversing the judgment of Lightman J at first instance (who had in turn reversed the decision of the tribunal), the Court of Appeal held that it did not. In the course of delivering the principal judgment, Sir John Vinelott expressed the view (at page 390) that the formulation proposed by the Commissioners and accepted by the tribunal in *Ormiston Charitable Trust* (see above) added a gloss which might be too restrictive. He continued:

> "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…"

In a concurring judgment, Beldam LJ observed (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…"

14. In *South Molton Swimming Pool Trustees* (1999, Decision No 16495), the tribunal accepted the appellant's submission that a swimming pool was capable of falling within Note (6)(b) even though it did not look like a village hall.

15. In *Sport in Desford* [2004] UKVAT V18914, the tribunal expressed the following view:

> "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 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."

16. Finally, the building in *Caithness Rugby Football Club* [2015] UKFTT 378 (TC) was a clubhouse comprising four changing rooms occupying about half of the building, a main hall area, a kitchen area which doubled as a bar when functions were held, toilets, an officials' room, a store room and a boiler room. It was constructed and managed by a members' club on a non-commercial basis and was let out at modest rates for use by a significant number of diverse community groups. Although the construction of the

clubhouse had been motivated by the appellant's own needs, 90% of the use of the hall was by other clubs and groups. The tribunal held that a sporting pavilion or clubhouse was capable of being used "as a village hall or similarly" and that, in the circumstances of the case, the clubhouse satisfied the requirements of Note (6)(b).

17. I begin my own analysis by noting that, grammatically, the words "or similarly" relate back to the word "use". Enquiry must therefore focus upon whether the use or intended use of a building is similar to use of a building as a village hall, rather than, for example, upon whether the building is similar to a village hall. I note also that the need for "local" use is made clear by the reference in sub-paragraph (b) to provision of social or recreational facilities "for a local community". The reference to use similar to that of a village hall must therefore, in my view, be to something other than use by or for persons who live in the vicinity of the building. I am not inclined to adopt either the formulation approved in *Ormiston Charitable Trust* (but doubted by Sir John Vinelott in *Jubilee Hall*) or the respondents' primary contention in the present appeal, both of which focus upon local control or administration of the building's use. I prefer the approach of the tribunal in *Caithness Rugby Football Club*, which focused upon local community use rather than local community control.

18. It is also clear that something more is required than mere use for the provision of social or recreational facilities for the local community: otherwise, the reference to use as a village hall or similarly would be emptied of content. I respectfully agree with the view expressed by Beldam LJ in *Jubilee Hall* that attention must focus on the nature of the activities conducted – or intended to be conducted – in the building, and that the question is whether these are similar to the type of social or recreational activities that one would expect to be conducted in a village hall for the benefit of a local community. That will, inevitably, depend upon the facts and circumstances of each case. It does not, however, seem to me to be a necessary requirement that there should be a "mix" of activities such as one might find carried on in a traditional village hall; the sub-paragraph merely requires use "similar to" – not "the same as" – that of a village hall. The carrying on of a mix of activities may be favourable to a finding that the use of a building is similar to that of a village hall, but a single use might, depending upon circumstances, qualify if it consisted of providing social or recreational facilities for the local community.

19. What does seem to me to be essential, however, is that the activities carried on *in the building* be similar to use of a building as a village hall. The difficulty for the appellant in the present case, as I see it, is that the building is not itself, subject to a *de minimis* exception for occasional use of the meeting room/kitchen or the entrance/foyer area, used in providing social or recreational facilities, but is used rather as an adjunct to the social or recreational facilities provided for the local community by the sports pitch. Unlike the tribunal in *Caithness Rugby Football Club*, the FtT in the present case has made no finding that the building itself is used to any material extent by the local community for social or recreational activities. On the contrary, the Tribunal emphasised the lack of suitability of the entrance and foyer for any form of use similar to that of a village hall.

20. In my opinion, the FtT focused correctly upon the potential uses of the building itself rather than on its facilitation, in turn, of use of the sports pitch, whether in its present form or after it has been developed as an all-weather facility. The Tribunal held (at paragraph 161), in my view correctly, that the design of the building was relevant to the extent that it dictated what uses were reasonably practicable. It was entitled to find, on the evidence before it, that a building used primarily to provide changing room facilities and storage for sporting equipment was not used as a village hall or similarly. It was correct to hold (paragraph 169) that the statutory definition would be extended to an unacceptable length if it were suggested that any room used for social or recreational activities could be used as a village hall or similarly. Whilst I do not share the Tribunal's view that the existence of a large multipurpose hall is a necessary feature in order to meet the legislative test (although it is likely to be a favourable indicator if present), I do not consider that this observation was critical to its conclusion that the building in the present case failed to meet the test.

Conclusion

21. For these reasons, I hold that the appellant has failed to demonstrate any error of law on the part of the FtT. The appeal must therefore be refused.

Lord Tyre

Release date: 12 November 2015