



Neutral Citation: [2022] UKFTT 00211 (TC)

Case Number: TC08534

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2018/06508

VAT – Zero-rating – Item 1 (a) (ii) of Group 5, Schedule 8 VATA 1994 – First grant of a major interest – whether intended for use solely for a relevant charitable purpose – Appeal dismissed.

Heard on: 10 January & 23, 24 & 26 May 2022

Judgment date: 29 June 2022

Before

**TRIBUNAL JUDGE NEWSTEAD TAYLOR
MR CHRISTOPHER JENKINS**

Between

BLETCHINGLEY CHURCH HOUSE CHARITY

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mrs Lisa Swan, the Appellant’s Treasurer

For the Respondents: Mr Michael Farrell, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The Appellant (Bletchingley Church House Charity or BCHC) appeals against the Respondents' decision dated 11 May 2016 ("the Decision"), upheld on review on 6 September 2016, disallowing input tax in the sum of £87,002.75 in respect of VAT periods 05/15, 08/15, 11/15 and 02/16 on a number of grounds, but specifically that:

"2. BCHC is incapable of making a grant that qualifies for zero rating under Item 1 (a) (ii) of Gp,5, Sch. 8 of the VAT Act 1994, and hence the goods and services on which the VAT has been charged cannot be used for the purpose of any taxable business, which carries the right of recovery.

BCHC is incapable of making a grant that qualifies for zero rating, for two reasons:

(i) Such a grant is not lawful without Charity Commission approval, which has not been given, and;

(ii) Even if the Charity Commission approved the grant, the person to whom the grant will be made does not meet the requirements of Note 6 of Gp. 5, Sch. 8 of the VAT Act 1994, and so cannot issue a valid certificate under Note 12 (b) of Sch. 8..."

2. For the avoidance of doubt, BCHC has also submitted VAT returns for the periods from 05/16 to 02/17. These VAT returns are not the subject of the Decision and, accordingly, are not in issue in this appeal. The extent to which, if at all, this Judgment determines the issues in respect of the later VAT returns is, presently, a matter between the parties.

THE HEARING

3. The hearing took place on 10 January 2022, 23-24 May 2022, and 26 May 2022.

4. The Tribunal has considered the parties' skeleton arguments, the documents in the hearing bundle comprising 481 pages, the oral evidence as detailed below, and the authorities bundle comprising 648 pages along with the supplementary authorities bundle comprising 94 pages.

5. On 10 January 2022, neither Mr John Brown (BCHC's volunteer VAT Consultant) nor Officer Rowe could join the video hearing by video. They both agreed to join by telephone and did so. After a short adjournment, Mr Brown confirmed that he had the electronic bundles and that, whilst he could not print them off, he could work from them electronically. BCHC, the Respondents and Mr Brown all consented to proceed with Mr Brown giving oral evidence and being cross examined by telephone, which he did. Mr Brown's evidence concluded at around 15.30.

6. At the conclusion of Mr Brown's evidence, BCHC applied for permission to adduce witness statements from Mrs Swan (BCHC's Treasurer and the director of Bletchingley Church House Administration Limited ("BCHAL") and Mr Fowler (one of BCHC's Trustees). There were no witness statements from BCHC itself. The only existing witness statement was from Mr Brown. The Respondents did not object to the application. We granted the application having considered Rule 2 of the First-tier Tribunal (Tax Chamber) Rules 2009 ("the Rules"). We concluded that permitting the further witness statements was both fair and just because it was a proportionate step given the importance of the case and the complexity of the issues, it ensured that the parties were able to participate fully in the proceedings, it would enable proper consideration of the issues and, due to a lack of time, the hearing was to be part heard in any event.

7. Also, in advance of the next hearing dates, the Tribunal invited the parties to consider the following authorities, none having been referred to in the original skeleton arguments:

(1) *Jubilee Hall Recreation Centre Ltd v Customs & Excise Commissioners; Customs and Excise Commissioners v St Dunstan's Educational Foundation* [1999] STC 381 (“*Jubilee Hall*”)

(2) *Customs & Excise Commissioners v Yarburgh Children's Trust* [2002] STC 2007 (“*Yarburgh Children's Trust*”)

(3) *Hanbury Charity v HMRC* [2007] 20126 (“*Hanbury*”)

(4) *Caithness Rugby Football Club v Revenue & Customs Commissioners* [2016] STC 2028 (“*Caithness*”).

8. Unfortunately, due to ill health, Mr Brown was unable to attend the hearing after the first day. Mrs Swann, BCHC's representative, confirmed by email to the Tribunal that BCHC was content to proceed in Mr Brown's absence.

9. On 23 May 2022, Mrs Lisa Swan, Mr Fowler, Officer Seymour, and Officer Rowe of the Respondents all gave oral evidence and were cross examined. At the end of Day 2, the Tribunal invited the parties to consider the following authorities in advance of their closing submissions, *Revenue & Customs Commissioners v Longridge on the Thames* [2016] STC 2362 (“*Longridge*”) and *Wakefield College v Revenue & Customs Commissioners* [2018] STC 1170 (“*Wakefield*”).

10. On 24 May 2022, as agreed with the parties, the Respondents made their oral closing submissions first. Due to lack of time, the Appellant's closing submissions were adjourned to 26 May 2022, thereby allowing Mrs Swan time to consider the Respondents' closing submissions and prepare a response.

11. On 26 May 2022, the Appellant made oral closing submissions and, at the Respondents request, both parties were afforded a short final right of reply. In her closing submissions Mrs Swan, who is not legally trained, tended to give evidence that had not been given before. The Respondents objected to this. The Respondents submitted that they were prejudiced because they had been unaware of this evidence and, consequently, had been deprived of the ability to consider it and test it under cross examination. We agree. For these reasons, in reaching our decision we have not considered any new evidence given in closing submissions.

The Evidence:

(i) Mr Brown

12. Mr Brown confirmed that Mrs Swan had written his witness statement for him, and he had signed it. Whilst he accepted that the content of the witness statement was true, he could not confirm if the references in the witness statement to the documents were correct. Therefore, with the Respondents' agreement, Mr Brown's witness statement was admitted in evidence without the references. At paragraph 6 of his witness statement, Mr Brown stated that “... *We argue that it is BCHC, as the owner of Church House, and a registered charity that is using the building as a village hall, albeit via BCHAL which manages the lettings on its behalf.*”

13. In examination in chief, Mr Brown contended that BCHAL managed the letting of Church House on behalf of BCHC not in its own right, that, whilst he did not have details, BCHAL charged hirers market rates to rent Church House and that BCHAL did not charge VAT because it was below the VAT threshold and not VAT registered.

14. In cross examination, Mr Brown: confirmed that

(1) Church House was built in 1907. It had been continuously used by the local community since construction. It stood erect both prior to the amendments to BCHC's governing documents in May 2011 and prior to the Lease.

(2) The works done to Church House in 2015/16 ("the Works") were not works of construction, but works of restoration, being work done to put Church House into a useable condition. Although, he later stated that some work was construction such as installing a lift and disabled facilities. However, he ultimately agreed that no new building was constructed as a result of the Works.

(3) A tenant under a lease has the right to use the leased property and a landlord does not. Accordingly, he accepted that the lease between BCHC and BCHAL dated 2 September 2019 ("the Lease") granted BCHAL the right to occupy and use Church House.

(4) BCHAL was not, is not and was not intended to be a charity.

(5) Following the Lease, BCHAL let Church House on behalf of BCHC to the local community i.e., BCHAL was BCHC's appointed representative / agent and BCHC used Church House for a relevant charitable purpose. Mr Brown described the Lease as a "*lease to act as an agent.*" However, Mr Brown accepted that there was no management agreement *per se* between the BCHC and BCHAL.

(6) After the Lease, all Hirers of Church House booked via BCHAL and the schedules of lettings ("the Schedules") demonstrated use by residents. He accepted that there was no record of BCHC using Church House after the grant of the Lease, meaning that BCHC's name did not appear on the Schedules. He considered this to be a pedantic point. He asserted that it was not considered necessary to record BCHC's use of Church House. He also did not think that BCHAL charged BCHC for using Church House.

(7) It was BCHC's intention to have Church House managed by a Management Committee and a commercial tenant was a way to reclaim VAT. He contended that this approach was in accordance with legislative intent.

15. We found Mr Brown to be an honest witness who was doing his best to assist the Tribunal. Overall, we found his evidence to be somewhat defensive no doubt because BCHC had acted on his informal advice and that advice was in question in these proceedings. Also, on occasions his oral evidence was inconsistent both with the oral evidence of other witnesses and the documentary evidence, for example Mr Brown's contention that there was a management agreement between BCHC and BCHAL was inconsistent both with the terms of the Lease and with Mrs Swan's oral evidence. In the circumstances, where such inconsistencies arose, we preferred the oral evidence of other witnesses supported by the documentary evidence.

(ii) Mr Fowler:

16. Mr Fowler provided a short witness statement primarily dealing with the Works. His background is as a Chartered Engineer and, consequently, he was asked to act as project manager for BCHC in respect of the Works. He confirmed that the Works did not involve the demolition of Church House due, in part, to the fact that Church House is in a Conservation area and has Art and Craft features. However, he maintained that the work to Church House, which started in April 2015 and ended in October 2016, involved major construction.

17. In cross examination, Mr Fowler confirmed that:

(1) The minutes of BCHC's meeting on 1 December 2014 were not queried at the time and he assumed them to be accurate. Specifically, he confirmed that the VAT section of the minutes, detailed at paragraph 30 below, was accurate.

(2) The Works did not involve the demolition and rebuilding of Church House, the demolition to ground level of any external walls or the construction of a new building or extension. The Works involved the alteration of Church House's internal form. He also accepted, albeit reluctantly, that the Works done to Church House were not works of construction.

(3) He was unaware of, did not understand and could not explain BCHC's shareholding in BCHAL.

(4) BCHAL was not a charity.

(5) He signed the Lease on behalf of BCHC on 2 September 2019 albeit he did not understand it, did not read it in full and could not explain it to us. Specifically, he could not explain the reason for the rent being £1,000 more than Church House's open market rental value, but he did accept that the building had deteriorated over time and a maintenance fund was required for the future. Ultimately, Mr Fowler said he signed the Lease in good faith following Mr Brown's recommendation.

(6) BCHC did not grant any other leases.

(7) Following the Lease, BCHC used Church House as shown on the Schedules. Specifically, BCHC's fundraising committee met at Church House, for example the Schedules show that on 1 March 2018 from 8pm to 10pm "BCH Committee" used the lower ground floor ("LGF"). He thought that BCHC booked its use of Church House via BCHAL.

(8) Other charities, such as The Children's Trust, Bereavement Care and Hawthorns School, used Church House following the Lease to BCHAL. However, in answer to a question from us, Mr Fowler accepted that there was no evidence in the bundles confirming that the Hirers identified by Mr Fowler were in fact charities.

(9) The Hirers book the use of Church House with and pay the rental to Elaine.

(iii) Mrs Swan

18. Mrs Swan's witness statement explained the history of her involvement in BCHC, BCHAL and with the Respondents. In cross examination, Mrs Swan confirmed that:

(1) Mr Brown was adamant that, in accordance with legislative intent, BCHC could reclaim the VAT on the first grant of a major interest to BCHAL and, as he was the expert, Mrs Swan relied on him.

(2) The Works did not involve construction¹.

¹ This is consistent with Mrs Swan's letter to the Respondents dated 11 October 2019 in which she stated "*The costs incurred by BCHC are directly attributable to the process of putting the property into a condition under which it can be used in fulfilment of the original and still extant objective of the charity. These costs are indeed not the cost of construction of a new building, that is not and has never been the point, but they are the cost of refurbishment to enable the property to be used to provide the facilities as described in Note 6 (b), Group 5...*

The reference to planning permission is completely in accordance with the work of refurbishment and alterations to improve community facilities; The construction of a new building has never been mooted- no new build was

(3) BCHC did not ask the builder to zero rate the invoices from the outset because it was BCHC's intention to reclaim the VAT on the Works pursuant to Group 5, Schedule 8 of the Value Added Tax Act 1984 ("Gp. 5, Sch 8 VATA"). A. However, when it became apparent that there was a potential difficulty with the intended plan, BCHC did ask the builder to zero rate future invoices referable to disable access, which he did. She confirmed that there is no cross over between the £87,002.75 claimed in this appeal and the invoices which have been zero rated.

(4) The purpose of BCHAL was to separate the running of a village hall from BCHC's fundraising, to have a trading arm of BCHC and, via the rent, to build up a maintenance fund. This evidence was consistent with a letter dated 9 June 2016 from Mrs Swan to the Respondents in which she stated as follows " *...The structure of leasing Church House to BCHAL that manages the day to day running of the company and building up an annual maintenance fund from rental income in BCHC, is a key aim of entering into the transaction.*" In addition, in cross examination she confirmed that the recovery of the VAT was also considered attractive.

(5) Mrs Swan is the Director of BCHAL, and she runs it along with Elaine. The Trustees, via BCHC, are the sole shareholders of BCHAL, but BCHC, being the sole shareholder of BCHAL, did not step into a director role. If there is a problem with Church House, such as the lift, a Trustee, perhaps Mr Fowler, might become involved.

(6) The intention was always for Church House to be used as a village hall and the permitted use clause in the Lease was intended to fulfil BCHC's charitable objectives.

(7) She wrote the majority of the Business Plan along with input from others. Specifically, she wrote Section 6 on 'Projection of Income and Expenses.' This Business Plan was created to obtain grants. It existed for many years and evolved over time. The figures it contained were future projections. The Business Plan projected an annual surplus of £5,219 which was the same as profit.

(8) BCHC was not operating as a business in granting the Lease.

(9) Mrs Swan prepared the Lease. She did speak to a solicitor, but BCHC did not have sufficient funds to instruct the solicitor to prepare the Lease. Mrs Swan obtained a standard lease online. The only amendment she made to the online version was the addition of the permitted use clause. She did not know what the additional rent detailed in the Lease referred to. She accepted that the exclusion of the common parts per Clause 5 was a mistake. She confirmed that, despite the inconsistent clauses in the Lease, BCHC insured Church House. She also confirmed that BCHC paid and pays all the other utility bills on Church House. However, save for the VAT in issue in this appeal, BCHC does not reclaim any VAT. It submits nil returns. However, it does recharge all the utility bills to BCHAL including the VAT element.

(10) The Lease is a commercial lease with a heavy restriction in respect of the permitted use clause. It gives BCHAL the right to exclusive use of Church House, save in respect of the communal areas, as tenant subject to the BCHAL's

constructed on the work has all been towards the refurbishment and alteration of a building of which BCHC is the 'person constructing.'"

contractual obligation to pay rent of £5,000 per annum. BCHC does not charge VAT on the rent. The open market valuation considering the permitted use clause was £4,000 per annum. Accordingly, the rent is a commercial rent and includes a £1,000 premium which was not intended to make a profit but to build up a maintenance fund. Mrs Swan considered that both the obligations and terms of the Lease were commercially fair and reasonable.

(11) BCHAL is not a charity.

(12) The intended users of Church House at the time the VAT Returns were filed were the local community of Bletchingley and not more than 95% of those were charities. Accordingly, following the Lease a charity did not solely use Church House. However, Mrs Swan's evidence did vary on this point and later she contended that a charity, namely BCHC, did use Church House after the Lease as it was the 100% shareholder of BCHAL.

(13) Pursuant to Clause 13 of the Lease, BCHAL opens the whole of Church House for business to the public. As director of BCHAL, it was Mrs Swan's view that the operation of a commercial business was within the terms of BCHAL's articles. In short, BCHAL operates a letting business to make profit. Mrs Swan accepted that BCHAL, by renting out Church House to the Hirers, was undertaking economic activity.

(14) Church House is advertised only in the Bletchingley Magazine. As a result, Mrs Swan's evidence was that it was only known to be available for hire among the local community.

(15) Elaine arranges the letting of Church House. She occupies a room in Church House three mornings a week. The answerphone tells prospective hirers to ring on Monday, Wednesday, or Friday to speak to Elaine. She is employed by the Bletchingley Parochial Church Committee ("BPCC"), but BCHAL pays 1/3 of her salary in recognition of the work she does arranging the letting of Church House. BCHAL is not VAT registered and does not charge VAT on rent to the Hirers.

(16) BCHAL, when it has had sufficient funds, has paid the rental due to BCHC. Presently, BCHAL owes money to BCHC. BCHC has not taken any action in this regard. There is no evidence of formal deferral of the rent. In short, BCHAL pays rent when it can. BCHC's accrued rights to rent is reflected in the accounts of BCHC and BCHAL.

(17) If BCHAL makes more than £5,000 then the intention is that BCHAL will pass the surplus up to BCHC as a donation.

(18) There was no management agreement between BCHC and BCHAL.

(19) If BCHC recovers the VAT, it will be used to repay two interest free loans. If it is not recovered, these loans will be written off and gift aid claimed.

19. We found both Mr Fowler and Mrs Swan to be honest witnesses who were doing their best to assist the Tribunal.

(iv) HMRC's Evidence:

20. Officer Seymour's witness statement describes the procedural history leading up to the Decision. In cross examination, she confirmed that when making the Decision she had not liaised with the Wolverhampton Registration Unit to whom Mr Brown had written before BCHC had been VAT registered. She accepted that Church House looked like a

village hall, but somewhat qualified this by stating that village halls all operate and look different.

21. Officer Rowe's witness statement sets out his involvement with BCHC, his attendance at the meeting on 6 September 2019 and his review of the Decision. In cross examination, Officer Rowe confirmed that he had not liaised with the Wolverhampton Registration Unit. He confirmed his view that Church House was not used as a village hall after the grant of the Lease because it was not run by a charity. In response to questions from us, Officer Rowe also confirmed that he had considered whether Church House was used exclusively by a charity and concluded, based on the Schedules, that it was not.

22. Based on the evidence provided, (both documentary and oral), we make the following findings of fact. Some of the facts were in dispute, and we also make further findings later in our decision.

Findings of Fact

23. On 25 March 1898, BCHC was created by a conveyance of land in trust ('the Conveyance.')

Specifically, Jarvis Kenrick conveyed to the Reverend William Chatterley Bishop and others a parcel of land measuring 43.5 feet together with the messuage, being a dwelling house with outbuildings, and schoolroom erected thereon on trust to:

“(1) ... grant the use of the premises to the Rector for the time being of the said Parish on such days and at such times as he shall from time to time appoint for a Sunday or other School or Schools for the religious instruction and education of the inhabitants of the said Parish and such other persons as the Rector shall approve in the doctrines of the Church of England as by Law established for the holding of meetings and religious services for the delivery of lectures and for any other purpose having for its object the spiritual wants of the inhabitants of the said Parish.

(2) ... grant the use of the premises at all times subject to the trusts hearing before declared and subject also to the Rules and regulations to be made by a Committee of Management to be appointed as herein before mentioned as an for a Parochial Hall a Parish Room Class Rooms Reading Rooms a Library Men's or Women's Clubs Institutes and Guilds Meeting rooms a Lecture Room a Concert Room or in any other manner for the secular education instruction or amusement of the inhabitants of the said Parish and such other persons as the Committee of Management shall think fit to admit there too.

(3) ... grant the use of any part of the premises as a residence for any teacher or teachers or caretaker appointed by the Committee of Management.

(4) ... grant the use of the premises for any intellectual moral or social object and or purpose of the inhabitants of the said Parish or the neighbourhood without regard to the religious or political views of any persons so using the premises...”

24. In 1907, BCHC constructed Church House, Bletchingley.

25. In the 1970s, Church House underwent minor improvements.

26. In 2008, Mrs Lisa Swan, a director of an accountancy firm, was appointed as treasurer of BCHC. At the time of her appointment, BCHC was fundraising to raise funds to renovate Church House which was in a poor state of repair. Specifically, Church House did not meet modern requirements in respect of, among other things, Health & Safety, and

disabled access. As a result, Church House was only being used a few hours per week by user groups leading to rental income of less than £1,000 per annum.

27. In 2009, BCHC set up the Church House Appeal Committee. Mrs Swan was a member of the Committee. The Committee's aim was to raise over £550,000 to renovate Church House and re-establish it as a bustling up-to-date community building centred on serving the people of Bletchingley and its close neighbours.

28. In 2011, BCHC applied to register with the Charity Commission for England & Wales ("the Charity Commission"). From 11 May 2011, BCHC was registered with the Charity Commission under number 1142012.

29. On 12 May 2011, BCHC, in accordance with an order of the Charity Commission, updated its governing document, being the Conveyance. Clauses 1, 2, 3 and 4 of the Conveyance were deleted and replaced with the following:

"1. The object of the charity is the advancement of education, the advancement of the Christian religion and the provision and maintenance of a village hall for the use of the inhabitants of Bletchingley, Surrey and the surrounding area without distinction of political, religious or other opinions, including use for meetings, lectures and classes and other forms of recreation and leisure time occupation with the objects of improving the conditions of life for the said inhabitants."

30. By October 2014, BCHC had raised £513,563.

31. On 24 November 2014, BCHC authorised Mr John Brown of VAT Consultancy ("Mr Brown") to act as its agent.

32. On 1 December 2014, BCHC had a meeting and the minutes of that meeting record:

"VAT

- *John Trott, Lisa Swan and Sarah King have met and gone ahead with contacting John Brown, providing him with the information requested and completing the appropriate forms.*
- *LS is now in the process of applying for VAT registration for Bletchingley Church House Charity and a separate legal company which administers Church House which won't have charitable status. The question about whether the members of each have to be separate has been asked and we are awaiting a response. LS confirmed that we wouldn't have to charge VAT on any rental of the building because this will be a separate company."*

33. On 8 December 2014, Mr Brown wrote to the Respondents enclosing a VAT 1 in respect of BCHC. In the covering letter, Mr Brown stated:

"By way of explanation BCHC constructed a property known as Church House in 1907; This property has been operated as a village hall since that date. The property has been retained in the ownership of BCHC since and no grant of a major interest has yet been made by BCHC in the property..."

The intention is that Church House will be refurbished, altered and brought up to standards commensurate with its future use as a village hall.

The property will be leased to a separate legal entity, Bletchingley Church House Charity Administration Limited BCHAL for over 21 years and that company will be responsible for the letting and use of the property as a village hall on behalf of the charity..."

34. On 31 December 2014, BCHC drew up a business plan (“the Business Plan”). BCHC’s stated vision was:

“Church House will become a modern facility to meet a range of needs across the whole community. This includes enabling and supporting projects working to affect real change in the lives of disadvantaged and excluded people including lone parents, children, the elderly, and young people, by providing the facilities they need to extend their services to Bletchingley and run projects here.”

35. For the avoidance of doubt, nowhere in the Business Plan is it stated that BCHC’s intention is to refurbish Church House in order to grant a first major interest, being a long lease, of Church House to a third party, namely BCHAL.

36. The Business Plan confirmed that:

(1) At that time Church House was used for an average of 2 hours per week by St Mary’s Church, twice a week for around 3 hrs by Alcoholics Anonymous and once a week for around 2 hours by the Bletchingley Youth Group.

(2) The redevelopment included a lift to all floors, rooms for meetings and other functions with storage space for regular users, smaller, more friendly rooms for counselling, surgeries and private meetings, modern kitchen facilities serving all three floors, toilets, including for the disabled, that are easily accessible from all parts of the building, Office space for business and community users and the ability to securely close off those parts not in use whilst providing access to main facilities. The tendered costs totalled £625,000.

(3) Local businesses had expressed interest in using the rooms as business meeting rooms that could be hired on an hourly basis. It was estimated that one business user would use one room for one hour each week at an annual charge of £1,300.

(4) The hourly charges would be a high rate of £25, a normal rate of £15 and a low rate of £10 for hire of Church House or a high rate of £15, a normal rate of £10 and a low rate of £5 for hire of a room(s).

(5) Once completed, an independent management committee would be appointed to run the facility on a day-to-day basis. An administrator would be responsible for managing lettings, marketing the hall, and meeting room facilities, reporting to the management committee, attending management meetings, organising routine maintenance, and updating the website. The role was estimated to take 5hrs per week at a rate of £10 per hour and to last for at least 3 years.

(6) BCHC did not expect to have to pay the full VAT rate on the total construction because a significant proportion of the restoration related to improving facilities for the disabled. BCHC were hoping for a favourable ruling in the near future.

37. On 23 February 2015, BCHC entered into a contract with Hindscray Limited for alterations and extensions at Church House (“the Works Contract.”) The alterations and extensions were more specifically described as *“External repairs, internal alterations and re-ordering plus the construction of a single storey extension with associated external works and drainage”* including the design and construction of structural connections and a lift as shown in drawings attached to the Works Contract. Pursuant to the Works Contract, BCHC was required to pay Hindscray Limited the VAT exclusive sum of £487,743.20.

38. For the avoidance of doubt, we do not accept that the works detailed in the Works Contract and the Business Plan were works of construction as contended by Mr Brown. In

reaching this conclusion, we have considered the nature of the works, the Works Contract, the evidence of Mr Fowler on this point as detailed in paragraph 15 (2) above, the evidence of Mrs Swan as detailed in paragraph 16 (2) above and a contemporaneous letter, dated 10 December 2015, from Mr Brown to the Respondents in which he stated “...*In fact, we are not dealing with supplies in the course of construction but supplies in the course of refurbishment, alteration and updating as explained in my letter of 08 December 2014.*” In all the circumstances, we accept the Respondents submission that Church House was constructed in 1907 in accordance with *University of Hull v Customs & Excise Commissioners* [1975] Lexis Citation 32. Also, we accept that the works, being the conversion, reconstruction or alteration of an existing building, were not within the definition of “*the construction of a building*” as per Note 16 (a) of Gp. 5, Sch8 VATA.

39. On 16 March 2015, works began at Church House.

40. On 14 April 2015, the Respondents confirmed that BCHC had been registered for VAT with effect from 1 December 2014.

41. On 8 May 2015, Mrs Swan completed a Form 64-8 confirming that she was BCHC’s agent in respect of its VAT affairs.

42. On 10 June 2015, BCHC submitted its 05/15 VAT Return. This was a repayment return.

43. On 14 July 2015, Officer Seymour visited BCHC in order to verify BCHC’s 05/15 VAT Return. She met with Mrs Swan. Officer Seymour was informed that BCHC had submitted the 05/15 VAT Return in respect of renovation costs for Church House and that once completed BCHC intended to make a first grant of a major interest in Church House to BCHAL which it considered to be zero rated under Gp. 5, Sch 8 VATA.

44. Between 12 August 2015 and 11 October 2019, the parties entered into extensive correspondence. We have, where relevant to the issues in dispute, referred to that correspondence in greater detail within in the body of our decision at paragraphs 80 – 124 below.

45. On 12 August 2015, Officer Seymour wrote to BCHC expressing a number of concerns. Specifically, Officer Seymour stated:

“2. I would agree that the proposed grant under item 1(a) (ii) has the potential to qualify as a zero-rated supply. However, the first grant of a major interest in a village hall can only be zero-rated if made to a charity that intends to put it to a relevant charitable use under note 12, the receiving charity would be required to issue the person constructing with a certificate confirming that intention. I have seen no evidence that there is any intention for BCHAL to be registered as a charity. BCHC do not hold a certificate to confirm that any intended grant of a major interest would qualify for zero-rating and therefore appear to be incapable of making a first grant in the form of a taxable supply.”

46. On 11 September 2015, the Respondents wrote to BCHC in the following relevant terms:

“ ...

Contrary to Mr Brown's assertions, it is a matter of law that the recipient of the first grant of a major interest in a building is the entity that must certify that they intend to make charitable use of it. Therefore, for the first grant of a major interest in Church House to qualify for zero-rating, the trustees (person constructing) must first be in possession of a certificate from BCHAL (the recipient) which confirms that BCHAL will

be using that building to make charitable supplies (notes 12(a) and 12(b) of Gp. 5, Sch. 8, VAT Act 1994 refer).

It is my understanding that BCHAL “will be responsible for the letting and use of the property” by BCHC and third parties. Notwithstanding my reservations about BCHAL’s lack of charitable status, the making of such commercial supplies by BCHAL does not equate to charitable use by BCHAL. BCHAL would therefore be unable to issue the required certificate to BCHC...”

47. On 28 September 2015, a document called “*Proposed Refurbishment and Alteration to Improve Community Facilities*” was prepared for the purpose of planning permission.

48. On 11 December 2015, Mr Brown sent BCHC’s Business Plan to the Respondents.

49. On 7 January 2016, BCHAL was incorporated. Initially, Mrs Swan was the sole shareholder in and director of BCHAL.

50. On 11 January 2016, Mr Brown wrote to the Respondents enclosing BCHAL’s Certificate of Incorporation.

51. On 28 January 2016, Mrs Swan, on behalf of BCHAL, wrote to BCHC confirming that Church House would be used solely for a relevant charitable purpose as a village hall or similar in providing social or recreational facilities for a local community in accordance with Note (6) (b), Gp. 5, Sch 8 VATA.

52. On 11 March 2016, Mr Brown wrote to the Respondents enclosing the unsigned lease of Church House from BCHC to BCHAL.

53. On 11 May 2016, the Respondents wrote informing BCHC of their decision that BCHC’s claims to repayment of input tax on returns covering the period 01 December 2014 to 29 February 2016 was denied (“the Decision”). Further on 11 May 2016, the Respondents wrote to BCHC notifying BCHC that the amounts declared on the 05/15, 08/15, 11/15 and 02/16 VAT Returns had been reduced to nil.

54. On 17 May 2016, BCHC secured a valuation report from S Edge-Partington, a Chartered Surveyor. Mr Edge-Partington valued the leasehold rental of Church House, on the basis of an open market value with restricted use, in the region of £4,000 per annum. He also noted that “*It is not considered appropriate to advertise the property as the tenant is required to comply with the landlord’s governing document as it see fit, rather than to operate the property of a strictly commercial basis.*”

55. On 7 July 2016, Mrs Swan transferred her shareholding in BCHAL to BCHC resulting in BCHC being the sole shareholder of BCHAL.

56. On 12 July 2016, the Respondents confirmed that, as requested, a statutory review of the Decision would be undertaken.

57. On 9 August 2016, BCHC wrote to the Respondents providing further information for consideration. In particular, BCHC provided a stock transfer form dated 7 July 2016 and confirmed that “*Since our last correspondence, the subscriber shares in BCHAL have been wholly transferred to BCHC. ...*”

58. On 6 September 2016, the Respondents wrote to BCHC upholding the Decision (“the Review Decision.”)

59. In or around October 2016, the refurbishment works at Church House were completed.

60. On 1 November 2016, BCHAL entered into occupation of Church House on terms later recorded in the Lease.

61. On 3 March 2017, the Respondents wrote to BCHC explaining that only one review was permitted at Law and inviting BCHC to apply for an out of time appeal.
62. On 21 November 2017, Mr Brown wrote to the Respondents reiterating BCHC's position and providing a schedule of use of Church House, BCHAL's accounts as at 31 March 2017 and BCHC's accounts as at 31 March 2017.
63. On 26 November 2017, the Respondents wrote to Mr Brown repeating that only one review was permitted at Law and referring BCHC to the right to lodge an appeal and the right to apply for ADR.
64. On 17 October 2018, BCHC appealed to the First-tier Tribunal (Tax Chamber) ("FTT or the Tribunal").
65. On 2 September 2019, BCHC (the Landlord) and BCHAL (the Tenant) entered into a long lease in respect of Church House ("the Lease.") The relevant provisions of the Lease are set out in the Annex to this Judgment. In light of Mr Brown's contention that the Lease was 'a lease to act as an agent' and/or that there was a management agreement between BCHC and BCHAL, we have carefully considered the Lease. In particular, we have considered Clause 20 which provides that BCHAL will carry on business as the disclosed agent of BCHC. BCHC could not explain the purpose or effect of Clause 20. We note that there is no supporting evidence of BCHAL acting as BCHC's disclosed agent. We also remind ourselves that the Lease was obtained online and lightly amended resulting in inconsistent / irrelevant clauses remaining in the Lease. We have concluded, taking into account the Lease and the evidence of Mrs Swan, Mr Brown and Mr Fowler, that there was no such management agreement. In reaching this conclusion we have considered the parties' agreement, detailed below, that the Lease is valid. We note that if the Lease was invalid there would be no first grant of a major interest and BCHC's appeal would inevitably fail. Pursuant to the Lease, BCHC let Church House to BCHAL from 1 November 2016 to 31 October 2041 at an annual rent of £5,000 and covenants that BCHAL will have exclusive occupation of Church House save for the communal areas. In these circumstances, the terms of the Lease are inconsistent with a management agreement.
66. On 6 September 2019, a meeting took place between Officer Seymour and Officer Rowe and Mrs Swan and Mr Fowler at Church House. As at this date, BCHAL had not made any payments of rent under the lease due to a lack of funds received from lettings. Following the meeting, the Respondents raised a number of questions and requests for further information.
67. In September 2019, BCHAL paid £1,000 to BCHC.
68. In October 2019, BCHAL paid a further £1,000 to BCHC.
69. On 11 October 2019, Mrs Swan, on behalf of BCHC, replied to the Respondents request for further information.
70. On 4 November 2019, Officer Rowe wrote to Mrs Swan upholding the Decision and the Review Decision.

THE LAW

(I) LEGISLATION:

71. Article 2(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the "Principal VAT Directive or PVD") relevantly provides as follows:

"The following transactions shall be subject to VAT:

(a) *the supply of goods for consideration within the territory of a Member State by a taxable person acting as such ...*

(c) *the supply of services for consideration within the territory of a Member State by a taxable person acting as such ...*”

72. Article 9(1) of the PVD relevantly provides:

“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.”

73. Section 30(2) 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.

“(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...”

74. S.96 VATA defines a major interest’ in relation to land as “*...the fee simple or a tenancy for a term certain exceeding 21 years...*”

75. Item 1 (a) (ii) in Gp 5, Sch. 8 VATA specifies:

“1 The first grant by a person—

(a) constructing a building—

(i) ...; or

(ii) intended for use solely for ... a relevant charitable purpose; or

(b)...

of a major interest in, or in any part of, the building, dwelling or its site...”

76. Note 6 of the notes to Gp 5, Sch. 8 VATA (“Note 6”) relevantly 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...”

77. Note 12 of the notes to Gp 5, Sch. 8 VATA (“Note 12”) relevantly states:

“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...”

78. Note 16 of the notes to Gp 5, Sch. 8 VATA (“Note 16”) relevantly states:

“For the purpose of this Group, the construction of a building does not include–

(a) the conversion, reconstruction or alteration of an existing building; or

(b) any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or

(c) subject to Note (17) below, the construction of an annexe to an existing building.”

THE ISSUES

79. The issues between the parties evolved, crystallized, and narrowed over the course of the proceedings. Ultimately, it was agreed between the parties that for Item 1 (a) (ii) of Gp. 5, Sch. 8 of VATA to apply the following requirements needed to be met:

(1) There must be a first grant.

(2) By a person constructing a building.

(3) Intended for use solely for a relevant charitable purpose.

(4) Of a major interest in or in any part of the building.

80. It was agreed between the parties that:

(1) BCHC had permission from the Charity Commission to enter the Lease.

(2) BCHC had person constructing status, *Customs & Excise Commissioners v Link Housing Association Ltd* [1992] STC 718.

(3) The Lease was valid and constituted the first grant of a major interest in Church House in accordance with S.96 and Note 1 of Gp.5, Sch. 8 VATA.

(4) BCHAL was not a charity.

81. Whatever our reservations about some of these agreed facts / issues, they were agreed, and that agreement was confirmed to us on a number of occasions during the hearing. We did not hear any argument on the agreed facts / issues and, accordingly, we do not consider it either within our remit to go behind them or appropriate to do so. In the circumstances, the issue for determination by us was whether Church House was intended for use solely

for a relevant charitable purpose at the time of the Works, *Jubilee Hall @ [388 g-h]*. This issue encompassed the following sub-issues:

- (1) Was Church House used by a charity?
- (2) If so:
 - (a) Was Church House intended for use “*otherwise than in the course or furtherance of a business*” for the purposes of Note 6 (a) of Gp. 5, Sch. 8 VATA, and/or
 - (b) Was Church House intended for use “*as a village hall or similarly in providing social or recreational facilities for a local community*” for the purposes of Note 6 (b) of Gp. 5, Sch. 8 VATA.

THE APPELLANT’S SUBMISSIONS

82. In short, it was the Appellant’s case that Church House was intended for use solely for a relevant charitable purpose as it was used by BCHC, being a charity, “*as a village hall or similarly in providing social or recreational facilities for a local community*” in accordance with Note 6 (b) of Gp. 5, Sch. 8 VATA.

THE RESPONDENTS’ SUBMISSIONS

83. The Respondent’s case was that Church House was not intended for use solely for a relevant charitable purpose as required by Item 1 (a) (ii), Gp. 5 of Sch. 8 VATA. In support of that contention, the Respondents submitted that:

- (1) Use for a relevant charitable purpose means use by a charity as required by Note 6 of Gp. 5, Sch 8 of VATA. No charity was using Church House. Alternatively, if a charity or charities was/were using Church House they were not doing so solely.
- (2) Further or alternatively, if a charity was using Church House, then Church House was not being used:
 - (a) “*otherwise than in the course or furtherance of a business*” as required by Note 6 (a) of Gp. 5, Sch. 8 VATA, and/or
 - (b) “*as a village hall or similarly in providing social or recreational facilities for a local community*” as required by Note 6 (b) of Gp. 5, Sch. 8 VATA.

DISCUSSION

(I) RELEVANT CHARITABLE PURPOSE:

84. Item 1 (a) (ii), Gp. 5, Sch. 8 VATA zero rates the first grant of a major interest by a person constructing a building intended solely for use for a relevant charitable purpose in, or in any part of, the building. The phrase “*intended for use solely for ... a relevant charitable purpose*” is defined in Note 6. There are, at least, 3 components to Note 6. First, the use must be by a charity. Second, the use must be “*otherwise than in the course or furtherance of a business*” and/or third, the use must be “*as a village hall or similarly in providing social or recreational facilities for a local community...*”

85. We proceed below to consider each of these components in turn with reference to each of the alleged users of Church House, being BCHC, BCHAL and the Hirers, namely the

third parties hiring all or part of Church House from BCHAL, in accordance with *Yarburgh @ [7]* and *Hanbury @ [45 & 47]*².

(II) CHARITY?

86. Note 6 of Gp. 5, Sch. 8 VATA states that *“Use for a relevant charitable purpose means use by a charity...”* Accordingly, it is an entry level requirement that the use must be by a charity for it to be use for a relevant charitable purpose. This is clear from *Witney Town Bowls Club v Revenue & Customs Commissioners* [2015] UKFTT 421 (“Witney”) and *Eynsham Cricket Club v HMRC* [2019] UKUT 0286 (TCC) (“Eynsham”).

87. *Witney* concerned whether the supply of services, specifically construction services in respect of a new clubhouse, to the Club were zero rated under Item 2, Gp. 5, Sch. 8 VATA. The central matter for the Tribunal was whether the building was *“intended for use solely for a relevant charitable purpose.”* This involved the consideration of two issues. First, whether the Club was a charity. Second, if it was, whether the requirements of Note 6 were met. It was accepted that the Club was not a registered charity, but a community amateur sports club (“CASC”). The Club argued that it was not necessary to be a registered charity to qualify for zero rating. The Respondents argued that a CASC could not be a charity by virtue of s. 6 of the Charities Act 1911. The Tribunal considered the arguments and concluded that the Club was not a charity. In conclusion, at [39 -83] the Tribunal stated *“For the reasons that we have given above, in our view, the Club is not a charity within the definition in paragraph one 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 VATA 1994. It follows that this appeal must fail. ...”*

88. In *Eynsham* the Upper Tribunal considered whether the construction of a cricket club was zero rated under Item 2, Gp. 5, Sch. 8 VATA. At [2] the Upper Tribunal stated:

“... in order to obtain the benefit of that provision, the requirements of the definition of “relevant charitable purpose” contained in Note 6 to Group 5 of Schedule 8 VATA had to be met, which meant that it had to be found that the pavilion was intended to be used “by a charity” either “otherwise than in the course or furtherance of a business” or “as a village hall or similarly in providing social or recreational facilities for a local community .”

89. At [23] the Upper Tribunal set out Note 6 and at [24] stated :

“Therefore, in order for there to be use for a “relevant charitable purpose”, there must be use “by a charity”. The relevant definition of charity “ for these purposes is contained in paragraph 1 of Schedule 6 FA 2010, as paragraph 7 (d) of that Schedule provides for this definition to apply to, among others, enactments relating to value added tax...”

90. The Upper Tribunal decided that the cricket club could not be a charity for the purposes of Sch. 6 to the Finance Act 2010. [184 (1)] and, consequently, it was not strictly necessary to determine the other issues [124]. For the avoidance of doubt, we note that

² Pursuant to *Hanbury @ [45 & 47]* and *Yarburgh Children’s Trust @ [7]*, the term ‘use’ looks at all the uses made of, in this case, Church House and requires us to consider the totality of the arrangements. We acknowledge that *Hanbury* and *Yarburgh Children’s Trust* are both cases dealing with Item 2 of Gp. 5, Sch 8 VATA, but consider the above proposition to be equally applicable in this case.

Witney was considered by the Court of Appeal. However, we were only referred to the Upper Tribunal decision on the basis that it was upheld on appeal by the Court of Appeal.

91. Therefore, as is clear from *Witney* and *Eynsham*, if the user of Church House is not a charity, then the entry level requirement of “*Use for a relevant charitable purpose*” is not met. We continue below to consider whether each of the users of Church House were charities.

92. As to BCHC, it was agreed between the parties that BCHC was and is a charity. In this regard, we note that BCHC was created on 25 March 1898 and, from 11 May 2011, was registered with the Charity Commission under number 1142012. Further, on 12 May 2011, BCHC updated its governing documentation in accordance with the Charity Commission. Therefore, as BCHC is a charity the entry level requirement for “*use for a relevant charitable purpose*” is met and we must proceed to consider whether or not BCHC’s use of Church House was “*otherwise than in the course or furtherance of a business*” and/or “*as a village hall or similarly in providing social or recreational facilities for a local community...*”.

93. As to BCHAL, BCHC did not argue that BCHAL was a charity for the purposes of Sch. 6 to the Finance Act 2010 or at all. In fact, BCHC conceded that BCHAL was not a charity. The Respondents argued that BCHAL was not a charity and, in their amended skeleton argument at [84-101], made submissions on the point. However, given the parties’ agreement on the point it does not fall for determination by us. Accordingly, it follows that BCHAL’s use of Church House cannot be use for a relevant charitable purpose because BCHAL does not meet the entry level requirement of being a charity. Consequently, it is not strictly necessary to proceed to consider whether or not BCHAL’s use of Church House was “*otherwise than in the course or furtherance of a business*” and/or “*as a village hall or similarly in providing social or recreational facilities for a local community...*” However, having heard the arguments in full and for completeness, we set out our views on the other matters later in this judgment.

94. As to the Hirers, Mr Fowler contended that some of the Hirers were charities and, consequently, that charities did have use of Church House. However, Mrs Swan accepted that less than 95% of the Hirers were charities. The Respondents relied on Mrs Swan’s concession and argued that there was not any evidence proving, on the balance of probabilities, that 95% or more of the Hirers were charities. We have carefully considered all the available evidence and have concluded that less than 95% of the Hirers were charities. In reaching this conclusion, we refer to and rely on the following:

(1) The Business Plan, dated 31 December 2014, identified 18 different prospective user groups of Church House under 7 different headings, being Sure Start Children Centre, Welcare, Bletchingley Youth Group, Alcoholics Anonymous, Church, Office use and other. The Business Plan did not identify whether these prospective users were charities. It estimated annual letting income from these user groups which at 75% utilisation totalled £12,623. However, the Business Plan was a prospective document and, consequently, cannot be relied on as evidence of the actual Hirers. Therefore, we cannot rely on the Business Plan either to establish that prospective users were charities or that those prospective users actually hired Church House.

(2) Pursuant to Clause 3 of the Lease, Church House was only to be used in accordance with the Appellant’s charitable objectives. Clause 3 does not limit the use of Church House to charities. We do not consider that requiring the use of Church House to be in accordance with BCHC’s charitable objectives is the same

as that use being by a charity. Further, we note that Clause 13 of the Lease expressly states that BCHAL “...will open the whole of the Premises for business to the public...” Accordingly, the potential hirers of Church House are the public at large not just charities.

(3) The Appellant adduced a schedule of occasional and short-term bookings of Church House from 1 October 2017 to 30 May 2019 and a schedule of regular weekly bookings (“the Schedules”). In his evidence, Mr Fowler asserted that several of the named hirers were charities but accepted that there was no evidence in the bundle substantiating that assertion. The Schedules simply record the Hirers names. They do not identify which, if any, of the named hirers are charities. Further, whether a Hirer was a charity was not recorded as part of the booking process. We do not consider that the names alone are sufficient to prove that the named Hirers are charities.

(4) Further or alternatively, if in fact, a charity or charities did use Church House then we remind ourselves that in accordance with Item 1 (a)(ii), Gp. 5, Sch. 8 VATA Church House must be intended for use solely for the relevant charitable purpose. It is clear from the Business Plan, the Lease, and the Schedules that Church House was not intended for use solely for the relevant charitable purpose. This is because the Business Plan expressly refers to business users. Specifically, local businesses who have expressed an interest in using the rooms as business meeting rooms for hire on an hourly basis and who are projected to generate an estimated annual income of £1,300 per annum. The Lease refers to making Church House available to the public at large not just charities. The Schedules clearly show that some of the Hirers are named individuals for example Grace Kelly, Pam Miller, and Rosemarie Pardington. These are clearly not charities.

(5) Whilst the Respondents accept that up to 5% business use of Church House can be ignored as *de minimis*, see *Wakefield* at [5], BCHC did not, whether using the Schedules or otherwise, seek to prove that at least 95% of the Hirers of Church House were charities. It is not for us to undertake this exercise, especially when the names of the Hirers on the Schedules are insufficient to establish whether they are a charity.

95. Accordingly, again, it is not strictly necessary to proceed to consider whether the Hirer’s use of Church House was “*otherwise than in the course or furtherance of a business*” and/or “*as a village hall or similarly in providing social or recreational facilities for a local community...*” However, again having heard the arguments in full and for completeness, we set out our views on the other matters later in this judgment.

(III) “OTHERWISE THAN IN THE COURSE OR FURTHERANCE OF A BUSINESS”

96. In accordance with Note 6, if the entry level requirement of use by a charity is met then it is necessary to consider whether that use is “*otherwise than in the course or furtherance of a business*”.

97. The following cases consider the relevant legal principles that apply when considering whether use is “*otherwise than in the course or furtherance of a business*”.

98. *Revenue & Customs Commissioners v Longridge on Thames* [2016] EWCA Civ 930 (“*Longridge*”) concerned whether the supply of services to a charity during construction of a training centre were zero rated under Items 2 & 4, Gp. 5, Sch. 8 VATA. This included

consideration of whether the charity was carrying on business or economic activity for VAT purposes. In this regard, the Court of Appeal stated:

“109. It is possible to distil certain propositions, relevant to this case, from the terms of the Principal VAT Directive and from the decisions of the CJEU. I consider that the following general propositions are established:

- (i) It is only supplies, of goods or services, "for consideration" which are subject to VAT: Article 2;*
- (ii) There must be a direct link between the supply and the consideration before it is right to hold that the supply is "for consideration": Finland at [44]-[45];*
- (iii) Indeed, if there is no direct link between the supply and the consideration, the question of economic activity does not strictly arise as there is no consideration to form the basis of an assessment to VAT: Finland at [43];*
- (iv) VAT is charged on the amount of the consideration; it is irrelevant for the purpose of calculating the VAT payable whether the consideration for the supply is above or below the market value of the supply: Finland at [44] refers to "the value actually given";*
- (v) It is irrelevant for the purpose of calculating the VAT payable whether the consideration for the supply is at a concessionary rate; whatever precisely was meant by the word "concession" in EC v France at [21], it cannot be taken to mean that any reduction in price by way of a concession takes the supply outside the scope of economic activity; indeed, in EC v France at [20], the CJEU obviously thought that lettings by local authorities at subsidised rents were an economic activity;*
- (vi) Article 9 states that a taxable person is a person who carries on any economic activity, whatever the purpose of that activity: Finland at [37];*
- (vii) If a person supplies goods or services "for consideration", i.e. satisfying the test of direct link referred to in (2) above, and the activity is "permanent", then there is a rebuttable presumption, or a general rule subject to possible exceptions, that the supply for consideration is an economic activity: Finland at [37];*
- (viii) The character of the activity (i.e. whether it is an economic activity) is to be judged objectively: Finland at [37];*
- (ix) The subjective motive of the person making the supply does not influence the identification of the objective character of the supply; this follows from the proposition that the character of the activity is to be judged objectively;*
- (x) A charitable activity can be an economic activity: see EC v Netherlands, discussed at paragraph 17 above;*
- (xi) A non-profit making activity can be an economic activity: Finland at [40].”*

99. The Court of Appeal considered the matter again in *Wakefield College v Revenue & Customs Commissioners* [2018] EWCA Civ 952 (“*Wakefield*”). This was a case concerning whether construction services supplied to Wakefield, an educational establishment, were zero rated in accordance with Item 2, Gp. 5, Sch. 8 VATA. Again, this involved considering whether the taxpayer was carrying out an economic activity. In this regard, the Court of Appeal summarised the correct legal approach as follows:

“51. There was a good deal of agreement between the parties on the correct legal approach, following these cases, particularly Borsele. What follows is my analysis of the current legal position, but I will indicate any disagreements between the parties.

52. *Whether there is a supply of goods or services for consideration for the purposes of article 2 and whether that supply constitutes economic activity within article 9 are separate questions. A supply for consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient: see, for example, the judgment in Borsele at [24]. That is what is meant by "a direct link" between the supply of the goods or services and the consideration provided by the recipient: see Borsele at [26] and contrast Apple and Pear Development Council v Customs and Excise Comrs. There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied. This requirement was satisfied in both Finland and Borsele.*

53. *Satisfaction of the test for a supply for consideration under article 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity. However, as Mr Puzey for HMRC pointed out, the Advocate General remarked in her Opinion in Borsele at [49], "the same outcomes may often be expected".*

54. *Having concluded that the supply is made for consideration within the meaning of article 2, the court must address whether the supply constitutes an economic activity for the purposes of the definition of "taxable person" in article 9. The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made "for remuneration". The important point is that "remuneration" here is not the same as "consideration" in the article 2 sense, and in my view it is helpful to keep the two terms separate, using "consideration" in the context of article 2 and "remuneration" in the context of article 9.*

55. *Whether article 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in Borsele at [29]. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to make a profit. Although a supply "for the purpose of obtaining income" might in other contexts, by the use of the word "purpose", suggest a subjective test, that is clearly not the case in the context of article 9. It is an entirely objective enquiry.*

56. *In describing the relationship between the supply and the charges made to the recipients in the context of article 9, the CJEU has used the word "link". In Finland at [51], the court concluded that "it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct...for those services to be regarded as economic activities". Likewise, in Borsele at [34], the court adopted precisely those words in concluding that the provision of the school transport was not an economic activity.*

57. *Mr Prosser QC for the College submitted that whether there was "a sufficiently direct link" between the services and the charge made was an important circumstance, while Mr Puzey submitted that "direct link" does not feature in the analysis.*

58. *I regard this as a largely semantic point. The word "link", whether "sufficient" or "direct", is used as no more than shorthand to encompass the broad enquiry as to*

whether the supply is made for the purpose of obtaining income. It is not a separate test, or one of the factors to be considered when addressing the central question. For my part, I think it is apt to cause some confusion to use the same word for both article 2 and article 9 and I have not myself found it particularly helpful or illuminating in considering whether there exists an economic activity.

59. Each case requires a fact-sensitive enquiry. While cases concerning the supply of legal aid services or school transport will provide helpful pointers to at least some of the factors relevant to the supply of subsidised educational courses, there is not a checklist of factors to work through. Even where the same factors are present, they may assume different relative importance in different cases. The CJEU made clear in Borsele at [32] that it was for the national court to assess all the facts of a case.”

100. The above applicable legal principles were succinctly summarised in *Yeshivas Lubavitch Manchester v The Commissioners for Her Majesty’s Revenue & Customs* [2019] UKFTT 427 (TC) @ [109-116], a case concerning Item 2 of Gp. 5, Sch. 8 VATA, as follows:

“109. Item 2 in Group 5 of Schedule 8 VATA requires that at the time of supply, the building was “intended for use solely for ... a relevant charitable purpose”. Note 6 defines “use for a relevant charitable purpose” to include use “otherwise than in the course or furtherance of a business”.

110. The word “business” in Note 6 has the same meaning as the expression “economic activity” in Article 9(1) of the Directive.

111 “Economic activity”, within the meaning of Article 9(1) of the Directive, requires a supply “for consideration” within the meaning of Article 2 of the Directive.

112. A supply for consideration requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient. There is no need for the consideration to be equal in value to the goods or services: it is simply the price at which the goods or services are supplied (Wakefield College at [52]).

113. For there to be an economic activity, the supply must also be made for the purposes of obtaining income therefrom on a continuing basis. A supply meeting this test is referred to for convenience as one made “for remuneration” (a different concept to the concept of “for consideration”) (see Wakefield College at [52]-[55], [59]; Longridge at [70], [72]-[73], [84]).

114. Determining whether there has been a supply for remuneration requires a fact-sensitive enquiry. There is not a checklist of factors to work through. Factors considered to be significant in other cases may provide helpful pointers, but the same factors may assume different relative importance in different cases. (Wakefield College at [59]).

115. This enquiry does not involve subjective factors such as whether the supplier is aiming to make a profit, and concessionary charges are therefore not an indicator against economic activity (Wakefield College at [55]; Longridge at [93]).

116. The fact that a provider has charitable status does not automatically mean that its operations cannot constitute a “business” within the meaning of Note 6. A charity, as part of its operations, may for instance conduct a business designed to make money for its support, such as a charity shop. However, the payment of fees is not a deciding factor but

only one of the factors to be put in the balance in determining whether a charity's activities constitute a "business" (St Paul's at [17], [27])."

101. We continue below to consider whether each of the uses made of Church House by each of the users is *"otherwise than in the course or furtherance of a business"* by applying the above legal principles.

102. As to BCHC, it is our view that there is a supply for consideration from BCHC to BCHAL. This is because a legal relationship exists between BCHC and BCHAL under the Lease. There is reciprocal performance, namely BCHC provides BCHAL with exclusive possession of Church House, save for the communal areas which neither party contended were material, in return for the payment of rent of £5,000 per annum. Accordingly, there is a direct link between the supply and the consideration provided by BCHAL. Next, we must consider whether the supply constitutes an economic activity. Whilst the fact that there is a supply for consideration is indicative of the supply also being for remuneration it is not determinative. There is no presumption. We must consider all the objective circumstances of the supply to decide whether the supply is made for the purposes of obtaining remuneration, namely income therefrom on a continuing basis. We have concluded that the supply is made for remuneration. In reaching this conclusion we rely on the following principal points:

(1) The fact that BCHC is a charity does not automatically mean that its activities cannot constitute a business, *Yeshivas Lubavitch Manchester @ [116]*.

(2) The valuation report of Mr Edge-Partington confirmed that on 17 May 2016 Church House had an open market value, considering the permitted use clause, of around £4,000 per annum. Therefore, as this is an open market value, we consider this to be evidence of a market of other properties that operate on a similar basis.

(3) The rent due under the Lease was £5,000 per annum, namely a regular, recurring, and non-concessionary amount.

(4) Whether BCHC was aiming to make a profit is a subjective factor and one to which we have no regard in this objective analysis, but the objective fact is that BCHC charged a premium of £1,000 on the open market rental value.

(5) BCHC was entitled to enforce payment of the rent in accordance with clauses 18 and 22 of the Lease.

(6) Whilst there were delays in payment of the rent and no evidence of enforcement, BCHC and BCHAL's accounts show the accrued rental receipts without write off. To date, BCHAL has paid, albeit belatedly, £14,000 in rent to BCHC. We also remind ourselves that *"A non-profit making activity can be an economic activity: Finland at [40]."* Longridge @ 109 (xi).

103. For all the above reasons considered both individually and cumulatively, we conclude that the supply was made for the purposes of obtaining income therefrom on a continuing basis.

104. As to BCHAL, we consider that there is a supply for consideration from BCHAL to the Hirers. This is because a legal relationship exists via the oral contract, no evidence of a written contract having been provided, between BCHAL and the Hirers. There is reciprocal performance, namely BCHAL provides the Hirers with a room(s) or the whole of Church House in return for the payment of rent. We remind ourselves that in accordance with *Wakefield at [52]* *"There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied."*

Accordingly, there is a direct link between the supply and the consideration provided by the Hirers. The next question is whether the supply constitutes an economic activity. As above, the fact that there is a supply for consideration is indicative of the supply also being for remuneration, but it is not determinative. There is no presumption. We have considered all the objective circumstances of the supply and decided that the supply is made for the purposes of obtaining remuneration, namely income therefrom on a continuing basis. In reaching this conclusion we rely on the following principal points:

(1) Pursuant to Clause 13 of the Lease, BCHAL can “...open the whole of the Premises for business to the public...” Accordingly, the Lease provides for BCHAL to operate in the course or furtherance of a business.

(2) BCHAL prepares accounts, albeit those accounts state that BCHAL’s principal activity has been “facilitating the use of the building known as Church House in Bletchingley as a village hall.”

(3) BCHAL pays a 1/3 of Elaine’s salary in recognition of the work she undertakes for BCHAL administering the letting of Church House.

(4) The sole activity of BCHAL is the letting out of Church House to the public. Specifically, BCHAL rents out the room(s) in Church House or the entirety of Church House to the public for specified periods of time as evidenced by the Schedules. Some of the bookings are regular, repeat bookings taking place over a few years. Others are one off bookings.

(5) BCHAL lets out the room(s) or the entirety of Church House in return for payment. There was no direct evidence as to BCHAL’s charge out rates. Mrs Swan gave evidence on this point in her closing submissions, but we have not considered this for the reasons detailed at paragraph 11 above. We have considered BCHC’s Business Plan which details a review of the charge out rates of local facilities. This review was undertaken to project income and expenses. BCHC proposed a fee structure of £5-15 per hour for a room and £10-25 per hour for the whole of Church House which was roughly consistent with the rates of the Bletchingley Village Hall (a separate and non-related building), being £11-29 per hour to rent the whole complex and £6-£16 per hour to rent a room. Also, BCHC proposed charging the Church £300 per month, which was expressly stated to be a current market rate, to use one room in Church House as the Parish Office. Therefore, the proposed fee structure represented commercial rates which would be sufficient to maintain an annual rent of £5,000. Mr Brown’s evidence was that BCHAL charged the Hirers market rates. The rent charged by BCHAL to the Hirers was BCHAL’s sole income. BCHAL was responsible for all outgoings on Church House save for insurance. Notably, BCHAL paid, albeit late, most of the rent. Accordingly, we are satisfied that BCHAL let Church House, whether by way of individual rooms or the entire building, to the public at commercial rates (broadly like those in BCHC’s Business Plan) which were sufficient to enable BCHAL to satisfy or make a significant contribution towards its liabilities.

(6) Whilst BCHAL operated at a loss, we remind ourselves that a non-profit making activity can be an economic activity, *Commission of the European Communities v Republic of Finland C-246/08* at [40].

(7) We note that the Business Plan provided a range of rates, being low, normal, and high. The low rate was for youth, OAP, Church, Sure Start and Welcare. The normal rate was for other village organisations and local residents. The high rate was for occasional users and other groups. As to the range of rates, we remind

ourselves that concessionary charges are not an indicator against economic activity, see *Longridge* at [93], *Wakefield College* at [55] and *Yeshivas Lubavitch Manchester @* [115]. Similarly, we consider that forbearance by a landlord from enforcing the covenants under a lease are also not necessarily an indicator against economic activity there being many reasons why a landlord may elect not to do so.

(8)As detailed in the Business Plan, there was a range of venues for hire in Bletchingley. There are other venues, in particular the Village Hall & Community Centre complex, that operate on a similar basis to Church House. Accordingly, there is a market for venue hire in Bletchingley and BCHAL is a market participant.

105. Again, for all the above reasons considered both individually and cumulatively, we conclude that the supply was made for the purposes of obtaining income therefrom on a continuing basis.

106. As to the Hirers, we have considered whether the Hirers' use of Church House was "*otherwise than in the course or furtherance of a business*" We are not satisfied that BCHC has proved, on the balance of probabilities, that the Hirers' use of Church House was "*otherwise than in the course or furtherance of a business.*" In reaching this decision, we note the following:

(1)The primary evidence as to the identity of the Hirers was the Business Plan and the Schedules.

(2)As to the Business Plan, this refers to several potential hirers such as the Sure Start Children's Centre, Welcare, Bletchingley Youth Group, Alcoholics Anonymous, Church, office use (including business use) and other users such as family gatherings / children's parties. However, this was a prospective document and, consequently, cannot be relied on as evidence of the actual Hirers. Also, it is clear from the Business Plan that the use of Church House by hirers was not limited to use "*otherwise than in the course or furtherance of a business...*" as hires to local businesses for meeting rooms was envisaged.

(3)As to the Schedules, these record some details of the Hirers from 18 October 2016 until 30 May 2019. No updated schedules were provided for the hearing. The Schedules list the purpose of the hire. Some of the hires are clearly for family gatherings / children's parties, but a significant number are for yoga classes, pilates classes, training days for ring teachers, interviews for an organist and CB Counsellor Training interviews among others. Whilst we are content that the family gatherings and children's parties are not business activities, we consider that the remainder of the above hires could be business activities, by which we mean that the Hirer could be renting Church House to conduct their own business which may or may not involve charging a fee to those attending the relevant activity at Church House.

(4)Accordingly, we have considered whether the Hirers provided a supply both for consideration and for remuneration to the end user or not. We consider that there may be a supply for consideration from some of the Hirers to the end users. This is because a legal relationship with reciprocal performance may exist between some of the Hirers and the end user such that those Hirers provided an activity, such as a yoga class, at Church House and in return the end user paid a fee for attending the class. If so, there may be a direct link between the supply provided by the Hirers and the consideration provided by the end user. However, there is insufficient evidence before us to enable us ultimately to determine whether the supply was, firstly, for consideration and, secondly, for remuneration. Therefore, BCHC has

failed to prove that the Hirers used Church House “*otherwise than in the course or furtherance of a business.*”

(iv) “AS A VILLAGE HALL OR SIMILARLY IN PROVIDING SOCIAL OR RECREATIONAL FACILITIES FOR A LOCAL COMMUNITY...”

105. Further, in accordance with Note 6, if the entry level requirement of use by a charity is met then it is also necessary to consider whether that use is “*as a village hall or similarly in providing social or recreational facilities for a local community...*”

106. As to BCHC, it argued that by leasing Church House to BCHAL it (BCHC) was using Church House as a village hall. However, BCHC’s evidence on this point was inconsistent.

107. On the one hand, the following written and oral representations were made that BCHC did not use Church House after the Lease:

(1) In a letter, dated 8 December 2014, Mr Brown, acting as BCHC’s agent, wrote to the Respondents stating that BCHAL “*...will be responsible for the letting and use of the property as a village hall on behalf of the charity...*”

(2) On 9 June 2016, Mrs Swan wrote to the Respondents confirming that “*We can only reiterate that BCHC intention has always been to lease the property to a trading arm that will manage and run the building, whilst the rent provides a maintenance fund going forwards...*” and “*As above, the intended use of the building is not for BCHC but for the intended users ...*”

(3) Mr Fowler’s oral evidence was that following the Lease BCHC booked its use of Church House via BCHAL like all other Hirers.

108. On the other hand, the following written and oral representations were made by BCHC that BCHC did use Church House after the Lease:

(1) On 19 August 2015, Mr Brown wrote to the Respondents in the following terms:

“4. As regards your assertion that the grant in a village hall can only be zero-rated if it is made to a charity that intends to put the building to a relevant charitable use, the law requires that the building is to be used by a charity. BCHC is a charity and it is BCHC that will continue to use the building as a village hall as it has done for nigh on 100 years. As a person constructing a building BCHC is perfectly entitled to make a zero-rated first grant of a major interest in a building that it has constructed. BCHAL will, under the terms of the lease granted to it by BCHC, let the building on behalf BCHC for use as a village hall in the manner in which BCHC has done hitherto. Thus the village hall will continue to be used by a charity and the opportunity to grant the zero- rated lease for over 21 years enables the legislative intent that the provision of a building for use by a charity should be free of VAT cost as to its construction. This position, clearly explained to your colleagues in Wolverhampton, was accepted by them culminating in the acceptance of registration as of 01 December 2014 advised in a letter dated 14 April 2015.

5. You infer that the zero- rating can only be made if the major interest is granted to a charity but the law does not say this, it is sufficient that the building is used by

a charity which it will continue to be, i.e. by BCHC with BCHAL letting the building to users and otherwise effecting its use as a village hall.”

(2) On 12 October 2015, Mr Brown wrote to the Respondents stating:

“...Note (6) (b) to Group 5 defines a relevant charitable purpose to be use by a charity as a village hall or similar in providing social or recreational facilities for a local community. BCHC is a charity and the required activity is fulfilled as it has been since 1907 and will continue to be.

The ‘use by a charity’ is fully satisfied as the building will continue to be used by BCHC in providing the required facilities for a local community with the actual administration of the building and the lettings being carried out on behalf of the charity by the proposed ... (BCHAL.)

...the building will continue to be used as a village hall by a charity (BCHC) with the administration and letting being carried out on behalf of BCHC by BCHAL. The lettings will clearly be by BCHAL on behalf of BCHC so that the continued use of the building in providing a village hall to the local community is axiomatic. The letting income received by BCHAL on behalf of BCHC will not be retained by BCHAL but will be paid to BCHC

... BCHC will continue to use the building for a relevant charitable purpose through the administrative role of BCHAL”

(3) On 10 December 2015, Mr Brown wrote to the Respondent stating *“BCHAL is not itself going to use the building solely for a relevant charitable purpose and BCHC will continue to use the building for such purpose ...”*

(4) On 3 March 2017, Mr Brown wrote to the Respondents in the following terms:

“... to enable the property to be let by BCHAL on behalf of BCHC to the users of a village hall.

... In 2 (ii) you state that the person to whom the grant is made does not meet the requirements of Note 6 to Group 5, Sch. 8, VATA 1994. It does; the use of the building by BCHC (a charity) via the lettings to users by BCHAL fall squarely within Note 6(b) as the use is as a village hall in providing social or recreation activities for a local community. The building has no other use; within the village of Bletchingley there is another building that may provide some, but not exclusive facilities similar to that of a village hall. The website of this other building was visited by the officer concerned and it is from that source that the incorrect suggestion that the building will not be used exclusively as a village hall; It will not be used by persons out with the local community...

Fundamentally, the building is to be used by a Charity, BCHC, in accordance with Note 6 (b)...”

(5) On 11 October 2019, Mrs Swan emailed the Respondents stating *“...The concept of landlord and tenant, although an inevitable part of a lease, may be misleading in the relationship between BCHC and BCHAL. What must be seen is flow through of the granting of the facilities of the village hall ultimately by BCHC in accordance with its charitable objectives”*

(6) Mr Brown’s oral evidence was that after the Lease BCHAL let Church House on behalf of BCHC to the local community i.e., BCHAL was BCHC’s appointed

representative / agent and BCHC used Church House for a relevant charitable purpose.

(7) Mrs Swan's oral evidence was that BCHC used Church House after the Lease as it was the 100% shareholder of BCHAL i.e., BCHAL was a 100% subsidiary of BCHC.

109. Further, BCHC submitted that BCHAL was akin to the separate management committee of local residents in *Hanbury* which was set up to ensure that the hall was used as a village hall for the benefit of the local community, *Hanbury @* [28 & 45].

110. We have considered all the evidence and submissions on this point. We conclude that BCHC did not itself use Church House "*as a village hall or similarly in providing social or recreational facilities for a local community...*" by leasing it to BCHAL. In reaching this conclusion, we have referred to and relied on the following:

(1) We are concerned by BCHC's inconsistency on the issue. In particular, we are concerned by the changing nature of both Mr Brown's and Mrs Swan's evidence.

(i) As to Mr Brown, his letter to the Respondents dated 8 December 2014 stated that BCHAL "*...will be responsible for the letting and use of the property as a village hall on behalf of the charity...*" It did not assert that BCHC would be using Church House which is his primary contention in later correspondence.

(ii) As to Mrs Swan, on 9 June 2016 she informed the Respondents that following the Lease "*...the intended use of the building is not for BCHC but for the intended users ...*" On 11 October 2019, she informed the Respondents that there was "*flow through*" between BCHC and BCHAL. Before us, she argued that following the Lease BCHC was using Church House.

(2) We consider the most reliable and credible pieces of correspondence to be Mr Brown's letter dated 8 December 2014 and Mrs Swan's letter dated 9 June 2016. This is because Mr Brown's letter was written to the Wolverhampton Registration Unit seeking VAT Registration. It explains briefly BCHC's proposal. It pre-dates the dispute between BCHC and, accordingly, is not reactive to any concerns or queries raised by the Respondents. In short, we consider this to be untainted by the concerns raised later by the Respondents and, consequently, more reliable. In respect of Mrs Swan's letter, this was the first letter from Mrs Swan to the Respondents. Whilst it was a response to the Respondents' correspondence dated 11 May 2016, it was the first time that Mrs Swan had expressed her view on the matter, and we consider it to be less tainted by the dispute than later correspondence.

(3) BCHC leased Church House to BCHAL. It is agreed between the parties that the Lease is valid and constituted the first grant of a major interest in Church House. Pursuant to the Lease, BCHC, as landlord, leases Church House to BCHAL at a commercial rent and BCHAL "*...open[s] the whole of the Premises for business to the public ...*" The Lease is not a management agreement. It is inconsistent with the terms of the Lease, such as the provision for exclusive possession, that BCHC would continue to use Church House, save for the communal areas, after the Lease.

(4) In *Hanbury @* [28 & 45], the tribunal found that the appellant intended to use the hall as a village hall. The Tribunal relied on the following facts. First, a management committee of local residents was set up to ensure that the hall was

used as a village hall for the benefit of the local community. Second, the management committee included some of the appellant's trustees. Third, the hall was used as a village hall controlled by local residents. Fourth, the appellant wished to secure a complete separation of the charity from the management of the hall and "*The favoured option was to establish a separate charity to which the Appellant would grant a lease of the hall at a peppercorn rent but retaining the reversionary interest.*"

(5) In contrast with *Hanbury*, Church House is leased to BCHAL. BCHAL is not a charity but is a separate legal entity. BCHC, being the sole shareholder of BCHAL, does not step into a director role. In a letter, dated 9 June 2016 Mrs Swan stated that "... *It is the intention that the ownership and management of BCHAL will change to include various volunteers in the community to take on the roles of managing and running the refurbished building. This will be finalised in the next two months as volunteers are sought and the refurbishment comes to an end.*" However, there is no evidence that such change was ever affected. BCHAL pays a commercial not peppercorn rent. In accordance with *The Commissioners for Her Majesty's Revenue & Customs v Caithness Rugby Football Club* [2016] UKUT 0354 @ 34³, the fact that the local community does not have direction or control over the use of Church House is not decisive. We have considered all the above factors and concluded that this case is distinguishable from *Hanbury* and, accordingly, that *Hanbury* does not assist us in determining whether BCHC intended to use Church House as a village hall.

(6) In *Jubilee Hall* @ [393 f-h & 397 d-f], the Court of Appeal considered the argument of St Dunstan's Educational Foundation that leasing a building at a rent was sufficient use by the lessor. The Court of Appeal disagreed. We are bound by this decision. Specifically, Sir John Vinelott stated:

"It is the intended use of the building that is material. The foundation did not itself 'use' the building by allowing it to be used by the college as its delegate in pursuance of its obligation to ensure that the school or college was conducted and maintained. As the college was a fee-paying school, use by the college was not 'use otherwise than in the course or furtherance of a business.'" [393 f-h]

Further, Beldam LJ stated:

"It was argued that simply by making it available to the school and the local authority for use in return for charges, the foundation was in fact using it. It was argued that if the building is to be leased at a rent that is sufficient use by the foundation.

I do not think that the word 'use' in this context includes the activity of leasing the building. Further, there is again the question that the use by the local authority in return for charges, even though the charges help to promote the charitable purposes of the foundation, is a commercial use, as is use by a fee-

³ "*I am satisfied, for the reasons discussed above, that the appellant's suggested interpretation of note 6(b) is not correct. On a proper construction of the provision it does not require that a local community has direction over, or control of, the use of the building within which the relevant facilities are provided. In any particular case the existence or absence of direction or control will be a relevant factor, but not necessarily a decisive one. In my opinion the use of the building may be intended to be at the disposal of the local community even though the community is not the body directing or controlling its use.*"

paying school. I do not consider that the use in this case could be said to be similar to the use made of a village hall.” [397 d-f]

111. Therefore, we conclude that BCHC’s use of Church House is not “*as a village hall or similarly in providing social or recreational facilities for a local community...*” but is commercial use. Further and for the avoidance of doubt, if, which we do not accept, BCHC did use Church House after the Lease “*as a village hall or similarly in providing social or recreational facilities for a local community...*” it did not do so solely because BCHAL, which is not a charity, and the Hirers, less than 95% of which were charities, also used Church House and their use was not for relevant charitable purpose. Therefore, Item 1 (a) (ii) in Gp 5, Sch. 8 VATA is not satisfied.

112. Next, putting to one side the fact that BCHAL is not a charity, it is necessary for us to consider whether BCHAL’s use of Church House is “*as a village hall or similarly in providing social or recreational facilities for a local community...*” We do not consider that it is. We refer to and rely on paragraphs 104 (1-8) above as applicable. We also note that in *Jubilee Hall @* [390 a-c], the Court of Appeal considered what level of economic activity precluded qualification as a village hall or similar and held that “*... the only economic activity is one in which they participate directly; the obvious examples are the bring-and-buy or jumble sales, the performance of a play by local players and the like. On a strict construction, any economic activity carried on by somebody outside the local community even to raise money for the maintenance of the village hall (by, for example, letting the hall at a commercial rate) would be outside sub-para (b)...*”

113. For these reasons, we have concluded that BCHAL’s commercial activities were “*quite plainly a well organised commercial operation competing with other [facilities] in the neighbourhood. ...*”⁴ and went well beyond the normal activities of a village hall. In short, BCHAL operates a letting business to make profit. Consequently, BCHAL did not use Church House “*as a village hall or similarly in providing social or recreational facilities for a local community...*” For the avoidance of doubt, we have considered the certificate provided by BCHAL purportedly in accordance with Note 12 (b) of Gp.5, Sch. 8 VATA. We note that BCHAL is not a charity, and it does not let Church House exclusively to charities. Accordingly, we do not consider that BCHAL was able to confirm that Church House would be used solely for a relevant charitable purpose as required by Item 1 (a)(ii) of Gp. 5, Sch. 8, VATA.

114. As to the Hirers, we have considered whether or not the Hirers’ use of Church House was “*as a village hall or similarly in providing social or recreational facilities for a local community...*” We are not satisfied that BCHC has proved, on the balance of probabilities, that the Hirers’ use of Church House was “*as a village hall or similarly in providing social or recreational facilities for a local community...*” In particular, we are concerned that the potential level of economic activity by the Hirers may well be inconsistent with the use of Church House as a village hall for social or recreational facilities for a local community. In reaching this decision, we refer to and rely on the reasoning at paragraph 106 (1-4) as applicable.

115. In addition, it is clear from the Business Plan and potentially from the Schedules, as detailed in paragraph 104 (3) above, that the use of Church House by hirers was not limited to use “*as a village hall or similarly in providing social or recreational facilities for a local community...*” as hires to local businesses for meeting rooms, to the Church for a

⁴ *Jubilee Hall @* [397 a-b]

Parish Office at a current market rent of £300 per month and to Hirers who may themselves have been undertaking business activities were envisaged and/or took place.

116. Finally, as confirmed in *Jubilee Hall @ [390 a-b]*, “... *the 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...*” Unfortunately, no attempt was made by either party to define the local community of Bletchingley. Specifically, no submissions were made during the hearing that those within a specific radius (or any other radius) were the local community.

117. We are aware that in the Business Plan a review of other facilities within a 3-mile radius was undertaken. Mr Brown, in a letter dated 10 December 2015 to the Respondents, stated that “... *this focus on a 3-mile radius is clearly indicative of the building being for the use of the local community.*” We do not accept the logic of this contention. The fact that, when conducting a review, BCHC looked at a 3-mile radius does not itself indicate that the ultimate use of Church House will be by the community within that radius or that the community within that radius is necessarily the local community.

118. We have considered and discounted BCHC’s submission that as hire of Church House was solely advertised locally only members of the local community hired Church House. We do not accept this. Local advertising does not prevent or prohibit bookings being made by those outside the local community. We also do not accept BCHC’s alternative submission that use by those outside the local community was modest because there is no evidence to substantiate this. We are aware that the addresses of some of the potential hirers are stated on their letters of support, but no addresses of the Hirers are detailed on the Schedules.

119. Therefore, without an agreed definition of local community or submissions on the point we are not satisfied that BCHC has proved, on the balance of probabilities, that the Hirers are members of the local community and, accordingly, that the use made of Church House is as a village hall providing social or recreational facilities for a local community.

CONCLUSION

120. In short, BCHC’s first grant of a major interest is not zero rated in accordance with Item 1 (a) (ii) of Gp. 5, Sch 8 VATA because Church House was not intended for use solely for a relevant charitable purpose. Specifically,

(1) BCHC was and is a charity, but its use of Church House was not “*otherwise than in the course or furtherance of a business*” or “*as a village hall or similarly in providing social or recreational facilities for a local community*”, Note 6 (a-b) of Gp. 5, Sch. 8 VATA.

(2) BCHAL was not and is not a charity. Also, its use of Church House was not “*otherwise than in the course or furtherance of a business*” or “*as a village hall or similarly in providing social or recreational facilities for a local community*”, Note 6 (a-b) of Gp. 5, Sch. 8 VATA.

(3) Less than 95% of the Hirers were charities. BCHC has not proved, on the balance of probabilities, that the Hirers use of Church House was “*otherwise than in the course or furtherance of a business*” or “*as a village hall or similarly in providing social or recreational facilities for a local community*”, Note 6 (a-b) of Gp. 5, Sch. 8 VATA.

121. For all of the above reasons, the appeal is dismissed.

122. Finally, and for the avoidance of doubt, BCHC did not rely on the correspondence between Mr Brown and the Wolverhampton VAT Registration Unit to found a legitimate expectation argument. In any event, we do not have jurisdiction to adjudicate on a claim based on legitimate expectation as per *HMRC v Abdul Noor* [2013] UKUT 071 (TCC).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

123. 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.

JUDGE JENNIFER NEWSTEAD TAYLOR
TRIBUNAL JUDGE

Release date: 29 JUNE 2022

Annex

The Lease provides, so far as relevant, as follows:

“Definitions

1. *When used in this Lease the following expressions will have the meanings indicated:*
 - a. *“Additional rent” means all amounts payable by the Tenant under this Lease except Base Rent, whether or not specifically designated as Additional Rent elsewhere in this Lease...*
 - c. *“FRI lease” means a full repairing and insuring lease where all costs of maintenance and repair and the cost of insurance (whether insured directly or through the Landlord) are met by the Tenant.*
 - d. *“Insurance Charge” means the cost to the Landlord of effecting and maintaining the Insurance Policies from and including any premiums paid and where relevant the cost of assessing any insured amounts;*
 - g. *“Open market Rent” means the best rent which might reasonably be expected to be paid by a willing tenant to a willing landlord for a letting of the whole of the Premises in the open market with vacant possession and without a fine or premium for the residue of the term remaining at the date of review;*

Intent of Lease

2. *It is the intent of this Lease and agreed to by the Parties to this Lease that rent for this Lease will be on a gross rent basis meaning the Tenant will pay the Base Rent and any Additional Rent and the Landlord will be responsible for all other service charges related to the Premises and the operation of the Building save as specifically provided in this Lease to the contrary.*

Let Premises

3. *The Landlord agrees to rent to the Tenant the building municipally described as Church House, Church Walk, Bletchingley, England, RH1 4PD, (“the Premises”). The Premises will be used for only the following permitted use (“ the permitted use”):*

In accordance with Bletchingley Church House Charity's governing document which states the following:

The object of the charity is the advancement of education, the advancement of the Christian religion and the provision and maintenance of a village hall for the use of the inhabitants of Bletchingley, Surrey on the surrounding area without distinction of political, religious or other opinions, including useful meetings, lectures and classes and

other forms of recreation and leisure time occupation with the objects of improving the conditions of life for the said inhabitants.

Neither the Premises nor any part of the Premises will be used at anytime during the term of this Lease by [BCHAL] for any purpose other than the Permitted Use...

5. Subject to this Lease, the Tenant and its employees, customers and invitees will have the non exclusive right to use for their proper and intended purposes, during business hours in common with all others entitled to the use of those parts of the Common Areas and Facilities from time to time permitted by the Landlord. The Common Areas and Facilities and the Building will at all times be subject to the exclusive control and management of the Landlord. The Landlord will operate and maintain the Common Areas and Facilities and the Building in such manner as the Landlord determines from time to time...

Term

7. The term of the lease commences at 12.00 noon on November 1, 2016 made ends at 12.00 noon on October 31, 2041...

Rent

10. Subject to the provisions of this Lease, the Tenant will pay a base rent of £5,000.00, payable each year, for the Premises (the "Base Rent.")

11. The Tenant will pay the Base Rent on or before 31st day of October of each and every year of the term of this Lease to the Landlord...

Use and Occupation

13. The Tenant will use and occupy the Premises only for the Permitted Use and for no other purpose whatsoever. The Tenant will carry on business under the name of BCHAL and will not change such name without the prior written consent of the Landlord, such consent not to be unreasonably withheld. The Tenant will open the whole of the Premises for business to the public fully fixtured, stocked and staffed on the date of commencement of the term and throughout the term, will continuously occupy an utilise the entire Premises in the active conduct of its business in a reputable manner on such days and during such hours of business as may be determined from time to time by the Landlord...

Restrictive Covenants

15. For so long as the Tenant, or an assignee or subtenant approved by the Landlord, is using and occupying the Premises for the Permitted Use and is not in default under the Lease, the Landlord agrees not to Lease space in the Building to any tenant who will be conducting in such premises as its principal business, the service of a village hall.

16. *The Landlord agrees to complete the refurbishment of the Premises to the necessary standard for the Tenant to be able to sublet the Premises for Permitted Use.*

Quiet Enjoyment

17. *The Landlord covenants that on paying the Base Rent and performing the covenants contained in this Lease, the Tenant will peacefully and quietly have, hold, and enjoy the Premises for the agreed term.*

Default

18. *If the Tenant is in default in the payment of any money, whether hereby expressly reserved or deemed as rent, or any part of the rent, and such default continues following any specific due date on which the Tenant is to make such payment, or in the absence of such specific due date, for the 30 days following written notice by the Landlord requiring the Tenant to pay the same then, the option of the Landlord, this Lease may be terminated upon 30 days notice and the term will then immediately become forfeited and void, and the Landlord may without further notice or any form of legal process immediately reenter the Premises or any part of the premises and in the name of the whole repossess and enjoy the same as of its former state anything contained in this Lease or in any statute or law to the contrary notwithstanding...*

20. *The tenant will carry on business under the name of Bletchingley Church House Administration Limited as the disclosed agent of the landlord...*

Distress

22. *If and whenever the Tenant is in default in payment of any money, whether hereby expressly reserved or deemed as rent, or any part of the rent, the Landlord may, without notice or any form of legal process, enter upon the Premises and seize, remove and sell the Tenants goods, chattels and equipment from the Premises or seize, remove and sell any goods, chattels and equipment at any place to which the Tenant or any other person may have removed them, in the same manner as if they had remained unbeaten distrained upon the Premises, all notwithstanding any rule of law or equity to the contrary, and the Tenant hereby waives and renounces the benefit of any present or future ..statute or law limiting or eliminating the Landlord's right of distress..."*