[2018] UKUT 440 (TCC)

Appeal reference UT/2018/0043

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Appellants**

- and -

GREENISLAND FOOTBALL CLUB — **Respondent**

TRIBUNAL: Mr Justice Horner

Sitting in public in Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF on 14 November 2018

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JUDGMENT

A. INTRODUCTION

[1] This is an appeal on a point of law from the decision of the First Tier Tribunal ("FTT") dated 7 February 2018 whereby it concluded that the appeal of Greenisland Football Club ("GFC") against a penalty issued by the Commissioners of Her Majesty's Revenue and Customs ("HMRC") under Section 62(1) of the Value Added Tax Act 1994 ("the Act") for £53,101 arising out of construction works in respect of which GFC had issued a zero rated certificate pursuant to Item 2 Group 5 of Schedule 8 of the Act, should succeed. Further, that even if GFC had been wrong to issue a zero rated certificate GFC had a reasonable excuse for issuing it under Section 62(3) of the Act.

[2] Ms Natasha Barnes appeared for HMRC instructed by Ms Alice Britton of HMRC's Solicitor's Office. Mr Tim Brown was instructed by Constable VAT Consultancy LLP. Both legal teams in general and counsel in particular deserve high praise for the quality of their submissions both written and oral and the efficient and effective way they presented their respective cases before the First Tier Tribunal.

B. BACKGROUND INFORMATION

[3] This appeal relates to the liability of GFC to pay VAT on the cost of the construction of a new clubhouse at Greenisland. The project was commenced in 2010 by GFC who hoped to construct a multipurpose facility for use by its members and the local community. GFC was formed in 1995 in Greenisland. Part of the area GFC serves falls into the top 26% of the most deprived wards in Northern Ireland. GFC leased the land it occupies from Carrickfergus Council originally, but its landlord is now Mid and East Antrim Council.

[4] The lease contains a covenant on behalf of GFC:

> "Not to use the premises or any part thereof other than for community recreational, social, physical and cultural purposes (including Club Meetings, briefings and as a point of social contact for Club Members and for servicing needs of the Local Community) and as permitted by the Council and subject to the Council's satisfaction."

[5] The Club was established to promote "fitness, advanced education and facilitate social development, particularly in relation to 10-18 year olds (hereinafter called "the beneficiaries") through healthy participation in sports and Association football …"; see paragraph 3 of the Constitution of GFC (also known as Greenisland Boys Football Club) which sets out the objects of the Club. At the time of the hearing before the FTT in January 2018 there were only some 40 members who each paid a subscription of £20. The explanation for this is that membership can only be achieved for those 18 years or over. Membership gives those members access to this new clubhouse which contains a small gym and various other facilities. The decision before the FTT records that "as well as full members, organisations within the area of benefit may be admitted as Affiliated Members and well-wishers anywhere or persons with special knowledge or experience to offer may become Associate Members."

[6] The evidence was that boys who play for GFC pay £20 per month by way of dues. Not every boy pays £20 per month. Those dues are discounted, for example, if there are a number of juvenile members from the same family. I was given no further details as to the financial arrangements between GFC and those juveniles who benefit from the facilities and who play for GFC's teams. However, the accounts of 2016 which were before FTT demonstrate that substantial dues were collected from the boys who played for GFC's teams. The total sum including membership subscriptions was over £55,000.

[7] The FTT was told by the GFC's Development Officer, Mr Munn that the clubhouse as constructed contains an office/committee room, an IT suite doubling as a meeting room, a kitchen, a fitness suite ("the gym"), function room ("the main hall"), showers, a storeroom, toilets and a community garden. Its design does not cater specifically for Association football. The showers are available for those who use the gym. The building is open at least 70 hours per week every week throughout the year. When it is open, anyone, regardless of whether they are a member or not, can call in and buy tea or coffee which is made in the kitchen. This is staffed by volunteers called "the Pink Ladies".

[8] The Management Committee of GFC comprises only members of GFC which is open to anyone who is over 18 years of age as I have noted. I have also set out the process by which Affiliated Membership and Associate Membership is acquired. The FTT was told that in respect of membership of the Management Committee anyone could be nominated by a member of GFC and the nominee did not have to be a member of GFC although once elected to the Management Committee at an AGM, the nominee automatically became a member of GFC. The FTT was referred to paragraph 5 of the Constitution.

[9] The facilities at the clubhouse are available for booking on a first come first served basis and open to anyone in the local community. The FTT recorded that GFC did not have any priority over any other body when it came to reserving facilities nor could it block book a particular facility for, by way of example, the whole of the football season, at the start of that season. However, EY, Accountants, who had acted for GFC in February 2015 when GFC was in dispute with HMRC about whether they were liable to pay VAT in respect of the clubhouse wrote to HMRC in the following terms, presumably on the instruction of GFC:

> "Please note that most slots are generally booked on a *first come, first served basis*"

but then went on to say –

> "Saturdays are only reserved for GFC during the duration of the season which usually occurs between the months of September through to May."

[10] At the time of the original hearing there were five other bodies who had keys to the clubhouse. There were at least 15 other groups which used the facilities including 12 charities. The evidence before the FTT from Mr Munn was that the GFC's Management Committee did not solely have GFC's interests to heart. Mr Munn had been GFC's Development Officer since 2013. Before that he had been the Club Secretary for 19 years. He provided an 8 page witness statement and also gave oral evidence which was challenged by HMRC. The FTT was favourably impressed by Mr Munn. He was described as a "totally credible witness" in its decision. He told the FTT that he was not sure if VAT applied to buildings. He consulted

colleagues who did know and he was told that there might be grounds for a zero rating. He went to HMRC's website and read VAT Notice 708 "Buildings and Construction", that is the 2007 version. Paragraph 14.7.3 provided that "village halls and similar buildings" satisfied the definition of "relevant charitable purposes". The notice stated:

> "A building falls within this category when the following characteristics are present:
>
> - There is a high degree of local community involvement in the buildings' operation and activities; and
>
> - There is a wide variety of activities carried on in the building, the majority of which are for social and/or recreational purposes (including sporting)?"

[11] He felt the clubhouse project fell within this category as it was supported by the local community and "it was always the intention that the entire community would use and benefit from the clubhouse". He had then checked this with GFC's accountant, and their consultant, neither of whom gave evidence, and both confirmed, he claimed, that the building could be zero rated. Their advice was never reduced to writing although there was an email providing some support for this approach by GFC's accountant in respect of a subsequent complementary project. It said:

> "From the facts available to me, this project is zero-rated and comes under the charity exemption for community buildings."

[12] The defence of "reasonable excuse" was raised by GFC very shortly before the final hearing in January 2018 despite the fact that the dispute about GFC's liability to pay the penalty had been ongoing for a number of years. There was no mention by Mr Munn of receiving any professional advice in his witness statement which was dated 16 September 2015 despite him having gone into great detail about what information he sought with respect to the grounds for a zero rating.

[13] The penalty of £53,101 was issued by letter of 12 December 2014. This decision was reviewed and upheld by letter of 26 March 2015. That decision was then appealed by notice of 21 April 2015. The hearing took place before the FTT on 26 January 2018. The decision was released by the FTT on 7 February 2018. It stated:

> "**Conclusion**
>
> 55. Greenisland Football Club's appeal against a penalty of £53,102 issued by HMRC under Section 62(1) of the VAT Act 1994 is successful on both grounds – the supplies were zero-rated and the certificate was correct but if this decision is wrong Mr Munn had a reasonable excuse for issuing the certificate and the penalty should be withdrawn."

[14] The decision of the FTT stated:

> "46. The Tribunal considers Mr Munn to be a totally credible witness.
>
> 47. The Tribunal finds that the clubhouse is used by many local clubs with no preference being given to GFC activities. Unlike the situation in the *Caithness* and *Eynsham* cases, GFC does not give any preference to GFC bookings. In fact Mr Munn advised the Tribunal that if GFC wanted to hire a facility which was already booked it would be unable to do so. The clubhouse is not used by GFC for changing either before or after training or matches as GFC has a separate building in which the members and junior members and visiting teams change and shower.
>
> 48. The Tribunal finds that GFC is not operating a business at the clubhouse. Actual income from the members is in the low hundreds of pounds. The income from the junior members and from the hire facilities is required to meet the costs of running the clubhouse, purchasing equipment, paying for the hire of the other three pitches used for training and other associated expenditure. Mr Munn keeps GFC's records in his own home where he considers them to be safer. Only emergency contact details are kept in the clubhouse.
>
> 49. Following the decision of Lord Doherty in *Caithness* this Tribunal is satisfied that GFC used the clubhouse in a manner similar to a village hall as the local community makes extensive use of facilities. In 2017 the clubhouse was extensively used for an After Schools Club, karate classes, a Women's and Toddlers group, a Ladies Keep Fit, Irish Dancing classes as well as a church on Sundays and several birthday parties.
>
> 50. The Tribunal is satisfied the requirements of Note 6(b) are met and that GFC was correct to consider the works to be zero rated and to issue a zero rating certificate to the builder."

[15] The FTT then went on to determine whether GFC could rely on reasonable excuse within the terms of Section 62(3) of the Act. It said:

> "52. Mr Munn convinced us that he had studied the HMRC guidance current at the time that he had consulted GFC's accountant and consultant both of them confirmed that the work could be zero rated. However Mr Munn did not telephone HMRC's helpline which he could have done.
>
> 53. The standard to be applied in deciding whether Mr Munn acted reasonably and therefore has a reasonable excuse as set out in the decision of *The Clean Car Company Ltd v The Commissioners of Customs and Excise* [1991] VATTR 234 where Judge Medd stated:

> `One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do? … It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the Tribunal considered relevant to the situation being considered.'

> 54. Mr Munn carried out research and consulted two professional people before he issued the certificate. He therefore had a reasonable excuse for having given it."

C. THE APPEAL

[16] HMRC have obtained leave to appeal from the FTT on three different grounds. They are:

(i) The FTT failed to give adequate reasons for its finding on a material issue ("Ground 1").

(ii) The FTT erred in concluding that GFC was not carrying out a business ("Ground 2").

(iii) The FTT's conclusion that GFC had a reasonable excuse was irrational/Wednesbury unreasonable/unlawful due to a failure to give adequate reasons ("Ground 3").

D. THE ARGUMENTS OF THE PARTIES TO THE APPEAL

[17] I intend to summarise briefly the arguments advanced on behalf of each of the parties. However, these short summaries are not intended to provide a detailed or full rehearsal of all the arguments addressed to the Tribunal by each side all of which I have duly considered in reaching this decision.

E. HMRC'S SUBMISSIONS

[18] HMRC complains that the decision of the FTT did not properly inform the parties why the FTT considered that the clubhouse was intended to be solely used similarly to a village hall

in providing social and/or recreational facilities for the local community. The FTT's conclusion was that GFC used the clubhouse in a manner similar to a village hall "as the local community makes extensive use of facilities" as per para [49]. But there is something more required than mere use: see *New Deer Community Association v Revenue and Customs Commissioners* [2015] UKUT 604 (TCC). Indeed, all the findings of fact did not provide adequate support for the FTT's conclusion. Moreover, some of the facts which were found were prima facie inconsistent with the use of the clubhouse as a village hall such as GFC's control over the use of the clubhouse.

[19] Secondly its conclusion that GFC was not carrying on a business although it received income from the members and others for use of the facilities was contradicted by Section 94(2) of the Act which specifically provides that a club will be deemed to be carrying on a business where it provides facilities to its members in return for a subscription.

[20] Thirdly its finding that GFC had a reasonable excuse is contradicted by all the surrounding circumstances. No explanation has been provided by Mr Munn as to why there was no mention of the professional advice he claims to have received in his original statement especially when GFC were professionally advised at the date of its submission in September 2015. Nor is there any explanation as to why this ground was not advanced until 22 December 2017, that is almost on the eve of the hearing. Further a reasonable taxpayer undertaking a one-off construction project costing a substantial sum of money, could reasonably be expected to check what the position was directly with HMRC before issuing a zero rated certificate.

F. GFC's SUBMISSIONS

[21] Firstly there is no failure to provide reasons. A review of the judgment in the context of the material evidence and submissions at the hearing makes it clear as to why FTT reached the decision it did – see *Synectiv v HMRC* [2017] UKUT 009 (TCC) at paras [20] and [21]. In any event the evidence before the FTT justified its decision.

[22] Secondly, the finding the FTT made at paragraph [48] was that GFC was not operating a business. This is a fact based on the evidence adduced and not a point of law. It was a conclusion that the FTT was entitled to reach on the evidence.

[23] Thirdly, Mr Munn's omission in his original statement was because the issue of whether GFC had a reasonable excuse was not in issue until December 2017. Further, it is not irrational for a taxpayer not to check the tax position with HMRC before embarking on a transaction where HMRC have published specific guidance to taxpayers on that very subject and advice has also been received from professional persons.

G. LEGAL FRAMEWORK

[24] Section 30 of the Act states:

> "(1) Where a taxable person supplies goods or services and 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 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."

Section 62 of the Act states:

"(1) Subject to subsections (3) and (4) below, where—

(a) a person to whom one or more supplies are, or are to be, made—

(i) gives to the supplier a certificate that the supply or supplies fall, or will fall, wholly or partly within any of the Groups of Schedule 7A, Group 5 or 6 of Schedule 8 or Group 1 of Schedule 9, or

(ii) gives to the supplier a certificate for the purposes of section 18B(2)(d) or 18C(1)(c),

and

(b) the certificate is incorrect,

the person giving the certificate shall be liable to a penalty.

(2) The amount of the penalty shall be equal to—

(a) in a case where the penalty is imposed by virtue of subsection (1) above, the difference between—

(i) the amount of the VAT which would have been chargeable on the supply or supplies if the certificate had been correct; and

(ii) the amount of VAT actually chargeable;

…

(3) The giving or preparing of a certificate shall not give rise to a penalty under this section if the person who gave or prepared it satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for his having given or prepared it."

[25] Item 2 of Group 5 of Schedule 8 of the Act provides for zero-rating to apply to:

> "2. The supply in the course of the construction of—
>
> (a) a building … intended for use solely for a … relevant charitable purpose."

[26] Note 6 to Group 5 ("Note 6") explains what is meant by a "relevant charitable purpose":

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

[27] A definition of "business" is set out at paragraph 94 and reads as follows:

> "**94 Meaning of "business" etc.**
>
> (1) In this Act "business" includes any trade, profession or vocation.
>
> (2) Without prejudice to the generality of anything else in this Act, the following are deemed to be the carrying on of a business—
>
> (a) the provision by a club, association or organisation (for a subscription or other consideration) of the facilities or advantages available to its members; and
>
> (b) the admission, for a consideration, of persons to any premises."

[28] The provisions which are set out in Note 6 where originally contained in Group 8 of Schedule 4 of the Finance Act 1972 and then paragraph 2 to Schedule 8 of the Value Added Tax Act 1983 ("the 1983 Act"). These provisions were enacted pursuant to Article 17 of the EC Council Directive 67/228 ("the Directive") which permitted Member States to:

> "… provide for reduced rates or event exemptions with refund, if appropriate, of the tax paid at the proceeding stage … Such measures may only be taken for clearly defined social reasons and for the benefit of the final consumer …"

[29] The terms of Article 17 were considered by the European Court of Justice in *EC Commission v United Kingdom* [1988] STC 456. Under a heading dealing with the phrase "For the benefit of the final consumer", the court stated that:

> "15. The Commission regards as "final consumers" those persons who stand at the final stage in the manufacturing and

commercial chain and have no right to deduct value added tax, that is to say non-taxable persons.

16. The United Kingdom considers that there is nothing in the general scheme of value added tax to indicate that the term "final consumer" should be treated as synonymous with the term "non-taxable person." On the contrary, the final consumer must be taken to be the natural or legal person at the end of a particular production or distribution chain for a particular product or service, even where that product or service is used in the production of other products or the provision of other services, regardless of whether or not the person is a taxable person.

7. Under the general scheme of value added tax the final consumer is the person who acquires goods or services for personal use, as opposed to an economic activity, and thus bears the tax. It follows that having regard to the social purpose of article 17 of the Second Directive the term "final consumer" can be applied only to a person who does not use exempted goods or services in the course of an economic activity. The provision of goods or services at a stage higher in the production or distribution chain which is nevertheless sufficiently close to the consumer to be of advantage to him must also be considered to be for the benefit of the final consumer as so defined." [Emphasis Added]

[30] The Court of Appeal in England considered Note 6(b) in *Jubilee Hall Recreation Centre Ltd v Customs and Excise Commissioners*, *Customs and Excise Commissioners v St Dunstan's Educational Foundation* [1999] STC 381. Sir John Vinelott giving the leading judgment referred to Article 17 of the second Directive and the ECJ's judgment in *EC Commission v UK* and said as follows at page 390(a):

"**In this context the plain purpose of sub-para (b) was my judgment to extend the relief in sub-para (a) to the case where a local community is the final consumer in respect of the supply of the services, including the reconstruction of a building, in the sense that the local community is a user of the services (through a body of trustees or a management committee acting on its behalf) and in which the only economic activity is one in which they participate directly**; the obvious examples are the bring-and-buy or jumble sale, the performance of a play by local players and the like. On a strict construction any economic activity carried on by someone outside the local community even to raise money for the maintenance of a village hall (by, for example, letting the village hall under commercial rate) would be outside sub-para (b). Similarly, hospital which provides free medical care and which carries on the business of selling flowers and books to visitors is outside sub-para (a). Mr Kent explained that the Commissioners exercise a reasonable administrative discretion and disregards

> such **incidental use if it is modest in its scope**." (Emphasis added)

[31] At page 396 of the decision, Beldam LJ gave some guidance on the relevance of the recipient of the zero-rated supply undertaking economic activity when he said as follows:

> "Be that as it may, the real question is whether, having regard to the scale of the commercial activities carried on at the Jubilee Hall to subsidise and promote the charitable objects, it can properly be said that the works were carried out to a building to be used <u>solely</u> for a relevant charitable purpose; in this context use by the centre solely in providing social or recreational facilities for a local community in a similar way to the use made of a village hall.
>
> The introduction of the concept of the village hall seems to me to have been intended to equate the activities with the kind of use ordinarily made of a village hall and thus to introduce considerations of scale and locality. For my part I think the scale of Jubilee Hall's commercial activities went well beyond the normal activities of a village hall, though from time to time village halls are used to raise money by commercial activities. Further, the beneficiaries of the zero rate are clearly not solely those who benefit from the charitable purposes."

[32] Note 6 has been considered by the Upper Tribunal and High Court in a number of cases including *Commissioner of Customs and Excise v Yarburgh Children's Trust* [2002] STC 207, *New Deer Community Association v HMRC* [2015] UKUT 604 (TCC) and *HMRC v Caithness Rugby Football Club* [2016] UKUT 354 (TCC). Ms Barnes, counsel for HMRC, submitted that the legal principles which can be derived from these cases and with which I agree, are as follows:

(a) Member States are only entitled to apply zero-rating where it is "for the benefit of the final consumer" or where the supply is "sufficiently close to the consumer to be of advantage to him" (Article 17 of the Directive and *EC Commission v UK* at [17].

(b) For the purposes of Article 17, the final consumer is the person who uses exempted services for personal use as opposed to in the course of an economic activity (*EC Commission v UK* at [17]).

(c) Note 6(a) exempts supplies which benefit the 'final consumer' because it only relates to buildings intended solely for use otherwise and in the course or furtherance of a business.

(d) Note 6(b) which preserves zero-rating for village halls or other buildings used for a similar purpose was 'needed because the operation of such buildings might be thought to constitute or involve some form of business or economic activity', see *Yarburgh Children's Trust* at [38].

(e) The purpose of Note 6(b) was therefore to extend the relief in Note 6(a) to the case 'where a local community is the final consumer in respect of the supply of the services … in the sense that the local community is the user of the services … and in which the only economic activity is one in which they participate directly' (see *Jubilee Hall* at page 390).

(f) For the purposes of Note 6(b) the issue is whether the intended use of a building is similar to use of a building as a village hall, rather than whether the building itself is similar to a village hall (see *New Deer* at [27]).

(g) It is not enough that the building be intended for use solely to provide social or recreational facilities to a local community. The intended use of the building must be similar to the type of social or recreational activities that one would expect to be conducted in a village hall for the benefit of the local community (see *New Deer* at [18]).

(h) In determining whether the economic activity is consistent with that undertaking within village halls, the scale of the activity is a relevant feature (see *Jubilee Hall* at page 396).

(i) The absence of control over the building by the local community does not necessarily mean that the building was not intended to be used in a manner similar to a village hall. It is a relevant factor but not a decisive factor (see *Caithness Rugby* at [34].

GROUND 1

[33] HMRC challenged the decision of the FTT on the basis of an error of law because of the failure on the part of the FTT to give adequate reasons for its finding that the intended use of the clubhouse was use by a charity "as a village hall or similarly …".

[34] In *HMRC v SDM European Transport Limited* [2013] UKUT 0251 (TTC) the Upper Tribunal stated at paragraph 73:

> "Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 requires the FTT to give full written findings and reasons in any decision upon which an application for permission to appeal may be based. The failure to give such reasons may therefore be an error of law. The failure to give reasons may thus be an error on a point of law which was involved in the making of the decision. Indeed, failure to give reasons or adequate reasons for findings in material matters was one of the items noted in paragraph 9 of the judgment of Brooke LJ in *R (Iran) v Home Secretary* [2005] EWCA Civ 982 in relation to similar rights of appeal from the Immigration Tribunal, as an error of law."

I consider that failure to give adequate reasons can constitute an error of law.

[35] Lord Browne in *South Buckinghamshire District Council v Porter (No:2)* [2004] UKHL 33 at paragraph 36 gave advice as to what amounts to adequate reasons. He said:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[36] In *English v Emery Reinbold and Strick Ltd and others* [2002] EWCA Civ 605 at paragraph 26 Lord Phillips MR said:

> "Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed."

[37] In that case at paragraph 19 the Court of Appeal made it clear that the judgment at first instance should enable the Appellate Court to understand why the judge reached his decision. Lord Phillips MR said:

> "This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue

> was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

[38] Of course, this Tribunal should be cautious in concluding that the FTT misdirected itself. In *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48 at para [25], Lord Hope said:

> "The appellate court should not assume too readily that the Tribunal misdirected itself just because every step in its reasoning is not fully set out in it."

[39] Finally, the Upper Tribunal in *Synective Ltd v HMRC* [2017] UKUT 99 (TCC) at para [21] offered advice as to the proper approach to be adopted by an appellate court or Tribunal, namely "to review the judgment in the context of the material evidence and submissions at the hearing in order to determine whether, when all these are considered, it is apparent why the Lower Tribunal reached the decision that it did."

It is thus clear from the authorities that the approach which a tribunal should take to giving reasons is contextual but that the explanation should be such as in all the circumstances permits the unsuccessful party to understand why the decision has gone against him.

[40] The conclusion by the FTT that the use of the GFC's clubhouse is "as a village hall or similarly in providing social or recreational facilities for a local community" appears from the judgment to be based on the following findings, namely:

(i) The clubhouse is used by many local groups with no preference being given to GFC activities.

(ii) There is no preference given to GFC bookings.

(iii) If the facility was booked then GFC would not have it.

(iv) There is a separate building for changing and showering.

(v) The building was not constructed to accommodate playing football or training indoors.

(vi) GFC was not operating a business at the clubhouse (see Ground 2 below).

There are other reasons offered such as where Mr Munn keeps GFC's records but no attempt has been made to try and relate these to the requirements of Note 6(b).

[41] Indeed, there is no satisfactory explanation of it either in the decision or in the trial bundles as to why the FTT was able to conclude that the use of the clubhouse was a qualifying use within Note 6(b). I have already set out what Sir John Vinelott said in *Jubilee Hall Recreation Centre Ltd v HMRC, HMRC v St Dunstan's Educational Foundation* where he stressed the importance of the local consumer being the final consumer in respect of the supply of services including the reconstruction of the building.

I emphasise his comment that:

> "Sub-paragraph (b) is intended to cover economic activities which are an ordinary incident of the use of a building by a local community for social, including recreational, purposes. The village hall is the model or paradigm of that case."

[42] Modest incidental use of the facility by other than members of the local community may be acceptable. However, it is no answer to say that it was used by members of the local community because the clubhouse was being used by members of GFC who were from that community. This is because the important issue is the capacity in which they were they using the facilities. If they were using the facilities as GFC members, junior members, affiliated members, associate members, playing members, its supporters, its parents etc (hereinafter called "GFC users"), then they were not doing so as members of the local community (see *Jubilee Hall* at 394(f).

[43] In *HMRC v Caithness Rugby Football Club* [2016] UKUT 354 (TCC) Lord Doherty said at paragraph 28:

> "In my opinion the judgments in *Jubilee Hall* support the proposition that the existence or non-existence of direction or control over the use of a building is a relevant circumstance, but not necessarily a decisive one (Sir John Vinelott at p. 390b; Beldam LJ at p. 397c; Thorpe LJ at p. 394j). It is one of several factors which may be pertinent. The judgments - particularly that of Beldam LJ - also suggest that in determining whether the requirements of note 6(b) are satisfied an important focus will be the intended uses of the building at the time goods or services were supplied; and that examination of actual uses which have ensued may often provide assistance in identifying the uses of the building which were intended at the time of the supply."

[44] In the judgment of the FTT there is no finding about how the use of the building is split between the local community and GFC. It is obviously used by the local community in all sorts of ways and these are set out in the judgment. It is also used by GFC users. But there is no attempt to assess:

(a) What was the intended use by the local community of the clubhouse?

(b) What was the intended use of the clubhouse by the GFC users?
(c) What has been the actual use of the clubhouse by the local community?

(d) What has been the actual use of the clubhouse by the GFC users?

[45] Although the FTT records that both the local community and GFC use the clubhouse, it makes no attempt to try and quantify or analyze the nature of their respective uses. I do note that in a letter dated 7 November 2014 to HMRC which appears to have been written by Mr Munn, who the FTT found so credible, he says in respect of the clubhouse that ;

> "We estimate the facilities will be used by the football teams at most 20% of the available time, mostly on a Saturday, and not exclusively at any one time"

Such use would not in my view be modest incidental use.

[46] He then goes on to say in the letter that the teams use the clubhouse to meet before and after training, they use it to socialise, for team meetings, for parents' meetings, for coaches meetings, for first aid etc. But there is no finding about the use of the clubhouse by GFC users. There should be because this proposed (or actual) use is inconsistent with the 6(b) exception. Such use is not a similar use to that of a village hall.

[47] One of the reasons relied upon by the FTT is that no preference is given to GFC activities. However, there is a submission by Ernst & Young ("EY") on 4 February 2015 on behalf of GFC to which I previously referred which states, presumably on instructions that the clubhouse is only reserved for GFC during the football season.

[48] The clubhouse timetable for September 2015 shows that the main hall was not booked apart from a children's birthday party at 12noon. The booking diary for 2015 reveals minimal bookings for Saturdays from January to April 2015 with no bookings in September and October. There is no explanation for this. It is surely important to know:

(a) If there is a restriction on outside groups booking the clubhouse on Saturdays during the football season.

(b) Whether the local community use the clubhouse on a Saturday when it is being used by the GFC users.

(c) Whether the local community do not bother to book or use the clubhouse on Saturdays during the football season because they know it will be monopolised by GFC users.

The whole issue of who is entitled to use the clubhouse, and in what circumstances, especially when the clubhouse will be needed by GFC users, is uncertain at best.

[49] There is also an After Schools Club which the diary suggests operates from 2pm to 6pm during school terms and 9am to 6pm during the holidays. It uses the clubhouse as its base. The accounts for the year ending 30 June 2016 reveal that the after schools club pay £10,578 in a year. This works out at £200 per week, presumably as a rent or a licence fee. Minimum details are provided as to its operation. I would have expected given the use of the premises by the After Schools Club for FTT to have made findings as to:

(a) Whether the After Schools Club is run as a business?

(b) What it charges?

(c) The basis on which £200 per week is paid by the After Schools Club?

(d) Whether After Schools Clubs paying such a "rent" and operating on such a basis are a feature of village halls?

[50] Finally, no attempt is made at all to deal with the issue of the management committee which runs the clubhouse being comprised only of members of GFC and the duty those members owe to GFC and not to the local community. There is no engagement whatsoever with the argument that GFC's clubhouse is not owned, organised and administered by the local community. At paragraph 39 of the decision the FTT said:

> "In *Caithness* Lord Doherty sitting in the Upper Tribunal dismissed HMRC's suggestion and interpretation of Note 6(b) that there had to be local community direction or control of the use of the building. The First-tier Tribunal had found that the intended use of their building was "use as a village hall or similarly". Caithness' clubhouse was managed by the club in a non-commercial basis. The clubhouse was let out to other groups for modest rates. The First-tier Tribunal specifically stated that it did not consider it decisive that the clubhouse was managed by one of the groups that use it and that only members of Caithness Rugby Football Club could be elected to its Executive Committee."

The FTT then quoted Lord Doherty at paragraph 34 where he said:

> "On a proper construction of the provision (Note 6(b)) 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 a building may be intended to be at the disposal of a local community even though the community is not the body directing or controlling its use."

[51] This does not mean that the FTT can ignore who controls the clubhouse. Rather, it remains a factor which the FTT should have taken into account, and which it would appear it did not, in assessing whether or not the intended use of the clubhouse was similar to that of a village hall. I would have expected a decision with adequate reasons to say what weight, if any, was given to this evidence about the management committee by the FTT in reaching its decision.

[52] Finally, the conclusion of the FTT that it is "satisfied that the GFC uses the clubhouse in a manner similar to a village hall as the local community makes extensive use of the facilities" is not the test. It is the intended use that is important although as Beldam LJ said in *Jubilee Hall* actual use can shine light on this issue. The Tribunal must go on to consider the intended and actual use GFC makes of the clubhouse and whether that use is consistent with a use similar to that of a village hall. In this case there has been an apparent failure on the part of the FTT to analyse either the intended or actual use of the clubhouse and whether its intended use or actual use was similar to that of a village hall .

[53] I am satisfied that the FTT has not offered adequate reasons to explain its conclusion that the requirements of Note 6(b) are met and that GFC was correct to consider the works to be zero rated and to issue a zero rated certificate to the builder.

GROUND 2

[54] It is uncontroversial that zero rating for the construction of a building in general, and a clubhouse in particular, can be achieved if the construction of the building is intended for use solely for a "relevant charitable purpose". Note 6 of Schedule 8 to the Act provides:

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

[55] Both parties are agreed that zero rating applies:

(i) for use by a charity otherwise in the course of or furtherance of a business; and

(ii) use as a village hall or similarly in providing social or recreational facilities for a local community.

[56] In this case the FTT found that GFC, a charity, was using "the clubhouse otherwise than in the course of a business". The explanation offered for this conclusion, which does not seem to have been a live issue between HMRC and GFC before the FTT, is set out at paragraph 48. This states:

> "48. The Tribunal finds that GFC is not operating a business at the clubhouse. Actual income from the members is in the low hundreds of pounds. The income from the junior members and from the hire of facilities is required to meet the costs of running the clubhouse, purchasing equipment, paying for the hire of the other three pitches used for training and other associated expenditure. Mr Munn keeps the GFC's records in his own home where he considers them to be safer. Only emergency contact details are kept at the clubhouse."

[57] No one has been able to divine what relevance to any issue in this case is the fact that Mr Munn, the Secretary kept GFC's records in his own home or that emergency contact details are kept at the clubhouse.

[58] But more importantly, nowhere in the decision does the FTT explain why it has seen fit to ignore the deeming provision of Section 94(2) of the Act which states at sub-section (2):

> "(2) Without prejudice the generality of anything else in this Act, the following are deemed to be the carrying on of business –
>
> (a) the provision by a club, association or organisation (for a subscription or other consideration) the facilities or advantages available to its members."

[59] There is no dispute that in this case the club does provide facilities for a subscription from members who are over 18 or for a consideration to junior, associate or affiliated members. This provision appears to be entirely overlooked by the FTT.

[60] The FTT does not appear to have applied its mind to what actually constitutes a business. The Act defines a business as including "any trade, profession or vocation". The Sixth Directive uses the term "economic activity" which is probably a wider term than "business". Therefore, "business" should be interpreted widely.

[61] In *C & E Commissioners v Lord Fisher* [1981] STC 238 Gibson J identified the following indicia which should be considered in determining whether the activities carried on amounted to a business:

> "(i) where the activity is a **serious undertaking earnestly pursued**; **or a serious occupation not necessarily confined to a commercial or profit making undertaking**;
>
> (ii) whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity;
>
> (iii) whether the activity is a certain measure of substance as measured by the quarterly or annual value of taxable supplies made;
>
> (iv) whether the activity was conducted in a regular manner and on sound and recognised business principles;
>
> (v) whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration;
>
> (vi) whether the taxable supplies are of a kind which, subject to differences of detail, are commonly made by those who seek to profit from them." (See Revenue Law, Principles and Practice (22nd Edition) at 32.28.

[62] These indicia were approved by the House of Lords in Institute of *Chartered Accountants in England and Wales v Customs and Excise Commissioners* [1999] STC 398 and in particular at page 404 in the speech of Lord Slynn of Hadley. It is also important to note the comments of Patten J in *Customs and Excise Commissioners v Yarburgh Children's Trust* [2002] STC 207 at para [21].

[63] Mr Brown on behalf of GFC said the issue of whether or not this was a business was a question of fact. He is right, but the issue of what comprises a business is a question of law. If the FTT do not ask itself the right question, it is never going to obtain the right answer. This may explain why in the judgment there is no detailed discussion of:

(a) The substantial income in respect of dues from junior members for use of the clubhouse and for defraying other expenses.

(b) The After School's Club which generates £10,000 per annum, that is approximately £200 per week and presumably represents a rent or licence fee.

(c) A tuck shop selling goods which realise an income of £4,000 per annum.

[64] The conclusion that GFC is not operating a business is not one that in the light of Section 94(2)(a) that the FTT properly instructed as to the relevant law could have reached. Indeed, it is difficult to understand how the FTT could have reached a conclusion that this was not a business even in the absence of the deeming provision. But no serious attempt was made by the FTT to define what was a business under the Act and whether or not what was taking place at the clubhouse constituted a business. I am satisfied that the FTT erred in law in concluding that GFC is not operating a business at the clubhouse or did not intend to operate a business at the clubhouse.

GROUND 3

[65] HMRC submit that the FTT erred in law in concluding that GFC had a reasonable excuse because the decision of the FTT was irrational/Wednesbury unreasonable and no adequate reason has been provided for that conclusion.

[66] The FTT concluded in the alternative that GFC had a reasonable excuse for incorrectly issuing the certificate if they were wrong on the issue of whether or not GFC was entitled to issue a zero rated certificate.

[67] It is important to appreciate that FTT did give reasons for the conclusion they reached. They believed Mr Munn. He was in their view a "totally credible witness". There is no point in asking this Tribunal to reach a different conclusion and reject Mr Munn's evidence unless there are grounds that would enable this Tribunal to do so. The FTT saw Mr Munn give evidence, they heard him give evidence and they watched him being cross-examined. They accepted his testimony as being truthful. Of course, points can be made, and were undoubtedly made before the FTT to challenge the veracity of Mr Munn's account as to the issue of the certificate and the reason that this issue was raised only shortly before the final hearing. It was also legitimate for HMRC to draw attention to the fact that there was no corroborating evidence from the accountants, for example, who provided the advice that this clubhouse construction should be zero rated which confirmed the opinion that Mr Munn had already reached. But, the FTT believed Mr Munn and this is a conclusion they were entitled to reach. There are no grounds for this Tribunal disturbing the FTT's conclusion on the reliability of Mr Munn's testimony.

[68] Mr Munn had told the FTT that he had relied upon HMRC's guidance set out at VAT Notice 708. He had also checked the position with his professional advisers and they had confirmed his original view. HMRC complained that a reasonable tax payer could be expected to check the position with HMRC by way of a non-statutory clearance before issuing a zero rated certificate. But in the application for leave the skeleton argument on behalf of HMRC states:

> "The Respondent would expect a reasonable conscientious tax payer, undertaking a one-off high value project such as this to construe the legislation, to seek professional advice **and/or** request advice from HMRC not merely rely on guidance." (Emphasis added)

[69] But the FTT has found that that is exactly what Mr Munn on behalf of GFC did. He did seek professional guidance. He followed the professional advice he was given. So HMRC has now changed its case to try and argue that GFC in any event should have sought advice from HMRC if GFC is to be entitled to rely on this defence. It is also noteworthy there is no mention on HMRC's VAT Notice 708 that advises a tax payer to seek advice direct from HMRC.

[70] In this Tribunal's opinion the FTT asked the correct question as per the *Clean Car Company v CCE* [1991] VATTR 834:

> "Was what the tax payer did an unreasonable thing for a trader of the sort envisaged … in the position the tax payer found himself, to do?"

[71] The answer the FTT reached was that in the circumstances of this case the answer was no. GFC provided the FTT with a reasonable excuse for having given a zero rated certificate. There are no grounds for this Tribunal interfering with this decision. The FTT's conclusion on this issue is unimpeachable.

CONCLUSION

[72] For the reasons given HMRC succeed on grounds 1 and 2. However, GFC succeed on ground 3. In the circumstances there is no ground for interfering with the decision of the FTT to allow the appeal of GFC against a penalty of £53,101 issued by HMRC under Section 62(1) of the Act. When the parties have had an opportunity to consider this judgment, I will receive submissions on the issue of costs, if the parties cannot agree between themselves.

Mr Justice Horner

Issued: 18 December 2018