[2017] UKFTT 0611 (TC)

TC06047

Appeal number: TC/2015/03802

VAT – revised decision following review - whether construction of cricket pavilion zero-rated – whether club a "charity"- no – whether intended use of pavilion in course or furtherance of a business – yes – whether intended use as a village hall or similarly in providing social or recreational facilities for a local community – yes - whether EU law principles of equal treatment or fiscal neutrality apply – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EYNSHAM CRICKET CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
SUSAN LOUSADA

Sitting in public at The Royal Courts of Justice, Strand, London on 14-17 June 2017 and having considered written representations from the parties in the course of the Tribunal's review under Rule 41 of the Tribunal Rules

John Brinsmead-Stockham instructed by Hogan Lovells for the Appellant (both acting pro bono)

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

© CROWN COPYRIGHT 2017

DECISION

1. The appellant cricket club (the "Club") is an unincorporated association and has at all material times been registered as a community amateur sports club ("CASC") for the purposes of the Corporation Tax Act 2010. The Club is appealing against a decision of HMRC dated 21 May 2015 that services supplied to the Club in connection with the construction of a new pavilion between June 2014 and February 2015 were standard-rated for VAT purposes. The Club considers that they were zero-rated by virtue of Schedule 8, Group 5, Item 2 of the Value Added Tax Act 1994 ("VATA 1994").

2. Unusually, therefore, this appeal is brought by the recipient of a supply, rather than the supplier. Mr Davey did not suggest that the Club had no standing to bring the appeal and the wording of s83(1)(b) of VATA 1994 and the decision of the Court of Appeal in *Customs & Excise Commissioners v Cresta Hotels* [2001] STC 306 indicates that it does have standing. We will therefore deal with the appeal.

3. The parties were agreed that three issues (at least) need to be determined in order to decide this appeal. The first relevant issue ("Issue 1") is whether the Club was a "charity" for the purposes of Schedule 8, Group 5, Note 6 of VATA 1994 (which in turn refers to a definition set out in Schedule 6 of Finance Act 2010 ("Schedule 6" and "FA 2010" respectively). Since they were agreed that the Club satisfied some aspects of that definition, Issue 1 was broken down into the following three sub-issues:

(1) Was the Club "established for charitable purposes only" for the purposes of paragraph 1(1)(a) of Schedule 6 ("Issue 1(a)")?

(2) Does s6 of the Charities Act 2011 prevent the Club from being "established for charitable purposes" for the purposes of paragraph 1(1)(a) of Schedule 6 ("Issue 1(b)")?

(3) Did the Club satisfy the "registration condition" under paragraph 3 of Schedule 6 ("Issue 1(c)")?

4. If the Club loses on Issue 1, it was common ground that UK statutory provisions mean that the appeal must fail. However, if the Club succeeds on Issue 1, the parties were agreed that the appeal would succeed if the Club could establish either:

(1) that the new pavilion was intended for use solely by the Club otherwise in the course or furtherance of a business for the purposes of Note 6(a) of Group 5 Schedule 8 VATA 1994 ("Issue 2"); or

(2) that the new pavilion was intended for use solely by the Club as a village hall or similarly in providing social or recreational facilities for a local community for the purposes of Note 6(b) of Group 5 Schedule 8 VATA 1994 ("Issue 3").

5. Issues 1 to 3 are all based on domestic UK legislation. Mr Brinsmead-Stockham argued in his skeleton argument that even if the Club's appeal failed as a result of the

application of UK law, the EU law principles of equal treatment and fiscal neutrality would still enable its appeal to succeed ("Issue 4"). Mr Davey submitted that Issue 4 was raised late and should not be considered and we will deal with that procedural issue later in this decision.

Evidence

6. The Club relied on witness evidence from Ian Miller who has been a member of the Club for over ten years and has been its chairman since 2015. Mr Davey cross-examined him. We were satisfied that Mr Miller was a reliable and honest witness. HMRC did not rely on any witness evidence.

7. We also had evidence in the form of a bundle of documents.

Findings of fact

The Club and its constitution

8. The Club is located in Eynsham in Oxfordshire, a village with approximately 4,500 residents. In legal form, the Club is an unincorporated association. Since 29 September 2001, the Club has been the tenant under the lease of the School Piece Field in Eynsham granted by the Bartholomew Educational Foundation (a registered charity). That field is around one mile from the centre of Eynsham. At times relevant to this appeal, the Club paid an annual rent of £450 to use the field.

9. At all material times, the constitution of the Club has described its objectives as including:

> - To promote participation within the local community in healthy recreation by the provision of facilities for the playing of cricket.
>
> - To promote the Club within the local community and within Cricket.

10. Membership of the Club is open to anyone (subject to payment of the subscription fee) regardless of age, sex, race, creed or cricket ability. The club's membership is divided into two broad categories. "Playing members" are eligible to play cricket for the club whereas "non-playing members" are not. The category of playing members is itself subdivided into junior members (young people and children) and senior members. As at 26 August 2016 (the date of Mr Miller's witness statement), the Club had 131 members of whom 75 were playing members and 56 were non-playing members. All playing members have, at all material times, been amateur cricketers and the Club does not employ any professional cricketers.

11. The annual subscription for a senior playing member is £70 (with a reduction to £60 if paid before 1 June in the relevant year). That subscription is reduced to £15, for those who are in full-time education or who are unemployed. The annual subscription for a junior playing member is £30. The annual subscription for a non-playing member is £5.

12. To ensure that the Club is open to as many people as possible from all backgrounds, the Club agrees occasional waivers or payment arrangements for playing members. For example, if a particular person played only a couple of matches for the Club, the membership fee might be reduced. If a particular person could not afford the annual membership fee, the Club would agree an instalment plan or even, in suitable cases, not seek to collect it at all. In practice, any individual who cannot afford the annual membership fee does not have to pay it.

13. The period during which the Club was without a pavilion resulted in a reduction in its membership. Once the pavilion was built, it was able to field two senior teams (a First XI and a Second XI) who participate in the Oxford Cricket Association ("OCA") league. It also fields an under-11 team (that plays matches against other local teams) and an under-9 group that, as part of the English Cricket Board's "All Stars" programme play games between themselves within the Club (and do not, therefore, compete with other clubs).

14. The Club is managed by a General Committee consisting of officials who are elected by members of the Club. Currently, 10 of the 12 members of the General Committee are residents of Eynsham. People who are not members of the Club are not allowed to vote on its affairs, or to elect officials. The Club permits the general public to attend its general meetings although, unless they are members of the Club, they are not allowed to vote at those meetings. In practice, a few members of the public attend the Club's annual general meeting, but the only attendees at other meetings, including meetings of the General Committee, are Club members.

15. The Club permits non-members to use the Club's facilities and to attend the various events and functions referred to below. This means that, while playing members are the only people who are allowed to play cricket for the club, non-playing members have relatively few benefits as compared with members of the general public although they are able to obtain a reduced rate if they wish to hire the pavilion, and are able to vote on Club business and serve on the Club's General Committee. People therefore generally choose to become non-playing members of the Club because they wish to support the Club in a modest financial way by paying the £5 annual subscription and most non-playing members are parents of junior playing members.

16. The Club has, since 2003, been registered as a community amateur sports club ("CASC") within the meaning of what is now s658 of the Corporation Tax Act 2010.

The new pavilion and events leading to its construction

17. From 2006 to 2012, the Club had a small pavilion that functioned as a basic cricket pavilion but could not be used for other activities. That pavilion burned down on 20 February 2012 and arson was suspected.

18. A new pavilion was essential if the Club was to continue to operate as a cricket club. That was firstly because, without a pavilion offering changing facilities and running water, it would be difficult for the Club to continue to participate in the

Oxford Cricket Association ("OCA") league. Secondly, as Mr Miller said "village cricketers like nice facilities" so, without a decent pavilion, the Club's better cricketers might move to other clubs. On a more positive note, a new pavilion might enable the Club to expand its membership. Mr Miller accepted in his evidence that, from the perspective of the Club, a new pavilion was "essential" and not a "nice to have". However, the new pavilion would not benefit the Club only. In an article in the Oxford Mail published on 23 July 2012, the then chair of the Club, Sue Cook, was quoted as saying:

> The insurance money we got after the fire, and money from fundraising, covers about half the cost of the new building and we have applications for various grants. Local building companies have also pledged their support, and we want the pavilion to become a focal point for the village.

In an article in the Witney Gazette published on 21 January 2014, the then Club secretary Allen Stevens said that:

> Having these new facilities will be valuable to the village, will allow us to attract new members and offer a better match day experience for visiting teams.

The proposed pavilion was described in a local newsletter called "Sport for all" as a "new club and community building".

19. The Club received £60,951 from its insurers to compensate it for the loss of its old pavilion. It needed significantly more than this to build a new pavilion and set about raising the necessary funds from a variety of sources. While fundraising efforts were ongoing, the Club started to plan the construction and planning permission was granted in August 2012.

20. On or around 29 April 2013, the Club applied to Sport England for a grant to help it to build a new pavilion. That involved it completing a detailed application form. Relevant aspects of that application form are as follows:

(1) The title of the project for the purposes of the application was "Eynsham Cricket Club Pavilion". The 100-word summary of the project explained that the new pavilion was needed to replace the one that had burnt down.

(2) In the section entitled "Need for Your Project", the Club outlined the amount and nature of cricket played at the Club with a particular emphasis on its junior teams. It noted that:

> The ability to offer [cricket] activities for the community is severely compromised without the normal permanent facilities that a cricket club should be able to offer…The club has the support of the local community who have contributed significantly with regard to local fundraising and support.

(3) In the section headed “Impact on Your Sport”, the Club was asked to explain what impact the project would have on sport locally. In its answer it noted, as its first point:

> ECC confidently expect that a new pavilion at School Piece will provide facilities for, not only the cricket club, but also for other groups and individuals within the community. School Piece already plays host to Eynsham Croquet Club and recently we have had an approach from a fledgling Eynsham Petanque Club to provide space on the field. Availability of a fully functioning, licensed pavilion will undoubtedly enhance what is already available to the community.

The Club concluded this section by making the point that:

> A new Eynsham Cricket Pavilion will lead to improved facilities in the village, creating a vibrant child and youth facility for cricket within Eynsham that spins off to a more successful adult club.

(4) In the section headed “Community Involvement”, the Club was asked to explain how the local community would continue to be involved in the project if it was successful. In response, the Club made the point that the Eynsham community was fully aware of the project and had already contributed some £8,700 in donations to help to build the new pavilion. The Club noted that it would continue to maintain local awareness of the project and would continue to seek to raise funds by running events and activities. It was noted that:

> Members of the public are always welcome to attend meetings of the Club General Committee and the AGM. We also anticipate that the facilities will be available for hire for community social events and functions.

(5) In the section of the form headed “Sustainability”, the Club was asked to explain how the facility would be managed and maintained so that it is available for sporting use for years to come. In response, the Club explained that the pavilion will be managed by volunteers within the Club and that a core of 3-5 key club officers managed the club’s operations. They explained that other organisations would benefit from the pavilion (by being able to hire it).

21. Also in April 2013, the Club applied for a grant from West Oxfordshire District Council. That also required it to complete a lengthy form and inevitably, many of the answers given on the Sport England form were duplicated on the West Oxfordshire District Council form. Relevant features of this application were as follows:

(1) In response to the question “How do you know there is a local need for the project?”, the Club gave an answer very similar to that outlined at [20(2)].

(2) When asked to detail “the project’s expected outcomes”, the Club listed as its first point:

> A permanent brick-built facility for primary use as a cricket pavilion but also available to other sports groups sharing School Piece and to

other village groups and individuals for use as a meeting place and social venue.

(3) The response to the question "How will the community benefit from the project?" was very similar to that outlined at [20(3)].

(4) In answer to the question "How do you plan to monitor the success of the project?", the Club gave (as its 6th point out of 9) the answer:

> Usage of the pavilion and field by other village organisations.

22. The Club's applications to Sport England and to West Oxfordshire District Council both suggested that it was assuming that the goods and services it received in connection with the construction of the pavilion would be subject to VAT. However, we accept that this conclusion was not reached after detailed analysis of the relevant statutory provisions: the Club simply "assumed the worst" and applied for grants accordingly.

23. The Club was successful in a number of its applications for funding and it also succeeded in raising funds from other sources. Overall it raised the following sums to pay for the pavilion:

(1) Sport England gave a grant of £50,000;

(2) West Oxfordshire District Council gave a grant of £30,941;

(3) The Club received the insurance payout of £60,951;

(4) Eynsham Parish Council gave a grant of £22,000;

(5) The Club raised £9,098 from individuals and local organisations by way of gifts and other fundraising efforts;

(6) Five individuals lent the Club £50,000[1]; and

(7) Oxfordshire County Council contributed £1,100.

24. The Club engaged Shaun Rowland Building Contractors Limited (the "Contractor") to construct the new pavilion and work started on 3 June 2014. The Contractor took some VAT advice to the effect that the construction services were zero-rated. Invoices that the Contractor submitted up until 15 October 2014 did not, therefore, include an amount in respect of VAT. However, following some discussions with HMRC, the Contractor decided that it should treat the services as standard-rated. Therefore, invoices submitted after 15 October 2014 included an amount in respect of VAT. In addition, on 26 February 2015, the Contractor issued a "VAT only" invoice relating to the VAT element of supplies made up to 15 October 2014 that had previously been treated as zero-rated. In total, the Club paid the Contractor £176,772.40 plus £35,344.48 VAT for the construction of the pavilion

---

[1] These loans were not made as part of the initial fundraising events, but in response to cost-overruns and the additional expenses incurred after the Contractor concluded that its supplies were standard rated as noted at [25].

25. Cost overruns, and the fact that the Contractor was charging VAT, meant that the Club did not have enough money to continue to use the Contractor's services after February 2015 but by then the pavilion was still not finished. Members and friends of the Club lent it £50,000 so that all amounts due up until then could be paid (and this resulted in the Contractor being paid in full for its work) and necessary materials to finish the construction could be purchased. Members of the club finished the job themselves by, for example, laying carpets, fitting shutters and painting the interior. The new pavilion was completed in May 2015.

26. The pavilion is made from brick. Inside it has changing facilities for both players and umpires, storage areas and a large central "social space". One of the Club's aims when finalising the design of the pavilion was to maximise this social space and the Club has placed an air hockey table and table tennis table there which both members and non-members are free to use. The pavilion also contains a licensed bar.

Other relevant amenities available in Eynsham

27. Eynsham has a village hall (which is split into two halls) and three churches that have small church halls with limited facilities. The village halls and church halls are all available for hire. The village halls are used for cinema screenings, theatrical performances, blood donor sessions, as polling stations and for the village show. The church halls are used for regular church activities, a weekly Tradecraft Fair Trader stall, a monthly podiatry clinic, art weeks, a carnival and flower festival and a weekly country market. The charges for hiring the Club's pavilion are slightly lower than those for hiring the Eynsham village hall.

Use of the pavilion – regular use by the Croquet Club and regular events scheduled by the Club

28. The pavilion is not open continuously. To be used, it needs to be unlocked by a member of the General Committee who has a key. Others, for example, the groundsman, have a key so that equipment stored at the pavilion can be accessed. Therefore, the pavilion is generally used only when some event organised by the Club is taking place or if a third party has hired it.

29. The Club has granted Eynsham Croquet Club (a separate club, whose membership does not overlap with that of the Club) a licence to use the School Piece Field and the new pavilion. The croquet club has built four croquet lawns which it uses two or three times a week between April and November. The croquet club is also allowed to use the pavilion and has its own key so that it can access it whenever it wants. The croquet club pays the Club an annual fee of £200.

30. The two senior teams play league matches on most Saturdays during the cricket season which runs for around 20 weeks from the beginning of May until the middle of September in each year. (Schedules are arranged so that one of the senior teams is playing at home and the other is playing away.) On Saturdays, players and umpires use the pavilion to get changed. At an average home game, between 10 and 25

spectators would watch the game, most of whom are locals out for a walk or dropping by for a drink, and will not typically be members of the Club. Spectators and players watch the game from the porch of the pavilion and the bar in the pavilion is open to both members and non-members. Between innings, the two teams have tea in the pavilion and, after the game, the teams enjoy a drink together along with anyone else who happens to be in the pavilion. In addition, while the game is going on, anyone (whether a member or not) is free to use the table tennis table and air-hockey table in the social space of the pavilion.

31. Mr Miller agreed in his evidence that Saturdays in the cricket season are "sacrosanct" in the sense that, since the Club needs to use the pavilion for the seniors' match, they would not agree to allow anyone else to hire the pavilion for exclusive use. However, on Saturdays, the Club shares use of the pavilion with the croquet club who practise on that day. To date no other club or individual has asked to use the pavilion on a Saturday alongside the Club but Mr Miller's unchallenged evidence was that, if such a request were made it could be accommodated by arranging matters so that the social area was available to all interested parties at the right time (since the Club only has an absolute need for the social area of the Club in the 45 minutes between innings when the players have tea).

32. A few of the Club's first team choose to practise during the week. However, they tend not to use the pavilion when doing so. Rather, they fix a day during the week when they agree they will practise and they simply turn up and use the cricket nets.

33. The Under 9 "All Stars" tend to play their games on a Friday evening during the cricket season. That coincides with "open nights" that the Club organises to encourage the youth of the village to turn up and try cricket or another sport. Those open nights involve the Club offering free cricket coaching for 5-11 year olds. After that, other games are organised such as table tennis, rounders and football for children and their parents. At about 8 pm, a barbecue is lit and people are free to cook their own food on it, with the Club bearing the cost of running the barbecue. The pavilion is in use on these club nights: people use the bar and table tennis and air-hockey tables are set up in the social area of the pavilion. No-one is required to be a member of the Club in order to attend the open nights. If the Club notices that children are attending frequently, they are invited to become junior members (and to pay their yearly subscription) and their parents are invited to become non-playing members.

34. Mr Miller explained the importance of the Club open nights to the community in the following terms:

> This part of the evening[2] gives parents and children of the village the opportunity to interact… The Club open nights receive great feedback and are talked about throughout the village. The Club gets more people attending week on week as a result. It provides many of the new and existing residents of Eynsham with an easy way to integrate into village life in Eynsham. Eynsham would be a far less desirable place to

[2] i.e. the part after the barbecue is lit and the Club sets up games for parents and children and allows them to organise their own activities

live if it was not for events such as these which bring the whole community together.

35. The Under 11 team plays only around 6 games per season and those games tend to be played on Thursday evenings or on Sundays. The pavilion would be used for those games (for players to get changed and to watch the game) and the children might buy a soft drink from the bar. Mr Miller's unchallenged evidence was that the Club's use of the pavilion for these games is not as "sacrosanct" as for the senior team games on a Saturday. If another individual or community group wanted to hire the pavilion at the same time as an Under 11 game then, provided the Club had a reasonable amount of notice, it would seek to rearrange the Under-11 fixture (by, for example, seeing if the opposition club could host it instead).

36. In 2015 and 2016, the Club hosted two children's sports camps each year. One was scheduled in late May (to coincide with half-term) and one was held during the school summer holiday of each year. Each sports camp lasted for a few days and involved the children being given the opportunity to play a variety of sports for a cost of around £15. The pavilion is used during the sports camps (for example so that indoor sports can be played if the weather is bad). About half of the children attending are non-members, although, to comply with the terms of its insurance policy, they need to become members for the duration of the sports camp, and the Club charges an extra £2 or £3 to arrange this.

37. The Club has also established a table tennis club that plays on a table in the social area of the pavilion. Around 4 or 5 children a week attend to play table tennis. All of those attending are from Eynsham and around half are members of the Club. The Club does not charge for participation in the table tennis club.

38. In the winter, the Club organises an occasional film night for local children that takes place in the pavilion. Members of the Club provide their personal projector equipment and a fee of £3 is charged to those attending to cover the cost of drinks and snacks and a small gift for the children. Film nights are open to both members of the Club and non-members. The Club also arranges Christmas and Halloween parties for local children, which are also open to both members and non-members. A charge of £5 is made to cover the costs of food, drinks and a small gift.

Use of the pavilion – special "whole community" events organised by the Club

39. A number of special "whole community" events have taken place at the Club and the pavilion:

(1) On 14 June 2015, a fair was held to celebrate the official opening of the new pavilion. There was a bouncy castle for children, face painting and various stalls.

(2) On 26 June 2016, the Club held a "fun day" with the local running club.

(3) For many years there has been an annual charity cricket match in remembrance of a local man who died in a hit-and-run collision. During that cricket match, the Club allows the charity to use the pavilion to prepare food and drink for sale and there is a barbecue and stalls that raise money for the charity. The Club also makes a donation (out of the proceeds of sales in the bar).

(4) The Club also hosts an annual match at the end of August in each year to celebrate 'Presidents' Day'.

(5) There is also an annual beer festival to celebrate the end of summer that takes place at the pavilion and on the ground. In 2016, the cricket match referred to at [(4)] was arranged so as to coincide with the beer festival.

Use of the pavilion – hiring to other clubs, community groups and individuals

40. The Club makes the new pavilion available for hire. During the week, the pavilion costs £20 per hour for a commercial organisation to hire, an Eynsham resident would be charged £10 per hour and a club member would pay £8 per hour. At the weekend the hourly rates for the above categories are £22, £15 and £10 respectively.

41. We were shown a schedule setting out bookings for the pavilion in 2015 and 2016. The overwhelming majority of those bookings involved the pavilion being used for regular scheduled events that the Club was organising (those outlined at [28] to [38]) or by the croquet club. However, there were a few occasions each year on which the Club allowed a local business, community group or individual to use the pavilion. For example:

(1) On 4 occasions in 2015 and 8 occasions in 2016 both members and non-members hired the pavilion for a celebration, usually a birthday party. The Club charged for these uses of the pavilion, with members being entitled to a discount as noted at [40].

(2) On 7 occasions on 2015 and 10 occasions in 2016 the Club made the pavilion available to a local club or community group. For example, a group of paramedics could not find space for work meetings at their local hospital and so hired the pavilion. The pavilion has also been used by the local karate club, the cycle club, a group of Morris dancers and a running club. It was not entirely clear from Mr Miller's witness statement whether the Club charged for all such uses of the pavilion. However, since he pointed out in his cross-examination an instance where the Club did <u>not</u> charge another society for use of the pavilion (a cycling club run by someone who had helped to paint the pavilion when it was being built), we have inferred that the Club generally charges for use by clubs and community groups.

The Club's finances

42. We were shown financial information relating to the Club between 2010 and 2016. Between 2012 and 2014, the Club's finances were considerably affected by large receipts (insurance proceeds, grants and donations) relating to the new pavilion and correspondingly large payments relating to the construction works. However, ignoring those exceptional items, we have accepted Mr Miller's evidence that, in a typical year, the Club's income would be more or less equal to its expenditure; sometimes it would make a small profit and sometimes a small loss. The Club's turnover on its ordinary activities has always been much less than £50,000 per year. It has not been liable to be registered for VAT at any relevant time.

43. Some of the income that the Club needs to function comes from donations either from members of the Club or the local community.

44. The Club's main sources of revenue following construction of the pavilion are as follows:

(1) Its principal source of revenue comes from the bar at the pavilion. (£14,306 of the Club's revenue in the 12 months ending on 30 September 2016 came from the bar.)

(2) It received around £2,000 in 2015-16 from the sports camps that it runs. It makes a profit of around £1,200 per year on those sports camps.

(3) As noted above, it charges members annual subscriptions. It also charges members who play in senior games a £10 match fee to cover the cost of preparing the players' tea and reimbursing the umpires their travelling costs.

(4) It obtains income from the hire of the pavilion as noted at [40].

(5) It receives a modest amount of income from the sale of cricket shirts (£170 in the year 2014-2015).

45. Everyone involved in the running of the Club is a volunteer and therefore there are no staff costs. The Club's main expenses include:

(1) alcohol and food sold in the bar;

(2) costs of maintaining the ground, including the tractor and mower that cuts the grass;

(3) costs associated with running the sports camps (which amount to approximately £500 per year).

Relevant statutory provisions

46. Item 2 of Group 5 of Schedule 8 of VATA 1994 ("Group 5") provides for zero-rating to apply to:

> The supply in the course of the construction of—

> (a) a building … intended for use solely for a … relevant charitable purpose…
>
> of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

47. Item 4 of Group 5 provides for zero-rating to apply to:

> The supply of building materials to a person to whom the supplier is supplying services within item 2 or 3 of this Group which include the incorporation of the materials into the building (or its site) in question.

Therefore, if a builder is treated as supplying a zero-rated service consisting of the construction of a building falling within Item 2, then the builder's supply of building materials used in the construction of that building are also zero-rated.

Charitable purposes

48. Note 6 to Group 5 explains what is meant by a "relevant charitable purpose" in the following terms:

> (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.

49. Therefore, in order for there to be use for "relevant charitable purposes", there must be use "by a charity". The definition is contained in paragraph 1 of Schedule 6 and paragraph 7(d) of Schedule 6 provides for this definition to apply to, among others, enactments relating to value added tax. The relevant definition is as follows:

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

[3] Which includes enactments relating to value added tax because of paragraph 7(d) of Schedule 6

(a) applies regardless of where the body of persons or trust in question is established, and

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

50. The parties were agreed that the appellant satisfies both the "management condition" and the "jurisdiction condition" referred to above and, accordingly, those conditions are not reproduced. However, the parties were not agreed as to whether the appellant was established for "charitable purposes only" (the requirement of paragraph 1(1)(a) of Schedule 6 of FA 2010) or whether it met the "registration condition" in paragraph 1(1)(c) of that Schedule.

51. Sections 2 to 5 and s11 of the Charities Act 2011 ("CA 2011) deal with the concept of "charitable purposes" in the following terms:

2 Meaning of "charitable purpose"

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

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

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

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

(a) to charitable purposes, or

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

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

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

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

…

3 Descriptions of purposes

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

…

(g) the advancement of amateur sport…

(m) any other purposes—

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

(2) In subsection (1) …

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

4 The public benefit requirement

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

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

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

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

5 Recreational and similar trusts, etc

(1) It is charitable (and is to be treated as always having been charitable) to provide, or assist in the provision of, facilities for—

(a) recreation, or

(b) other leisure-time occupation,

if the facilities are provided in the interests of social welfare.

(2) The requirement that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.

(3) The basic conditions are—

(a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended, and

(b) that—

(i) those persons have need of the facilities because of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or

(ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.

(4) Subsection (1) applies in particular to—

(a) the provision of facilities at village halls, community centres and women's institutes, and

(b) the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation,

and extends to the provision of facilities for those purposes by the organising of any activity.

But this is subject to the requirement that the facilities are provided in the interests of social welfare.

(5) Nothing in this section is to be treated as derogating from the public benefit requirement.

52. The statutory definition of the public benefit requirement (in s4 of CA 2011) seeks to preserve the effect of common law on this point. That common law is described in *Tudor on Charities* as containing two requirements:

> (1) the nature of the purpose must itself be a benefit (as opposed to a detriment) to the public; and
>
> (2) those who may benefit from the carrying out of the purpose must be sufficiently numerous and identified in such a manner as to constitute "the public or a section of the public".

53. Section 5 of CA 2011 re-enacted and replaced s1 of the Recreational Charities Act 1958 to deal with recreational charities whose charitable status was called into question by the decision in *IRC v Baddeley* [1955] AC 572. The provisions of s5 are somewhat convoluted, but not unclear or ambiguous, and the following principles emerge from it:

> (1) The provision of facilities for recreation (which includes the provision of village halls and community centres) is a charitable purpose provided those facilities are provided "in the interests of social welfare" and provided those facilities also meet the "public benefit" requirement
>
> (2) If the provision of recreational facilities does not meet the "basic conditions" set out in s5(3), those facilities will not be regarded as provided "in the interests of social welfare" and so will not be charitable.
>
> (3) If the provision of recreational facilities does meet the "basic conditions" set out in s5(3), it will **also** be necessary to demonstrate that they are provided in the interests of social welfare, if they are to be charitable.

The "registration condition"

54. The "registration condition" is dealt with in paragraph 3 of Schedule 6 of FA 2010 and in related provisions of CA 2011. Paragraph 3 of Schedule 6 of FA 2010 provides relevantly as follows:

> **3 Registration condition**
>
> (1) A body of persons or trust meets the registration condition if—
>
> (a) in the case of a body of persons or trust that is a charity within the meaning of section 10 the Charities Act 2011, condition A is met, and
>
> (b) in the case of any other body of persons or trust, condition B is met.
>
> (2) Condition A is that the body of persons or trust has complied with any requirement to be registered in the register of charities kept under section 29 of the Charities Act 2011.

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

5 55. At first sight, it appears strange that paragraph 3(1)(a) and 3(1)(b) invite a consideration of whether a body of persons or trust is a charity when the whole function of the "registration condition" is to determine whether that body of persons is a charity for the purposes of FA 2010. The answer to this apparent conundrum is that there are two different concepts of "charity" that are relevant. The first is that in FA 10 2010 (which defines what we will refer to as "Finance Act charities"), and the second is that set out in CA 2011 (which we will refer to as "Charities Act charities"). Therefore, the registration condition (in paragraph 3 of FA 2010) which applies for the purpose of determining whether a body of persons is a Finance Act charity applies differently depending on whether that body of persons is a Charities Act charity.

15 56. The most logical starting point to explain how the "registration condition" applies, in the light of the comments made at [55] above, is s1(1) of CA 2011 which defines a Charities Act charity as follows:

1 Meaning of "charity"

(1) For the purposes of the law of England and Wales, "charity" 20 means an institution which—

(a) is established for charitable purposes only, and

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

Therefore, a central feature of the definition of a Charities Act charity (which is not 25 present in the FA 2010 definition) is whether or not the institution is subject to the control of the High Court.

57. Section 10 of CA 2011 provides that, for the purposes of the rest of CA 2011, "charity" has the meaning set out in s1(1) except that certain ecclesiastical corporations and similar bodies and trusts are not charities.

30 58. Therefore, the combined effect of the above rather convoluted provisions is that, if an institution is a Charities Act charity (which can only be the case if the institution is subject to the jurisdiction of the High Court), that institution must comply with any requirement to be registered under CA 2011 in order to be a Finance Act charity. By contrast, if the institution is not a Charities Act charity (for example if it is not subject 35 to the jurisdiction of the High Court), it must satisfy any requirement to be registered on a corresponding register outside England and Wales.

59. The relevant registration requirements for the purposes of CA 2011 are contained in s29 and s30 of CA 2011. It is sufficient to note that a Charities Act charity that falls within s10 of CA 2011 is generally required to be registered. There are some 40 exclusions from this requirement in s30 of CA 2011, but none of those exclusions would apply to the Club. In particular, the Club's gross income is in excess of £5,000

per year and therefore, if s10 of CA 2011 applied to it, it could not benefit from the exclusion in s30(2)(d) of CA 2011.

The exclusion in s6 of CA 2011

60. Section 6 of CA 2011 contains an exclusion for sports clubs registered under the provisions of the Corporation Taxes Act 2010 as follows:

> **6 Registered sports clubs**
>
> (1) A registered sports club established for charitable purposes is to be treated as not being so established, and accordingly cannot be a charity.
>
> (2) In subsection (1), "registered sports club" means a registered club within the meaning of Chapter 9 of Part 13 of the Corporation Tax Act 2010 (community amateur sports clubs).

Discussion of Issue 1(b) – whether s6 of CA 2011 necessarily prevents the Club from being a Finance Act charity

61. It is convenient to start with Issue 1(b) since, if s6 of CA 2011 applies in the way that HMRC contend, the Club would fail on Issue 1 without any need to examine the facts in detail.

62. Read in isolation, the effect of s6 CA 2011 appears stark: a CASC is deemed not to be established for charitable purposes and so cannot be a charity. However, Mr Brinsmead-Stockham has persuaded us that despite the apparent breadth of the provision, it is possible for the Club to be both a CASC and a Finance Act charity.

63. Central to our reasoning is the conclusion that there are two different definitions of "charity" set out in FA 2010 and in CA 2011 (which we have referred to as a "Finance Act charity" and a "Charities Act charity" respectively) and we will start by explaining the significance of this. The relevance of the definition of a Finance Act charity is that it determines whether particular tax benefits are available. Running in parallel with the concept of a Finance Act charity is the concept of a Charities Act charity which is, among other things, relevant to the question of whether a body is subject to regulation under CA 2011. We therefore respectfully disagree with the conclusion of the Tribunal in *Witney Town Bowls Club v HMRC* [2015] UKFTT 0421 (TC) to the effect that Parliament intended the concepts of a Charities Act charity and a Finance Act charity to be "aligned". Our impression of the legislation is that Parliament has deliberately enacted two separate definitions which are relevant to completely separate matters (tax benefits on one hand and regulatory requirements on the other). The FA 2010 definitions cross refer to those in CA 2011, but we do not consider they were intended to be "aligned" given the different purposes that they serve.

64. In order to be a Finance Act charity, the Club must be "established for charitable purposes only" (paragraph 1(a) of Schedule 6). The meaning of "charitable purpose" in this context is that set out in s2 of CA 2011 (paragraph 1(4) of Schedule 6).

Therefore, FA 2010 provides that the question of whether a particular purpose is a "charitable purpose" is to be found by applying s2 of CA 2011. Importantly, in our view, paragraph 1(4) of Schedule 6 does not determine that the question of whether a body is "established for charitable purposes" must be determined by applying provisions of CA 2011. Rather, paragraph 1(4) has the more limited effect of treating s2 of CA 2011 like a dictionary in order to provide the meaning of "charitable purposes" for the purposes of the FA 2010 definition.

65. Meanwhile, in determining whether a particular body is a Charities Act charity, s1(1)(a) of CA 2011 asks whether a body is "established for charitable purposes only". The "charitable purposes" relevant in this context are those set out in s2 of CA 2011, the very same "charitable purposes" that apply in connection with the FA 2010 definition. However, the effect of s6 of CA 2011 is that, if a CASC is established for charitable purposes, it is to be treated as not so established with the result that it cannot be a Charities Act charity.

66. Section 6 of CA 2011 is not, therefore, explaining the meaning of "charitable purpose" in s2 of CA 2011. The advancement of amateur sport remains a charitable purpose within s2 even if s6 of CA 2011 applies. Rather, s6 of CA 2011 provides that CASCs are treated as not being <u>established</u> for charitable purposes. Moreover, that deeming provision applies only for the purposes of CA 2011. Therefore, s6 of CA 2011 means that a body of persons cannot be both a CASC and a Charities Act charity. However, since s6 of CA 2011 does not prevent the advancement of amateur sport from being a charitable purpose that falls within s2 of CA 2011, s6 does not prevent a CASC from being a Finance Act charity.

67. We consider that the natural reading of the statutory provisions is as set out above. Moreover, that reading accords with the evident purpose of the legislation which has to be understood in the context of the decision by the Charity Commission, on 30 November 2001, to reverse its long-held view that local amateur sports clubs were incapable of being charities. As a result of this change of view, the Charity Commission recognised "the promotion of community participation in healthy recreation by the provision of facilities for the playing of particular sports" as a charitable purpose.

68. In Finance Act 2002, Parliament enacted a regime offering tax benefits to CASCs that took effect from 1 April 2002. The effect of the Charity Commission's change in view was that a body could be both a CASC and a Charities Act charity. Moreover, if a CASC was a Charities Act charity, it would be subject to the mandatory regulatory requirements of the Charities Act (for example those relating to the provision of accounts) that might not be suitable for small amateur sports clubs. With that point in mind, s5(4) and s5(5) of the Charities Act 2006 (the predecessor provision to s6 of CA 2011) were enacted so as to prevent CASCs from being Charities Act charities and so subject to regulation under the Charities Act. Viewed in that light, the purpose of s6 of CA 2011 is to prevent CASCs from being subject to regulation under the Charities Act by preventing them from being Charities Act charities. That purpose can be achieved without concluding that s6 prevents CASCs from being Finance Act charities. Therefore, applying the dictum of Sir Robert Megarry V.C in *Polydor Ltd.*

and RSO Records Inc. v Harlequin Record Shops and Simons Records Ltd. [1980] 1 CMLR 669, 673 to the effect that "the hypothetical must not be allowed to oust the real further than obedience to the statute compels", we do not consider that s6 of CA 2011 should be construed as preventing a CASC from being a Finance Act charity if it otherwise answers to the statutory definition.

69. Finally, we note that there are other indications that s6 of CA 2011 is not intended to prevent a CASC from being a Finance Act charity on the face of the statutory provisions themselves:

(1) Paragraph 1 of Schedule 6, which contains the relevant definition of a Finance Act charity cross-refers to a number of provisions of CA 2011, but does not mention s6 of CA 2011. Rather, it provides that the meaning of "charitable purposes" is to be found in s2 of CA 2011, having regard to s7 and s8 of CA 2011.

(2) Section 2 of CA 2011 (which contains the definition of "charitable purposes") itself cross refers to other provisions of CA 2011 but does not mention s6.

70. Mr Davey suggested that Mr Brinsmead-Stockham's arguments to this effect were seeking artificially to "seal off" s6 of CA 2011 and that, read in context, s6 and s2 were intended to be read together. We do not agree. The statutory scheme itself "seals off" s6 by providing that the definition of "charitable purposes" is to be found in s2 of CA 2011 without having regard to s6. The relevance of s6 is that it prevents a CASC from being a Charities Act charity even if the purposes for which it is established amount to charitable purposes that fall within s2.

71. Nor do we agree with Mr Davey's submission that the tax law provisions in Schedule 6 are necessarily parasitic on the provisions of CA 2011 so that s6 compels the conclusion that a CASC cannot be a Finance Act charity. Of course, tax law provisions often rely on general law concepts. However, in Schedule 6, Parliament has explained precisely which provisions of CA 2011 are relevant to the definition of a Finance Act charity. Section 2 of CA 2011 is relevant (because it contains the definition of "charitable purposes"). However, s6 of CA 2011 is not relevant (because that provision operates only to prevent CASCs from being Charities Act charities).

72. Therefore, our conclusion on Issue 1(b) is that the fact that the Club is a CASC does not prevent it being a charity for the purposes of FA 2010. In reaching this conclusion, we recognise that we are respectfully disagreeing with the decision of the Tribunal in *Witney Town Bowls Club*. However, we have had the benefit of Mr Brinsmead-Stockham's detailed submissions on the construction of the relevant provisions which would not have been available to the Tribunal in that case since the appellant club was not represented by counsel.

Discussion of Issue 1(a) – whether the Club was established for charitable purposes only

73. Issue 1(a) reduces to an examination of two separate questions:

(1) Was the Club established for purposes that both (i) fall within s3 of CA 2011 (as extended by s5 of CA 2011) and (ii) satisfy the public benefit condition set out in s4 of CA 2011?

(2) Was the Club established only for those purposes?

5 74. We have concluded that the Club was established for purposes that included the advancement of amateur sport. Its constitution says as much and the way that it is operated is consistent with the statement in its constitution. The advancement of amateur sport is a charitable purpose listed in s3(1)(g) of CA 2011.

75. It is clear that the promotion of amateur sport is not a disbenefit to the public. 10 Therefore, the first limb of the public benefit condition set out at [52] is met. Mr Davey submitted that second limb of the public benefit condition was not met because members of the public could only join the Club by paying a membership fee. We do not accept that submission. The Club's activities of promoting amateur sport are of benefit to anyone in Eynsham or the surrounding district who is prepared to pay 15 modest and accessible fees to join the Club. The Club waives or reduces membership fees for people who would have difficulty paying them. Therefore, we consider that the people who can benefit from the Club's advancement of amateur sport are sufficiently numerous and defined in such a way as to constitute the public or a section of it.

20 76. We therefore consider that the requirement set out at [73(1)] is met. Therefore, the question is whether the Club was established solely for the charitable purposes set out above. In this regard, we were referred to a document entitled "Charitable Status and Sport" published by the Charity Commission in April 2003 which sets out how the Charity Commission approaches this question in the case of amateur sports clubs. 25 That document included the following extracts:

> 31 … all activities of the club would have to be directed towards healthy recreation and ancillary matters. If the club provided refreshment, for example, it could do so only as a purely ancillary activity connected to actual participation in the sport concerned.
>
> 30 **Social members**
>
> 32 The provision of facilities for use by members intending only to take advantage of the club's facilities is not charitable, so the club's constitution could not include a 'social' membership category.
>
> 33 This does not mean, though, that a charitable CASC cannot include 35 social facilities, such as a bar, on its premises. It simply means that activities of this nature must be operated by a separate non-charitable organisation, such as a social club to be run on an arm's length basis from the charity. This is the same basis upon which village halls and community centres, for example, operate social activities on their 40 premises.

77. The above statements set out the views of the Charity Commission on the law set out in CA 2011 (which involves a consideration, similar to that contained in FA 2010, of whether a body is "established for charitable purposes only"). The Charity Commission's views are not binding on this Tribunal. However, we consider that they

correctly identify that difficulties can arise where a sports club has a purpose of providing social facilities that stands separate from a purpose of advancing amateur sport. In the remainder of this section, therefore, we will analyse all the purposes for which the Club was established. We consider that these purposes were not fixed once and for all when the Club was formed but rather can evolve over time by reference to changing circumstances. The relevant time to consider the purposes for which the Club was established is the time at which the construction goods and services were supplied since the Club's status at this time is an element in determining whether these services were zero-rated or not.

78. For the reasons set out below, our overall conclusion is that, when the relevant goods and services were supplied to the Club, the predominant purpose for which the Club was established was the promotion of amateur sport. However, it also had a subsidiary purpose of providing social facilities to the residents of Eynsham that stood separate from the purpose of promoting amateur sport.

79. Mr Davey suggested that the Club was established in part to provide social facilities to its members and that this was demonstrated by the fact that it had a category of non-playing members (which he characterised as "social members" of the kind referred to in the Charity Commission document). We have not accepted that submission as we consider that "non-playing members" do not have any particular access to social facilities and instead join the Club primarily to provide it with modest financial support through their annual £5 membership fee.

80. Rather, the Club's "social purpose" involves the provision of social facilities to a wider category of person than its members. Contemporaneous documentation makes this clear. As noted at [18], the new pavilion was to be a "focal point for the village" and a "community building". The Sport England application referred to at [20] mentions how a licensed facility at the pavilion will benefit the whole community. The application to West Oxfordshire District Council referred to at [21] makes it clear that the pavilion was to be a "meeting place and social venue". The purposes for which the Club intended to use the new pavilion, which would be by far its most significant asset, explain the purposes for which it was established at the time the pavilion was being constructed. Those purposes cannot be explained solely by a desire to advance amateur sport given that the overwhelming majority of the local community are not cricketers. Rather, the various funding applications and the contemporaneous evidence in the form of newspaper articles point firmly to the conclusion that cricket was the Club's main concern but that it also had a strong community spirit which underpinned its subsidiary purpose of providing social facilities to the community unconnected with sport. It is significant that the largest area in the pavilion is described as the "social area".

81. The way the Club has acted since the pavilion was built demonstrates that one of the purposes for which it is established is a social purpose that stands separate from the promotion of amateur sport. Anyone can use the bar at the pavilion and purchase refreshments whether or not they have participated in amateur sport. Similarly, anyone is free to use the air-hockey and table tennis tables in the social area of the pavilion. The open nights that the Club organises have a core that relates to sport.

However, they are by no means concerned only with the promotion of amateur sport and Mr Miller's explanation of how the community responds to those open nights was couched at least partly in terms of their social benefits. Film nights and Halloween and Christmas parties that the Club organises for children have no relation at all to sport.

82. We have considered whether the social activities referred to above are simply ancillary to the Club's purposes of promoting amateur sport in the sense that they are either designed to raise revenue to finance the Club's sporting objects or to recruit new members for the Club. We have concluded that raising revenue and attracting new members (particularly junior members) is at least part of the rationale for the social activities that the Club pursues. However, by arranging these events, the Club is not simply seeking to extract cash from the local community or to induce members of the community to join. Rather, it is quite clear both from Mr Miller's evidence and contemporaneous documentation that the Club regards itself as part of the local community and that one of its purposes is to provide social facilities, not entirely connected with sport, to that community..

83. Therefore, the question is whether the Club's additional "social purpose" is charitable by virtue of s5 of CA 2011. We are satisfied that the "social purpose" amounts to the provision of facilities for recreation (which falls within s5(1)(a) of CA 2011). We are also satisfied that the provision of those facilities for recreation satisfies the public benefit requirement set out at [52] as those recreation facilities are not a public disbenefit and those who can enjoy the Club's recreation facilities are sufficiently numerous to constitute the public, or a section of the public. The recreation facilities that the Club offers are available to members of the public at large (and so meet the requirements of s5(3)(b) of CA 2011 by virtue of satisfying s5(3)(b)(ii)) since, as we have noted, one does not need to be a member of the Club to enjoy those facilities and, in practice, the Club allows anyone to access its recreation facilities.

84. Therefore, the key issues are:

> (1) whether the Club's provision of recreation facilities meets the "basic condition" set out in s5(3)(a) of CA 2011; and
>
> (2) if so, whether the Club's recreation facilities are provided "in the interests of social welfare".

85. Section 5(3)(a) of CA 2011 requires that

> the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended.

Since s5(3)(a) is concerned with whether the Club's purpose of providing recreation facilities is charitable, we consider this test must be approached by first asking who are the persons for whom the Club's recreation facilities are primarily intended.

86. In our judgement, the Club's recreation facilities are "primarily intended" for its members. The principal recreation facility that the Club offers is the ability to play

cricket and that facility is enjoyed primarily, if not exclusively, by the Club's members. The enhanced recreation facilities that the Club was able to offer came about only because it built the new pavilion: as we have noted at [17], the Club's previous pavilion was basic. The new pavilion was built with the Club's cricketing interests uppermost in its mind since, as noted at [18], without an upgraded pavilion the Club would find it difficult to continue to play in the OCA league. The initiative to build the pavilion came from the Club and the Club secured the overwhelming majority of the necessary funding. The Club owns the pavilion and has the right to exclude non-members from it if it chooses to do so and has determined that its use of the pavilion for Saturday senior club matches is "sacrosanct" as noted at [31]. In practice, as we have found, the Club is generous with its recreation facilities but it remains a private members' club and its purpose of providing recreation facilities to non-members is subsidiary to its purpose of providing such facilities to its members. In all of those circumstances, we consider that all of the Club's recreation facilities are "primarily intended" for the Club's members and not for residents of Eynsham generally.[4]

87. That leaves the question of whether the Club's facilities are provided for the purposes of "improving the conditions of life" for its members (being the persons for whom its recreation facilities are "primarily intended"). Mr Brinsmead-Stockham rightly notes that this does not require that the Club's members suffer from any social or economic disadvantage since, as the House of Lords noted in *Guild v HMRC* [1992] 2 AC 310, "persons in all walks of life and all kinds of social circumstances may have their conditions of life improved by the provision of recreational facilities of suitable character" and "the village hall may improve the conditions of life for the squire and his family as well as for the cottagers".

88. We have no doubt that the Club's members enjoy the recreation facilities that the Club offers. However, that is not enough to meet the basic condition of s5(3)(a) of CA 2011 since otherwise s5(3)(a) would be redundant as all facilities for recreation are presumably enjoyable. Parliament has decided that is only a subset of recreation facilities, namely those provided "with the object of improving the conditions of life" that are capable of being charitable. The Club exists because its 75 playing members enjoy playing cricket and, since cricket is a team sport, they need to organise themselves in order to do so. The Club's overriding object in providing recreation facilities to its members is to enable them to have a pleasant experience by playing a sport that they enjoy. We agree with Mr Davey that it would be undue hyperbole to describe the Club's facilities as being provided with the object of improving the conditions of life of its members. Mr Brinsmead-Stockham argued that, since the Club could not have continued in existence without the new pavilion it necessarily followed that the Club's recreation facilities at the new pavilion are provided to

[4] We do not regard this conclusion as inconsistent with our finding at [75]. In that paragraph, we conclude that the people who are capable of benefiting from the Club's purpose of advancing amateur sport are the residents of Eynsham and surrounding villages, and that class is sufficiently numerous to constitute the public or a section of it. That is not the same as concluding that the Club's recreation facilities are "primarily intended" for residents of Eynsham generally (as distinct from members of the Club specifically).

improve the conditions of life of its members by keeping Eynsham Cricket Club in existence. We do not consider that conclusion follows and, in any event, it amounts to Mr Brinsmead-Stockham assuming what he is seeking to prove, namely that Eynsham Cricket Club is, by its very existence, seeking to "improve the conditions of life" of its members.

89. Another way to approach the issue is to consider whether the "conditions of life" of the Club's members would be worse if the Club did not provide its recreation facilities. Mr Miller's witness statement mentioned that there are three cricket clubs (Stanton Harcourt, Witney Swifts and West Witney) between 5 to 7 miles away from Eynsham. The Club's Notice of Appeal mentioned the Charlbury Cricket Club that is also around 8 miles away from Eynsham. As we have noted at [18], cricketers can move from one village club to another. Therefore, we do not consider that members' "conditions of life" would be worse if the Club did not exist as they could still play cricket elsewhere although they may well be put to added inconvenience and have to travel further to pursue their hobby.

90. We do not, therefore, consider that the Club's subsidiary purpose of providing recreation facilities meets the "basic condition" of s5(3)(a) of CA 2011. Even though, in our discussion of Issue 3, we conclude that the pavilion was intended to be used as a "village hall or similarly", the specific reference to village halls in s5(4) of CA 2011 has not altered our conclusion. Even if the pavilion were actually a village hall (as opposed to being used similarly to a village hall), s5(4) would at most mean that the Club is treated as having a purpose of providing facilities for recreation. The Club still needs to meet the basic conditions (and the "social welfare" condition).

91. Since the Club's subsidiary purpose does not meet the basic conditions, that purpose is not charitable. In those circumstances, it is not strictly necessary to consider whether the Club's recreation facilities are provided "in the interests of social welfare". We note Lord Keith's statement in *Guild v IRC* that it is "difficult to envisage" a case in which the basic conditions are met, but the social welfare condition is not. Since we do not need to decide the point, we will not determine whether this is one of the exceptional cases to which Lord Keith refers. However, it also strikes us as hyperbole to conclude that the Club provides its recreation facilities "in the interests of social welfare" given, as we have noted, the Club's facilities are offered because 75 playing members have a shared love of the game of cricket.

92. Our overall conclusion, therefore, is that the Club's main purpose involves the promotion of amateur sport. We should not, therefore, be taken as expressing any reservation as to whether the Club meets the requirement set out in s658(1A) of the Corporation Tax Act 2010 to be a CASC. However, the existence of a separate, albeit subsidiary, social purpose that is not charitable (because it fails to meet the "basic condition" of s5(3)(a) of CA 2011) means that the Club was not established only for charitable purposes at the relevant times. Accordingly, the Club fails on Issue 1(a). That conclusion is sufficient to mean that the Club's appeal cannot succeed based on domestic UK provisions. Nevertheless, since we heard full argument on all other issues, we will express our conclusions on them.

Discussion of Issue 1(c) – whether Club satisfies the registration condition

93. The registration condition is set out in paragraph 3 of Schedule 6 and depends on whether the Club is a charity within the meaning of s10 of CA 2011.

94. Mr Brinsmead-Stockham argued that the effect of s6 of CA 2011 is that the Club is not a charity within the meaning of s10 of CA 2011. Therefore, paragraph 3(1)(a) of Schedule 6 is not relevant and there is no requirement for the Club to satisfy "condition A" (to the effect that it has complied with any requirement to be registered in the register maintained under s29 of CA 2011). Accordingly, to meet the registration condition, the Club must only satisfy condition B. There was no suggestion that the Club is under any obligation under the laws of a territory outside England and Wales to be registered in a register analogous to that maintained under s29 of CA 2011. Therefore, Mr Brinsmead-Stockham submitted that the Club had complied with "any" such requirement with the result that condition B was met.

95. Mr Davey submitted that this involved the Club seeking to have its cake and eat it by arguing, in the context of Issue 1(b), that s6 of CA 2011 was not relevant but that, for the purposes of Issue 1(c) it was relevant. We do not agree with that submission. Section 6 of CA 2011 is plainly relevant to the question of whether the Club is a Charities Act charity that falls within s10 of CA 2011. Indeed, the whole purpose of s6 of CA 2011 is to prevent a CASC such as the Club from being a Charities Act charity. Therefore, Mr Brinsmead-Stockham's argument involves applying s6 of CA 2011 where it is relevant (to the question of whether the Club is a Charities Act charity within s10 of CA 2011) but not applying it where it is not relevant (to the definition of "charitable purposes").

96. We do, however, agree with Mr Davey that it is odd that Parliament should have enacted a test that involves enquiring whether a small club based in Eynsham has complied with any requirement to be registered as a charity in a jurisdiction outside England and Wales. However, odd though it is, it is the effect of the legislation. Moreover, even if Mr Davey were correct and condition A is relevant (and not condition B), the Club would need only to demonstrate that it had complied with "any" requirement to be registered under s29 of CA 2011. On no view is the Club liable to be registered under s29 of CA 2011 since s6 of CA 2011 prevents it from being a Charities Act charity. Therefore, while we agree that there is an oddity in the way the legislation works, however that oddity is resolved, the Club satisfies the registration condition and succeeds on Issue 1(c).

Discussion of Issue 2 – whether the new pavilion was intended for use solely by the Club otherwise than in the course or furtherance of a business

97. It was common ground between the parties that, in order to succeed on Issue 2, the Club must demonstrate that, at the time the Club received the relevant supplies, the new pavilion must have been intended for use solely by the Club otherwise than in the course or furtherance of a business. That conclusion follows from the requirement, in

Item 2 of Group 5 that the intended use of the pavilion is solely for a "relevant charitable purpose" and Note 6(a) of Group 5. We will start by considering relevant authorities and will then apply those to the facts that we have found.

Relevant authorities

98. Mr Davey submitted that Issue 2 could be disposed of quite briefly since s94(2) of VATA 1994 provides that:

> (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.

Since the Club charges for membership, he submitted that its activities plainly fell within s94(2) of VATA 1994 with the result that its activities amounted to the carrying on of a business.

99. However, we agree with Mr Brinsmead-Stockham that the decision of Patten J in *Customs and Excise Commissioners v Yarburgh Children's Trust* [2002] STC 207 means that the relevant question is whether the pavilion was intended to be used solely in ways that did not involve the carrying out of an "economic activity" as that term is explained in the jurisprudence of the Court of Justice of the European Union ("CJEU").

100. We have drawn the following conclusions on the meaning of the concept of "economic activity" from the authorities that we were shown:

> (1) In *Gemeente Borsele v Staatssecretaris van Financiën* Case C-520/14, the CJEU determined that, in order for a person to be carrying on an economic activity, it is necessary for that person to supply goods or services for a consideration. However, while necessary, that is not sufficient for there to be an economic activity. All the circumstances in which the supply takes place have to be examined. For example, it may be relevant to compare the circumstances surrounding the supply being considered with the circumstances in which that type of service is usually supplied.
>
> (2) The question of whether there is an economic activity has to be ascertained by reference to the objective character of the transactions effected (*BLP Group v Customs & Excise Commissioners* [1995] STC 424) and not by reference to the subjective intentions of those involved.
>
> (3) As a general rule, an activity will be an economic activity where it is permanent and is carried out in return for remuneration. However, that general rule can be displaced by evidence either that there was no direct link between the service and the consideration or other evidence that shows that there was no economic activity (*HMRC v Longridge on the Thames [2016]* STC 2362).

(4) The fact that a person supplies goods or services for a consideration in order to further charitable objectives does not of itself prevent those supplies from forming part of an economic activity (since the concept of an economic activity is an objective one that does not relate to the subjective intentions of the supplier). Similarly, the absence of a profit motive is not relevant since an economic activity relates to the receipt of income, not of profit. (*Longridge on the Thames*).

Application to the facts

101. It is clear that, when the pavilion was being built, the Club intended it to be used in at least two ways that were capable of amounting to an economic activity. Firstly, it was intended that there be a licensed bar at the pavilion at which refreshments were sold. Secondly, the pavilion itself was to be available for hire by members of the community. We are quite satisfied that both of those activities involved the supply of services for a consideration with a direct link between the services being supplied and the consideration received.

102. If those supplies amount to an economic activity, then the requirements of Note 6(a) would be failed. Therefore, it is necessary to consider whether these supplies would amount to an economic activity.

103. We regard the activities as "permanent" in the necessary sense. Although the pavilion is not open all the time, nor indeed is it hired to third parties all the time, there is a structure of permanence about the activities that the Club pursues. Mr Miller in his evidence made it clear how important the revenue from the bar at the pavilion was to the Club. The bar serves refreshments on most occasions on which the pavilion is open. In addition, there is a structure of permanence about the Club's activity of hiring the pavilion to third parties which is also an important source of revenue for the Club, so much so that the Club would be prepared to rearrange junior cricket matches to accommodate a third party who wished to hire the pavilion.

104. It follows, therefore, that an application of the "general rule" outlined in *Longridge on Thames* would result in a conclusion that the supply of refreshments and of the pavilion itself amount to an economic activity.

105. The next question, therefore, is whether despite the application of the general rule, these supplies do not involve the carrying out of an economic activity. There is no doubt that there is a direct link between the consideration that the Club receives and the services it provides. Someone visiting the bar pays cash and receives, in return, a supply of refreshments. Someone hiring the pavilion pays cash and receives, in return, a contractual licence to use it for a specified period. Therefore, the first category of exception to the general rule that the Court of Appeal identified in *Longridge on the Thames* (outlined at [100(3)]) is not present. Accordingly, the focus should be on the second category of exception, namely whether there is other evidence that suggests that the supplies do not amount to an economic activity.

106. Mr Brinsmead-Stockham submitted that the following factors meant that the general rule should be displaced:

(1) The Club does not generate significant earnings.

(2) The Club has a limited number of customers.

5 (3) The Club is run by members on a wholly voluntary basis.

(4) The Club is not operated on a commercial manner on the basis of sound and recognised business principles.

(5) The Club is not operated with a view to profit and requires donations to continue in operation.

10 (6) The Club supplies services of a type that are not otherwise provided by commercial organisations.

107. We have not accepted those submissions for the following reasons:

(1) It is true that the Club does not generate significant earnings. However, activities do not need to be significant in order to amount to an economic
15 activity.

(2) The Club is located in a small village. Of necessity, therefore, its customer base is limited. However, once account is taken of visiting teams and the 10 to 25 spectators that could be expected at home adult matches and attenders of the club's "open nights", the customer base for the bar is
20 by no means small. Similarly, although the pavilion is not hired often, it is hired and the resulting revenue is important to the Club.

(3) The fact that Club is run by volunteers does not compel the conclusion that it is not carrying out an economic activity particularly given that the relevant supplies (refreshments and use of a space for birthday parties and
25 other events) are similar to supplies that might be undertaken by commercial organisations. The absence of a profit motive is not relevant.

(4) We do not agree that the Club is not operated on a commercial manner. Of course, it is not a large commercial organisation and the realisation of profit is not one of its main objects. However, even though its financial
30 situation is precarious, each year it is able to ensure that it generates just enough income to meet its expenses. In part it achieves this by generating revenue from its principal asset (the pavilion) by hiring it to third parties. In part it achieves this by ensuring that people who visit its premises are given an opportunity to spend money at a licensed bar and by actively
35 seeking to increase the number of people who visit its premises. Those are the actions of a body pursuing revenue in an organised and commercial way even though the commercial activity is itself relatively small.

108. There is no reason, therefore, to displace the operation of the general rule and accordingly the Club fails on Issue 2.

Discussion of Issue 3

109.Issue 3 is concerned with whether the new pavilion was intended for use solely by the Club as a village hall or similarly in providing social or recreational facilities for a local community for the purposes of Note 6(b) of Group 5 Schedule 8 VATA 1994.

5 110.We are quite satisfied that the pavilion was intended for use by the Club solely for the purpose of providing social or recreational facilities for a local community.[5] We consider that conclusion follows quite clearly from the nature of Eynsham (a small village which we are satisfied constitutes a "local community") and the intended use of the pavilion.

10 111.The key question is whether the pavilion was intended for use solely by the Club as a village hall or similarly for the purpose of providing those social or recreational facilities. We will approach this question first by considering the authorities on how the test should be applied and then apply the test to the facts that we have found.

Authorities on Note 6(b) of Group 5

15 112.The statutory provisions make it clear that the question to be examined is of the intended use of the building at the time the relevant supplies (i.e. those that are contended to be zero-rated) are received. That was emphasised in *Caithness Rugby Football Club v HMRC* [2016] STC 2028 where Lord Doherty said:

> The judgments—particularly that of Beldam LJ—also suggest that in
> 20 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.

25 113.In *New Deer Community Association v HMRC* [2015] UKUT 604 (TCC), the Upper Tribunal determined that it was necessary to determine whether the use or intended use of a building is similar to use of a building as a village hall with Lord Tyre saying, at [17]:

> I begin my own analysis by noting that, grammatically, the words 'or
> 30 similarly' relate back to the word 'use'. Enquiry must therefore focus upon whether the use or intended use of a building is similar to use of a building as a village hall, rather than, for example, upon whether the building is similar to a village hall.

114.It is not enough that the building be intended for use solely in providing social or
35 recreational facilities to a local community; the use must be similar to that of a village hall. Therefore, a village hall serves as a "model or paradigm" (*Jubilee Hall*

---

[5] This is not inconsistent with our finding at [86]. In that paragraph, we conclude that the Club's recreational facilities were "primarily intended" for members of the Club specifically, as distinct from residents of Eynsham generally. By contrast, in paragraph [110], we are concluding that overall the pavilion was to be used in providing recreational facilities to a local community, some of whom would be members of the Club and some of whom would not.

Recreation Centre Limited v HMRC [1999] STC 381 at 390d). In *Jubilee Hall*, Vinelott J, sitting as judge of the Court of Appeal, summarised the overall purpose of Note 6(b) as follows:

> In this context the plain purpose of sub-para (b) was in 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 the user of the services (through a body of trustees or a management committee acting on its behalf) and in which the only economic activity is one in which they participate directly; the obvious examples are the bring-and-buy or jumble sale, the performance of a play by local players and the like.

115.There is no separate free-standing test that a local community <u>necessarily</u> must have "direction or control" over the use of a building in order for the building to be intended for use as a village hall or similarly. However, the existence of direction or control is relevant to the assessment of whether the intended use of a building is similar to that of a village hall. That follows from *Caithness Rugby Football Club* where Lord Doherty said at [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 390; Beldam LJ at 397; Thorpe LJ at 394). It is one of several factors which may be pertinent…

116.Mr Brinsmead-Stockham also referred to an extract from *Hansard* detailing a debate in the House of Commons on 12 July 1989. That debate concerned a Government amendment to introduce what is now Note 6(b). Mr Peter Lilley, then a minister in the Government, said:

> This amendment is confined to buildings run by charities. It covers church halls, village halls and other community buildings providing similar social and recreational facilities for a local area. It also extends to buildings such as cricket pavilions and changing rooms…

He suggested that, applying principles in *Pepper v Hart*, this could be relied on as an aid to the construction of Note 6(b). We do not, however, agree with this submission. Note 6(b) is not ambiguous: it sets out an intelligible test to be applied although we accept that the test may be difficult to apply in certain situations. Moreover, Mr Lilley cannot have been saying that the construction of every cricket pavilion run by a charity necessarily qualifies for zero-rating since Note 6(b) linked zero-rating to the <u>intended use</u> of a building, which necessarily involves some analysis of the facts beyond the mere description of the building. We have not, therefore, had regard to the Hansard extract.

Application to the facts

117.The essence of Mr Davey's argument was that the pavilion was built to satisfy the need of the Club (and not the wider community) which needed a new pavilion if it

was to continue to function as a cricket club. In his submission, the Club, and not the wider community was the principal user of the pavilion. He acknowledged that other groups could use the pavilion but they would typically have to pay a fee to do so (with that fee benefiting the Club and not the community) and any such use would be at the Club's discretion and subject to the Club's own schedule. He noted that oversight and control of the pavilion was exercised by the Club, and not the community and submitted that this meant that the pavilion was not used as a village hall or similarly.

118.Those were strong arguments. There clearly are aspects of the intended use of the pavilion that point against the conclusion that it was intended for use as a village hall or similarly in providing social or recreational facilities for a local community. However, we do not agree that, for the purposes of determining the pavilion's intended use,the division between "Club" and "community" is as sharp as Mr Davey suggested.

119.The first point is that, as we have noted, the Club is generous with its facilities and does not exclude non-members from the pavilion. For example, residents of Eynsham who are not members of the Club choose to, and are permitted to, watch games of cricket from the pavilion and use the bar. Vinelott J, in *Jubilee Hall*, mentions the watching of a performance by local players as an "obvious example" of a village hall's use. That is not a statement of law that is binding on us, but we respectfully agree with it. If watching a play involving local actors is a prime example of a village hall's use, we see no reason why the use of the pavilion to watch a game of cricket involving local players is not also use that is at least similar to that of a village hall.

120.Moreover, the Club makes the pavilion available for use at events aimed at the whole community. The Friday night "open nights", the table tennis club and the children's film nights involve the pavilion being used for purposes that are exactly what one would expect of a village hall. The fact that these are organised by the Club rather than someone else does not detract from that conclusion as ultimately someone has to organise a community event otherwise it simply will not happen. As we have noted, the Club arranges events such as this partly because of its community spirt and partly because of the opportunity to raise revenue and seek new members. However, even to the extent that the Club is motivated by its own interests in arranging these events, the nature of the use of the pavilion remains the same and is similar to that of a village hall.

121.The fact that a person wishing to hire the pavilion has to pay a fee is also not inconsistent with the pavilion being used as a village hall or similarly in providing social or recreational facilities for a local community. We were referred to a report prepared in October 2011 by ACRE entitled "The state and management of rural community buildings in England" which suggested that 98% of rural community buildings are available for hire in return for a fee.

122.The points made at [119] to [121] above relate to the actual use of the pavilion. Note 6(b), by contrast, refers to the intended use and Mr Davey suggested that the actual uses of the pavilion by the community represented an "after the event rationalisation" rather than something that was intended while it was being built. We

do not agree. The Club's applications for funding demonstrate that, even before it was constructed, it was intended that the pavilion would be available for use by the wider community. Of course, in its applications for funding, the Club had an incentive to "talk up" the benefit to the community since the awarders of grants were clearly interested in that aspect. However, we do not consider that the Club has done so as what the Club said in its applications was consistent with the way the pavilion has actually been used. Moreover, the community of Eynsham had contributed over £9,000 to the cost of the pavilion. Mr Davey suggested that this was a small sum, just 3½% of the total cost, but Eynsham is a small village and the Club had succeeded in obtaining grants from other sources, so a large contribution from the village was not needed. We are, therefore, satisfied that the actual use of the pavilion was consistent with the use that was intended when it was being built.

123. We note that the test is whether the intended use of the pavilion is solely as a village hall or similarly for the purpose of providing recreational facilities to a local community. Therefore, any other intended use would cause the requirements of Note 6(b) to be failed. The Club has throughout intended to use the pavilion in some ways that involve no use by the community generally. For example, only players use the pavilion to get changed; the wider community does not. Similarly, the pavilion is used for committee meetings of the Club which the community generally does not attend. In addition, the Club's use of the pavilion on Saturdays during the cricket season is "sacrosanct" in the limited sense outlined at [31]. However, even a village hall cannot be used by everyone in the community all of the time and there will be occasions where one person's use of a village hall means that another person cannot use it at the same time. Therefore, while there are limited occasions on which the Club's use of the pavilion means that others cannot use it, that is not inconsistent with the pavilion being used similarly to a village hall.

124. Mr Davey also submitted that, because Eynsham already has a number of other amenities similar to a village hall (see the findings at [27]) and the pavilion is not located in the centre of Eynsham, that suggested that the pavilion cannot have been intended to be used in a manner similar to a village hall. We do not agree. All that is required is that the intended use of the pavilion be similar to that of a village hall. The fact that there are other facilities in Eynsham similar to village halls says little about the purpose for which the pavilion was intended to be used. Moreover, the fact that the pavilion is actually used in the manner set out above suggests that the existence of other facilities, and the distance of the pavilion from the centre of Eynsham, do not call into question whether the pavilion was intended to be used similarly to a village hall.

125. Finally, we have tested our conclusion against Vinelott J's explanation of the purpose behind Note 6(b). Given our conclusions as to the way in which the pavilion was intended to be used from the point at which it was being constructed, we consider that the local community was, in a real sense, the true consumer of the services of its construction[6]. Mr Davey drew our attention to the fact that those construction services

---

[6] This conclusion is not inconsistent with the conclusion we express at [86]. As a whole, the local community (consisting of both members of the Club and non-members) could realistically be

were not organised by the local community "through a body of trustees or a management committee acting on its behalf" in the words of Vinelott J. However, as we have noted, we do not consider that, by this phrase, Vinelott J was identifying a separate free-standing condition that needs to be satisfied as a matter of law. The decision in *Caithness Rugby Football Club* makes this clear.

126.For all of those reasons, the Club succeeds on Issue 3.

Issue 4 – EU law principles of equal treatment and fiscal neutrality

127.In his skeleton argument, Mr Brinsmead-Stockham argued that the EU law principles of equal treatment and fiscal neutrality require the relevant supplies to be treated as zero-rated, even if this result does not follow from domestic UK legislation. Mr Davey submitted that the Tribunal should not consider this argument at all, because it had not been adequately pleaded in the Club's grounds of appeal. Even if it had been adequately pleaded, he argued that neither principle applies to the facts of this case.

128.We will consider Mr Brinsmead-Stockham's arguments as we can do so briefly given the conclusions that we have reached in the rest of this decision.

129.The first aspect of the argument relied on the principle of equal treatment. As explained in *Marks and Spencer v HMRC* (Case C-309/06) this principle of EU law jurisprudence does not apply only in the VAT arena. Rather, the principle requires, as a general matter, that similar situations must not be treated differently unless such differentiation is objectively justified. The essence of Mr Brinsmead-Stockham's argument was that the Club was, for EU law purposes, no different from a cricket club such as the Charlbury Cricket Club which is registered as a charity but is not a CASC. Since the building of the Charlbury Cricket Club's new pavilion had qualified for zero-rating, the construction of the Club's pavilion should do so as well.

130.If the only reason that the Club could not meet the domestic UK law requirements for zero-rating related to Issue 1(b), it would at least be arguable that the principle of equal treatment is engaged since it could be argued that there is no relevant difference (in an EU law sense) between a sports club with charitable objects that is registered as a CASC and an identical club that is not registered as a CASC. However, the reason the Club cannot meet the domestic UK law requirements is that, as a matter of fact, it was not established for charitable purposes only. Therefore, there is a fundamental difference between the Charlbury Cricket Club, which was established for charitable purposes only, and the Club, which was not. Apart from a brief section in its Notice of Appeal which refers to averred similarities between the Club and the Charlbury Cricket Club, the Club has not produced any significant evidence to the effect that the Club and the Charlbury Cricket Club were in objectively similar situations. Given that one club is charitable and the other is not, we doubt that, even if it had produced detailed evidence, it could have succeeded in demonstrating this but we need not

---

regarded as the true consumer of the construction services even though the recreation facilities that the Club offers are "primarily intended" for members of the Club, as distinct from non-members.

make a determination to this effect since the Club has fallen far short of demonstrating to us that it is in an objectively similar position to that of the Charlbury Cricket Club (or any other charitable sports club). Mr Brinsmead-Stockham's arguments relating to the principle of equal treatment fail for this reason.

131. The principle of fiscal neutrality is a particular aspect of the principle of equal treatment that applies in the VAT context. That principle precludes treating similar goods and services which are thus in competition with each other differently for VAT purposes. As was made clear in *Rank Group plc v HMRC* Case C-259/10, for the principle to apply, it need not be demonstrated that the various goods and services are actually in competition with each other. Rather, this can be inferred from the fact that the goods and services are similar.

132. Thus, as presently understood, the principle of fiscal neutrality relates to supplies of goods and services and provides, in essence, that supplies of similar goods and services should not be treated differently. Mr Brinsmead-Stockham is seeking to extend that principle to the recipients of supplies by arguing that, since the Club and the Charlbury Cricket Club are objectively similar, the supplies of construction goods and services that they received should be treated in the same way for VAT purposes. He quite fairly accepted that there was no authority to support the application of the principle in this way. Moreover, as we have said, we are not satisfied that the Club and the Charlbury Cricket Club (or any other charitable sports club) are indeed objectively similar. We have not, therefore, accepted Mr Brinsmead-Stockham's arguments on fiscal neutrality.

Conclusion

133. The Club has failed on Issue 1(a) and so has failed on the entirety of Issue 1. That means that the Club's appeal cannot succeed as a matter of UK domestic law. Since the Club has failed on Issue 4, its EU law arguments do not enable the appeal to succeed. It follows that the appeal is dismissed.

134. We would like to express our particular gratitude to Mr Brinsmead-Stockham and Hogan Lovells for acting pro bono in this appeal. Had we not been told that they were acting pro bono we would not have been able to tell as the quality of the submissions and bundles were of the highest order. That is greatly to the credit of the Club's advisers.

135. This document sets out our decision following a review that we performed under Rule 41 of the Tribunal Rules and 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 42 days after this decision is sent to that party. (We are imposing a shorter deadline than the usual 56 days as the parties have already been aware of most of our conclusions for some time now and therefore only need time to focus on our amplified conclusions following our review). 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.

JONATHAN RICHARD
5 **TRIBUNAL JUDGE**

RELEASE DATE: 29 DECEMBER 2017