[2018] UKFTT 43 (TC)

TC06321

Appeal number: TC/2015/02816

VAT – zero-rated supplies – village hall or similarly providing relevant charitable purpose – ownership by local community not essential – decision in Caithness followed – also appellant had reasonable excuse

FIRST-TIER TRIBUNAL
TAX CHAMBER

GREENISLAND FOOTBALL CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN
MISS PATRICIA GORDON

Sitting in public at Tribunal Hearing Centre, 2nd Floor, Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF on Friday 26 January 2018 at 10:30 AM

Mr Timothy Brown BL instructed by Constable VAT Consultancy LLP for the Appellant

Mrs Sharon Spence, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Greenisland Football Club (GFC) against a penalty issued by HMRC under section 62(1) of the Value Added Tax Act 1994 (VAT Act 1994) for £53,101.00 on the basis that GFC issued a zero-rated certificate pursuant to Item 2 Group 5 Schedule 8 of the VAT Act 1994 to a contractor who supplied construction services to GFC in respect of a new building, a clubhouse, whereas HMRC believed the works did not qualify for zero-rating and so the certificate was issued incorrectly.

Background

2. GFC was formed in 1995 based in Greenisland, County Antrim. It is not registered for VAT. It is a not-for-profit community-based sports club registered with the Charity Commission for Northern Ireland as a charity. The land it occupies is leased from Carrickfergus Council, now Mid and East Antrim Council.

3. In 2010 GFC began a project to build a new clubhouse which it was envisaged would be a multipurpose facility for use by the community. Before the work commenced GFC issued a certificate to the builder that the building was intended for use solely for a relevant charitable purpose and therefore the builder could zero-rate the supplies.

4. After construction had been completed HMRC enquired into the VAT liability of the construction works and as a result of its enquiries decided that the construction should have been standard rated. Accordingly HMRC issued a penalty for £53,101 calculated at 20% of the cost of construction amounting to £265,505.00.

5. GFC sought a review of the decision to issue the penalty. HMRC's Review Officer upheld the decision on 26 March 2015. GFC issued a Notice of Appeal to this Tribunal on 21 April 2015. The grounds of appeal were:

> "We believe that HMRC have not properly taken into consideration all the facts and evidence as presented to them to make a balanced and impartial decision in this matter. This is clear from the initial response from HMRC, our response and the final review decision letter from HMRC.
>
> It is our belief that Greenisland Football Club rightfully claimed VAT zero rating on the construction services in respect of the building used as a village hall for the local community. The basis of relying on VAT zero rating lies within item 2(b), Group 5, Schedule 8 of the VAT Act 1994, relevant case law and HMRC guidance in place.
>
> A summary of our reasons to claim the VAT zero rating can be found in our response letter to HMRC's initial letter raising the penalty of £53,101."

6. The response letter referred to in the last paragraph of the grounds of appeal was written by Messrs Ernst & Young, GFC's then adviser, on 4 February 2015. While this letter extends to five pages the conclusion is as follows:

> "1. Even though the Committee of GFC is not made up of representatives from other community organisations which use the building, for the reasons stated above, this does not preclude zero rating on the construction services received by GFC from AMC Developments;
>
> 2. GFC do not have priority over the use of the building; and
>
> 3. The building is promoted as a facility for the benefit of the whole community rather than for one particular group. It is available for use by all sections of the community and no single group has priority over the others."

7. The case was then listed for hearing on 8 January 2016 but on 18 December 2015 HMRC made an application for the appeal to be stood over pending the release of the decision in *The Commissioners for Her Majesty's Revenue and Customs and Caithness Rugby Football Club* [2016] UKUT 0354 (TCC) (Caithness) which was then under appeal to the Upper Tribunal. As this application was by agreement with GFC Judge Kempster issued a Direction on 14 January 2016 staying the appeal until 60 days after the release of the Caithness decision.

8. The Upper Tribunal released its decision in Caithness on 27 July 2016. On 22 May 2017 HMRC applied for this appeal to be stood over pending the decision of the First-tier Tribunal in an appeal by Swanage Sea Rowing Club. Judge Jonathan Richards refused the application on 14 September 2017.

9. GFC made an application on 8 January 2018 to amend the grounds of appeal to be:

> "1. The construction works supplied to it were correctly zero-rated and therefore the certificate it issued was correct.
>
> 2. Alternatively, if the work was standard-rated and the certificate was incorrect, it had a reasonable excuse pursuant to section 62(3) VAT Act 1994.

10. As HMRC did not object to the application this Tribunal gave permission for GFC to amend the grounds of appeal.

The Law

11. Section 30 of the VAT Act states:

> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section –
>
> (a) no VAT shall be charged on the supply; but
>
> (b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

12. Section 62 of the VAT Act states:

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

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

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

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

and

(b) the certificate is incorrect,

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

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

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

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

(ii) the amount of VAT actually chargeable.

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

13. Schedule 8 Group 5 of the VAT Act includes the following provisions:

2. The supply in the course of the construction of –

(a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose.

Note 6 states:

(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.

Note 12 includes the following:

(12) Where all or part of a building is intended for use solely for a relevant residential purpose or a relevant charitable purpose –

(a) a supply relating to the building (or any part of it) shall not be taken for the purposes of items 2 and 4 as relating to a building intended for such use unless it is made to a person who intends to use the building (or part) for such a purpose

Arguments by GFC

14. Mr Brown submitted that the construction works were correctly zero-rated as the intended use of the building at the time the building was constructed was as a village hall or similarly in providing social or recreational facilities for a local community.

15. Mr David Munn, GFC's Development Officer since 2013 and prior to this date, Club Secretary for 19 years provided an eight page witness statement and also gave oral evidence to the Tribunal. He explained that the clubhouse had been paid for through GFC's own finances which it had been accumulating for several years, a generous donation by one individual of £100,000.00 and receipts from various football clubs and associations when a player was taken into their academies.

16. Mr Munn explained that the clubhouse fills a much-needed resource in the local community. Part of the area GFC serves is in the top 26% of the most deprived wards in Northern Ireland for multiple deprivation. Since completion the clubhouse has been used by a wide range of local community groups on a regular basis. The Tribunal was shown details of the bookings for September 2015 and the complete calendar year for 2017.

17. Mr Munn confirmed that the Management Committee consisted solely of members of GFC. Membership of GFC was open to all people aged 18 years and over. There are currently about 40 members who each pay an annual subscription of £20.00 which includes use of the small gym. All the facilities in the clubhouse are available for booking on a first come first served basis. GFC did not have any priority over any other body nor did it book any of the facilities for the whole season at the start of the season. As well as full members organisations within the area of benefit may be admitted as Affiliated Members and well-wishers anywhere or persons with special knowledge or experience to offer may become Associate Members.

18. The lease under which GFC held the property required GFC

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

19. Mr Munn explained that the Clubhouse included an office/committee room, an IT suite doubling as a meeting room, a kitchen, a fitness suite (gym), a function room (main hall), showers, store room, toilets and a community garden. The building was not constructed in any way to accommodate playing football or training indoors. If it had been it would have been designed totally differently with high ceiling, hard (not

carpeted) floor and no low level windows. The two showers are for use by those people who have been to the gym. The building is open at least 70 hours per week every week throughout the year. When it is open it is possible for anyone to call in and buy a cup of tea or coffee as the kitchen is manned by volunteers call the 'Pink Ladies'.

20. Mr Munn in his affidavit stated that in addition to GFC five other bodies are keyholders for the building and he gave examples of fifteen other groups which have used the facilities as well as twelve charities. In spring and autumn GFC training takes place outside on the grass pitches and there is no use of the clubhouse as there is a separate building with changing facilities. In winter during dark evenings training takes place at three other sites where there is floodlighting. GFC junior teams only book the clubhouse for the annual prize giving, parents' meetings or for fund raising activities. The adult team occasionally book the clubhouse on Saturday afternoons for a couple of hours to accommodate visiting teams for after-match hospitality. The clubhouse is not licensed.

21. Mr Munn explained that when the issue of whether or not VAT would be charged he was not aware as to how VAT was applied to buildings. He consulted colleagues who were versed in this field and was informed that there might be grounds for zero rating. He went to the HMRC website and read VAT Notice 708 'Buildings and Construction' – the June 2007 version. Paragraph 14.7.3 provided that 'village halls and similar buildings' satisfied the definition of 'relevant charitable purpose'. The Notice stated:

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

22. Mr Munn felt the clubhouse project fell into this category as it had the full support of the entire community and it was always the intention the entire community would use and benefit from the clubhouse. He stated during cross-examination by Mrs Spence that members of the GFC Management Committee did not solely have GFC's interests in mind. Many of the Committee members also have other interests and responsibilities as members of the local community.

23. Mr Munn informed the Tribunal that having read HMRC's guidance he checked with GFC's accountant and their consultant both of whom confirmed that the building could be zero rated. This was all done verbally and so no documentary evidence in support could be produced from the time the zero-rating certificate was issued. However in connection with an application for a grant made subsequent to the completion of the building GFC's accountant sent an email stating

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

24. In his witness statement Mr Munn commented on the updated version of HMRC VAT Notice 708 which he felt was HMRC trying to interpret matters to its benefit in order to minimize the occurrence of zero rating. He felt that HMRC's original interpretation was lacking in clarification.

25. When Mr Munn was questioned by the Tribunal concerning membership of the Management Committee he confirmed that anyone could be nominated by a member of GFC and the nominee did not have to be a member of GFC though once elected at an AGM the nominee automatically became a member of GFC. The relevant section of the Constitution is:

"5. Management Committee

5.1 The Committee shall meet not less than ten times a year and shall consist of not less than four people elected at an Annual General Meeting. Management committee members will automatically become individual members of the association upon election to the committee if they were not individual members before election onto the committee.

a) Nominations from members of the Association for members of the Committee will be taken at the Annual General Meeting.

b) If the number of nominations exceeds the number of vacancies, election shall be by secret ballot of the members of the Association present and voting at an Annual General Meeting.

c) if the number of nominations is less than the number of vacancies, further oral nominations may with the approval of the Annual General meeting be invited from members present and voting at the said Annual General Meeting."

26. Mr Brown referred the Tribunal to an application form in connection with a grant application which stated that the title of the project was "Greenisland FC – Bringing Local people together". The application continued stating:

"Greenisland Football Club is undertaking a development to construct a multi purpose community building facility which will incorporate a number of changing facilities for sporting usage, multi purpose rooms for community usage and also ancillary facilities all of which will be compliant with all relevant legislation pertaining to access and catering for people with disabilities."

27. The application also stated:

> "The aim of this project is to widen the level of access to a community facility and provide facilities which are inclusive of the needs of the whole community."

28. Mr Brown advised the Tribunal GFC did not have to comply with both Note 6(a) and (b) of Group 5 as they can be mutually exclusive. While HMRC argued that *Caithness* did not deal with the fact that, for the purposes of Item 2 of Group 5 of Schedule 8 any building that is being constructed must be intended for use solely for a registered charitable purpose, he pointed out that HMRC had not appealed that part of the First-tier tribunal decision.

29. Mr Brown maintained that the clubhouse was being used 100% of the time for charitable purposes and even if any part of GFC's use was not for relevant charitable purposes such usage falls below 10%.

30. If GFC's appeal is unsuccessful with regard to zero-rating, Mr Brown argued that GFC had a reasonable excuse under section 62(3) of the VAT Act 1994. As HMRC had requested that the appeal be stood over pending the decision in *Caithness* and as HMRC was unsuccessful in its appeal in the Upper Tribunal they themselves appear to be guilty of not understanding or interpreting the legislation correctly. Accordingly how can GFC not have a reasonable excuse for misunderstanding the same provision? GFC through Mr Munn read HMRC's then guidance, made what he believed was an informed decision in what has turned out to be a grey area.

Arguments by HMRC

31. HMRC accepts that a building was constructed and that GFC has the appropriate charitable status. HMRC argued that for zero rating to apply there is a requirement that the clubhouse should be similar to a village hall and provide activities typically carried on in a village hall. They argue that the word 'similarly' in Note (6)(b) should be interpreted as similar to the way a village hall operates. In this case the management committee of the clubhouse would generally be made up of individuals from a variety of local groups and clubs. This was recognised in the tribunal decision of *Sport in Desford* MAN/99/0803 where the committee of Sport in Desford was made up of members of the local council and non-sporting groups that intended to use the facilities. HMRC maintained that GFC's clubhouse is not owned, organised and administered by the local community.

32. HMRC also relied on the case of *Jubilee Hall Recreation Centre Ltd v Customs and Excise Commissioners; Customs and Excise Commissioners v St Dunsatn's Educational Foundation* [1999] STC 381 where Sir John Vinelott held that the conditions for zero rating were only satisfied where a local community is the final consumer in respect of the supply of the services in the sense that the local community is the user of the services (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. Mrs Spence claimed that the clubhouse was not freely available to the local community at large.

33. Mrs Spence also argued that while the terms of the lease under which GFC holds the land on which the clubhouse is built do not explicitly say that priority will be given to GFC members they do not prohibit this being the case. HMRC considers it implausible that any other user would be given priority over the numerous teams that fall under the umbrella of GFC.

34. HMRC would expect a village hall committee to be made up of representatives from the various groups that are intending to use the facilities. The members of the Management Committee of GFC owe their duty to GFC even if they have other interests.

35. Mrs Spence pointed out that the planning application described the building as a clubhouse. She referred the tribunal to GFC's accounts for the years ended 30 June 2012 and 30 June 2016. Membership and dues income in 2012 was shown as £20,666 which had grown to £56,987 in 2016. Mr Munn explained that each juvenile member paid £5.00 per week to mainly to cover the cost of coaching which took place twice each week as well as on Saturdays. Mrs Spence contended that this income disqualified the clubhouse from zero rating as HMRC considered GFC was a business using more than 5% for football activities. While the legislation in Note 2 of Group 5 states the building must be used solely for a relevant charitable purpose HMRC will allow up to 5% for business activities.

36. In her closing submission Mrs Spence informed the Tribunal that there were several other community facilities in the immediate area though she did not elaborate on their usage. She maintained the local community does not have a say in the running of the clubhouse as decisions on use are made by GFC's Management Committee. As GFC has substantial members – around 300 playing members – she believes Mr Munn has underplayed the use of the clubhouse by GFC. She finds it implausible that non-members would be given priority in bookings.

37. Arguing against allowing the appeal on the grounds of reasonable excuse Mrs Spence said that HMRC believed the decision in *Caithness* was wrong and turned on its own specific facts. GFC has produced no documentary evidence of the advice from GFC's accountant and in any event s71 of the VAT Act 1994 states that reliance on another is not a reasonable excuse.

Discussion

38. The Tribunal was referred to several cases, some of which are binding on our decision.

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

that only members of Caithness Rugby Football Club (CRFC) could be elected to its executive committee.

40. CRFC gave priority to its own needs in that bookings are made for rugby matches as soon as the fixtures for the season are published and others cannot book the clubhouse for those times. The FTT did not consider this to be a material consideration in weighing against the characterisation of the clubhouse as a "village hall or similar". As 90% of the usage of the clubhouse was by clubs or groups other than CRCF it could not be said that the majority of activities at the clubhouse were organised by CRFC itself or that use by groups other than CRFC were merely secondary or ancillary.

41. Lord Doherty went on to discuss the decision in *Jubilee Hall Recreation Centre Limited v Customs and Excise Commissioners* [1999] STC 381 where the Court of Appeal had held that for the local community to be the final consumer of the services it was essential that the intention was that it directed or controlled the use of the building. He continued at paragraph 25:

> "Moreover, in my respectful view, on a proper reading of the judgments none of them states that direction or control by a local community of the use of the building in which construction services have been incorporated is essential for zero-rating in terms of note 6(b)."

42. In his conclusions Lord Doherty stated at paragraph 34

> "On a proper construction of the provision [note 6(b)] it does not require that a local community has direction over, or control of, the use of the building within which the relevant facilities are provided. In any particular case the existence or absence of direction or control will be a relevant factor, but not necessarily a decisive one. In my opinion the use of a building may be intended to be at the disposal of a local community even though the community is not the body directing or controlling its use."

43. In the Upper Tribunal case of *New Deer Community Association v HMRC* [2015] UKUT 604 (TCC) Lord Tyre 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 and continued at [17]:

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

44. In the recent First-tier decision of *Eynsham Cricket Club and The Commissioners for Her Majesty's Revenue & Customs* TC/2015/03802 heard from 14 to 17 June 2017 the Tribunal decided that the key question was whether the new pavilion was intended for use by the club as a village hall or similarly for the purpose of providing those social or recreational facilities. The Tribunal noted that the club was generous with its facilities and did not exclude non-members from the pavilion. The Tribunal equated

watching a cricket match from the pavilion as being similar to watching a performance by local players in a village hall. The club made its facilities available for use at events aimed at the whole community. The fact that these were organised by the club rather than someone else did not detract from the conclusion these were what one would expect in a village hall. Someone had to organise a community event otherwise it simply would not happen. The Tribunal found that

> "the local community was, in a real sense, the true consumer of the services of its construction." (Paragraph 115)

45. Accordingly the club succeeded in its argument concerning note 6(b) of Group 5.

Decision

46. The Tribunal considers Mr Munn to be a totally credible witness.

47. The Tribunal finds that the clubhouse is used by many local groups with no preference being given to GFC activities. Unlike the situation in *Caithness* and *Eynsham* GFC does not give any preference to GFC bookings. In fact Mr Munn advised the Tribunal that if GFC wanted to hire a facility which was already booked it would be unable to do so. The clubhouse is not used by GFC for changing either before or after training or matches as GFC has a separate building in which the members and junior members and visiting teams change and shower.

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

49. Following the decision of Lord Doherty in *Caithness* this Tribunal is satisfied that GFC uses the clubhouse in a manner similar to a village hall as the local community makes extensive use of the facilities. In 2017 the clubhouse was extensively used for an After Schools Club, karate classes, a Womens & Toddlers group, a Ladies Keep Fit, Irish Dancing classes as well as a church on Sundays and several birthday parties.

50. The Tribunal is satisfied that the requirements of Note 6(b) are met and that GFC was correct to consider the works to be zero rated and to issue a zero rating certificate to the builder.

51. Although the Tribunal has found in favour of GFC on the first ground of appeal we also considered, if the certificate had been issued incorrectly, whether it had a reasonable excuse within the terms of section 62(3) of the VAT Act.

52. Mr Munn convinced us that he had studied the HMRC guidance current at the time and that he had consulted GFC's accountant and consultant both of whom

confirmed that the work could be zero rated. However Mr Munn did not telephone to HMRC's helpline which he could have done.

53. The standard to be applied in deciding whether Mr Munn acted reasonably and therefore has a reasonable excuse is set out in the decision of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 where Judge Medd stated

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

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

Conclusion

55. Greenisland Football Club's appeal against a penalty of £53,101.00 issued by HMRC under section 62(1) of the VAT Act 1994 is successful on both grounds – the supplies were zero-rated and the certificate was correct but if this decision is wrong Mr Munn had a reasonable excuse for issuing the certificate and the penalty should be withdrawn.

56. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ALASTAIR J RANKIN
TRIBUNAL JUDGE

RELEASE DATE: 7 FEBRUARY 2018