[2021] UKUT 23 (TCC)

Appeal number: UT/2020/0036 (V)

VAT– penalty- whether community amateur sports club had a reasonable excuse for issuing a zero-rating certificate in respect of the construction of a cricket pavilion- Section 62 Value Added Tax Act 1994

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

WESTOW CRICKET CLUB **Appellant**

- and -

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

TRIBUNAL: Judge Timothy Herrington
Judge Guy Brannan

Hearing conducted remotely by video conference deemed to be held in London on 1 December 2020

Michael Firth, Counsel, instructed by The Independent Tax & Forensic Services LLP, for the Appellant

Howard Watkinson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal (Tax Chamber) (Judge Malek and Ms Christian) (the "FTT") released on 2 December 2019. By that decision (the "Decision") the FTT dismissed the appeal of the appellant ("WCC") against the decision made by the respondents ("HMRC") on 31 March 2015 to impose on WCC a penalty under s 62(1) and (2) of the Value Added Tax Act 1994 ("VATA").

2. The penalty arose from the decision by WCC to issue a zero-rating certificate to Atkinson Builders Ltd on 9 March 2013 in relation to supplies made to WCC during the course of the construction of a new cricket pavilion. WCC was at the time the certificate was issued a community amateur sports club, but was not a charity.

3. HMRC imposed the penalty on the basis that the certificate was issued incorrectly because WCC was not a registered charity. In accordance with the provisions of s 62 VATA 1994, the penalty was assessed in the amount of £20,937, that sum being 100% of the VAT that the builder was liable to pay if the works were not zero-rated.

4. WCC appealed to the FTT against the penalty on the basis that it had a reasonable excuse for issuing the zero-rating certificate, it having conceded that it should not have done so. WCC contended that it relied on written advice from HMRC to the effect that the supply of the building works would be zero-rated.

5. The FTT concluded that WCC did not have a reasonable excuse for issuing the zero-rating certificate because it was not in the circumstances entitled to rely on what HMRC said and, in any event, even if it had a reasonable excuse on that basis, that excuse no longer applied once WCC completed the zero-rating certificate in which it gave confirmation to the effect that the building would be used solely for a relevant charitable purpose by a charity.

6. The FTT also raised of its own volition the question whether the penalty was proportionate on human rights grounds and asked for submissions on that issue at a later separate hearing. The FTT considered and dismissed arguments from WCC that the penalty was disproportionate because the regime (i) pursued an illegitimate aim (ii) was in general disproportionate and (iii) the result in the present case was disproportionate.

7. Permission to appeal on grounds relating to the proportionality issue was given by the FTT on 17 February 2020. Permission to appeal on grounds relating to the reasonable excuse issue was granted by the Upper Tribunal on 2 June 2020.

8. We have decided this appeal in favour of WCC on the reasonable excuse issue. In those circumstances, it has not been necessary for us to consider WCC's arguments

as to whether the penalty regime under s 62 VATA pursued an illegitimate aim on the basis that it was incompatible with Article 193 of the Principality VAT Directive or its other arguments on the question of proportionality. In our view, it is appropriate to leave those arguments to be determined in a case where they are material to the outcome of the appeal. Accordingly, this decision is limited to considering whether the FTT made any errors of law in relation to the reasonable excuse issue.

Relevant Legislation and Guidance

9. Section 30(2) VATA provides for zero-rating of a supply of goods or services specified in Schedule 8 thereto.

10. Group 5 of Schedule 8 to VATA provides for the zero-rating at Item 2 of:

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

11. Note (6) to Group 5, Schedule 8 to VATA states:

> "(6) Use for a relevant charitable purpose means use by a charity in either or both of 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."

12. Note (12) to Group 5, Schedule 8 to VATA states, in as far as is relevant:

> "(12) Where all or part of a building is intended for use solely for … a relevant charitable purpose—
> (a) a supply relating to the building (or any part of it) shall not be taken for the purposes of items 2 and 4 as relating to a building intended for such use unless it is made to a person who intends to use the building (or part) for such a purpose; and
> (b) a grant or other supply relating to the building (or any part of it) shall not be taken as relating to a building intended for such use unless before it is made the person to whom it is made has given to the person making it a certificate in such form as may be specified in a notice published by the Commissioners stating that the grant or other supply (or a specified part of it) so relates."

13. Section 62 VATA states, in as far as is material:

> (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 .. Group 5 … of Schedule 8 .., or

…

and

(b) the certificate is incorrect,

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

…

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

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

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

(ii) the amount of VAT actually chargeable;

…

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

14. HMRC have given guidance as to their view of what constitutes a "relevant charitable purpose". VAT Notice 708, as was in force at the material time, stated, as far as is relevant:

"**14.7 What 'relevant charitable purpose' means**

14.7.1 The definition

'Relevant charitable purpose' means use by a charity in either or both of the following ways:

- otherwise than in the course or furtherance of business – see sub-paragraph 14.7.3
- as a village hall or similarly in providing social or recreational facilities for a local community - see sub-paragraph 14.7.4

14.7.2 Where is this definition used?

The definition appears in the following situations:

- section 3 – zero-rating the construction of new buildings;

…

14.7.4 Village halls and similar buildings

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)

NB: Users of the building need not be confined to the local community but can come from further afield.

Any part of the building which cannot be used for a variety of social or recreational activities cannot be seen as being used as a village hall.

Buildings that are not typically seen as being similar to village halls are:

- …
- community amateur sports clubs

Buildings that are seen as being similar to village halls when the characteristics noted above are present:

- …
- sports pavilions
- …″

15. VAT Notice 701/1, as was in force at the material time, provided guidance on what is a charity, in as far as is relevant, as follows:

"2. What is a charity?

2.1 What is a charity?

A body is considered to be a 'charity' if it has charitable status. A non-profit making body does not necessarily have charitable status.

2.2 Proof of charitable status

There is no distinction for VAT purposes between those charities that are registered with the one of the charity regulators and those that are not. However, charities not registered with a regulator who want to claim VAT relief may need to demonstrate to Customs that they have 'charitable status' through recognition of that charitable status by the Inland Revenue.

Most charities in England and Wales are registered with the Charity Commission which confirms their charitable status. However some charities are not required to be registered: some are exempted by statute, such as universities; others are excepted because they are too small. In the case of a charity not registered with the Charity Commission, recognition of charitable status by the Inland Revenue is sufficient proof.

…

2.4 Are you still uncertain?

If you are still uncertain of your position, you can contact the:
Charity Commission on 0870 333 0123 or on their Internet website;
Office of the Scottish Charities Regulator on their Internet website; or
Inland Revenue on 0845 302 0203 or on their Internet website."

16. It should be noted that a Community Amateur Sports Club ("CASC") is a creature of statute introduced by s.58 of and Schedule 18 to the Finance Act 2002 that exists for the purposes of some taxation treatment and in certain circumstances a CASC is given the same tax treatment as a charity.

17. The question as to whether a CASC can be a charity for the purposes of the zero-rating in Group 5 of Schedule 8 to VATA has been considered in the case of *Eynsham Cricket Club v Revenue and Customs* [2019] UKUT 286 (TCC) ("*Eynsham"*). In that case, the FTT had decided that the taxpayer, a cricket club which was registered as CASC but which was not registered as a charity and was not a charity under the general law, was nevertheless a charity for the purposes of Group

5 of Schedule 8 because it was established for charitable purposes only. The Upper Tribunal reversed that decision, holding that a CASC could not be a charity for the purposes of Group 5 of Schedule 8, but the Court of Appeal has recently heard an appeal against that decision and its judgment is awaited.

18. It is also relevant to note that, contrary to the suggested position in HMRC's guidance, as set out above, that in *Eynsham* the Upper Tribunal held that the club's cricket pavilion did meet the requirements to qualify as "a village hall or similarly in providing social or recreational facilities for a local community."

19. In *Perrin v HMRC* [2018] UKUT 0156 (TCC). The Upper Tribunal gave guidance as to the meaning of "reasonable excuse" where it appears as a statutory defence to the imposition of a tax penalty. It said so far as relevant to this case at [70] to [81]:

> "70…. The task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.
>
> 71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind <u>all</u> relevant circumstances; because the issue is whether the <u>particular</u> taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times…
>
> 73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.
>
> 74. Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse….

75. It follows from the above that we consider the FTT was correct to say… that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account."

…

80. It does not matter whether we would have reached a different conclusion from the FTT, the only question for this Tribunal is whether the FTT was, as a matter of law, entitled to reach the conclusion that it did. In deciding that question, we are considering a classic example of Lord Hoffmann's "application of a not altogether precise legal standard to a combination of features of varying importance" (see the *Designer's Guild* case referred to at [**Error! Reference source not found.**] above). We bear in mind also Lord Hoffmann's warning in *Biogen v Medeva* (also referred to at [**Error! Reference source not found.**] above); the standard of "reasonableness", just as much as "negligence" or "obviousness" involves no question of principle but is simply a matter of degree and accordingly we approach with great caution the matter of differing from the FTT in its evaluation of that standard. …

81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:

> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

The Facts

20. The FTT made relatively brief findings of fact [8] to [16] of the Decision, which we can summarise as follows.

21. The only live evidence that the FTT heard was from Mr Robin Kellock, the treasurer of WCC, who also filed a witness statement. The FTT found Mr Kellock to be an honest and intelligent witness.

22. WCC was registered as a CASC in October 2012 and was not a registered charity. It is a cricket club run by unpaid volunteers. Mr Kellock, together with Ms Julie Price, the club secretary, dealt with all matters relating to its administration.

23. WCC raised funds to build a pavilion and prior to building works starting, Ms Price wrote to HMRC on 22 March 2012 giving details about WCC and the building project and seeking guidance on the zero-rating of supplies made to WCC for the construction works.

24. HMRC responded to WCC on 30 March 2012 in the following terms:

> "HM Revenue & Customs policy prevents this Department from providing a definitive response where we believe that the point is covered by our Public Notices or other published guidance, which, in this case, I believe it is.
>
> In view of the above, please refer to section 16 of Public Notice 708 Buildings and construction. This explains when you can issue a certificate. Section 17 includes the certificates.
>
> Furthermore I would refer you to sub-paragraph 14.7.4 which covers what is classed as a village hall or similar building. Providing the new pavilion meets the conditions set out, and it appears to do so, the construction work will be zero-rated for VAT purposes.
>
> If you have any further queries regarding this matter, please contact us quoting our reference number."

25. Mr Kellock read paragraph 14.7.4 of VAT notice 708.

26. WCC (through Ms. Price) completed a certificate for zero-rated and reduced rated building work on 9 March 2013 and ticked box 4 to confirm:

> "I have read the relevant parts of Notice 708 Buildings and construction and certify that this organisation (in conjunction with any other organisation where applicable) will use the building, or the part of the building, for which zero-rating is being sought …..solely for a relevant charitable purpose, namely by a charity in either or both of the following ways:
>
> …

(b) As a village hall or similarly in providing social or recreational facilities for a local community."

27. Mr. Kellock honestly believed that WCC was entitled to issue a zero-rated certificate and this was a belief shared by the other members of the club (and therefore WCC).

28. Following a check, HMRC wrote to the Appellant on 31 March 2015 with their decision that a zero-rated VAT certificate was issued incorrectly, and that a penalty of £20,937 under s 62(1) VATA was due as a result.

The Decision

29. Unless otherwise indicated, a reference to a number in square brackets is a reference to a numbered paragraph of the Decision.

30. At [17] the FTT recorded the basis of WCC's case that it had a reasonable excuse for having completed the zero-rated certificate with the consequence that the penalty should be discharged. WCC relied on the following matters (a) it was a "lay person" in matters of indirect taxation, (b) that it sought assistance and advice from HMRC in relation to the zero-rating certificate, (c) that HMRC advised it that the construction work was zero-rated, (d) that it acted reasonably in following that advice in issuing a zero-rated certificate and that (e) this provides it with a "reasonable excuse".

31. At [18] the FTT recorded WCC's acceptance that the letter dated 30 March 2012 set out at [26] above was not sufficient to create a "legitimate expectation". The FTT then said:

> "This, in our view, produces the following conundrum for the Appellant: Can it succeed on an argument based upon reasonable excuse where it accepts that no legitimate expectation was created? The range of circumstances which may afford an appellant a "reasonable excuse" are, of course, much wider that those that might create a legitimate expectation and, ordinarily, the answer would be "yes". However, in the present circumstances the Appellant's only "excuse" is that it relied upon "advice" from the Respondent. If it could not rely upon that advice in the "legitimate expectation" sense can it, nonetheless, rely upon it to give itself a "reasonable excuse"? We find this argument a conceptually difficult one to maintain; however, we accept that there might conceivably be a situation where the excuse relied upon consists of "advice" given upon which a legitimate expectation could not be founded, but which might, nonetheless, provide a "reasonable excuse". We, therefore, go on to consider whether or not the Appellant had a "reasonable excuse".

32. At [19] the FTT accepted that Mr Kellock, from his reading of HMRC's letter of 30 March 2020 and the relevant parts of VAT Notice 708, honestly believed that WCC was entitled to issue the zero-rated certificate and that is why he asked Ms. Price to complete it. However, the FTT concluded, with regret, at [20] that, viewed objectively, those facts did not amount to an objectively reasonable excuse for the

default. The FTT then set out what it said were its two strands of reasoning for that conclusion.

33. First, the FTT said at [21] that an objective reading of the letter dated 30 March 2012 shows that the author did not intend his letter to provide a definitive response to the query, let alone advice, because policy prevented him from doing so and accordingly asked the reader to refer to paragraph 16 of VAT Notice 708.

34. The FTT observed at [22] that "only after that does the author of the letter, Mr. Cooper, go on to refer to paragraph 14.7.4. of VAT Notice 708" and that his opinion on whether the pavilion met the criteria for zero-rating set out in that paragraph was not definite, using the phrase "it appears to do so." Accordingly, the FTT said that WCC should not have taken Mr. Cooper's letter as the definitive answer.

35. The FTT then went on at [23] to observe that Mr. Cooper appears to have laboured under the misapprehension that WCC was a charity, or was ignorant of the requirement for it to be so in order to provide a zero-rated certificate.

36. At [24] the FTT made the following criticism of HMRC:

> "24. We think, on balance, if HMRC are to rely upon their policy of not providing a definitive response to queries where the point is covered by a public notice then it should simply point to the relevant notice and do no more. We realise that this might be seen as unhelpful in some quarters, but for HMRC to offer a view whilst at the same time maintaining that the point is adequately covered by a public notice is more unhelpful still. It can, potentially, leave the taxpayer in "no man's land". It might also be helpful if HMRC specified that the information that it provided was of generic applicability and that it did not provide advice to taxpayers."

37. As regards the second strand of its reasoning, the FTT said this at [25]:

> "Secondly, we have concluded that even if the letter of 30 March 2012 had muddied the water sufficient to give the Appellant a "reasonable excuse" that no longer applied once the Appellant completed the certificate for zero-rated and reduced rated building work on 9 March 2013. This is because the certificate is explicit and asks for confirmation that the building will be used "solely for…a relevant charitable purpose, namely by a charity". The requirement is expressly set out and there is no other objectively reasonable interpretation that might be applied. In our judgment, if the Appellant thought that this was at odds with the letter of 30th March 2012 then the reasonable thing to do would have been to seek assistance in resolving the query and not to press ahead by inserting a CASC number on the form instead of the requested charity number."

Grounds of Appeal and issues to be determined

38. WCC has permission to appeal on nine grounds in total, five relating to the reasonable excuse issue, and four relating to the proportionality issue. The grounds relating to the reasonable excuse issue can be summarised as follows:

Ground 1 – the FTT erred in law as to what could amount to a reasonable excuse because it circumscribed the notion of reasonable excuse by reference to the concept of legitimate expectation.

Ground 2 – the FTT erred in law by deciding that definitive advice was required in order to provide the basis for reasonable reliance.

Ground 3 – the FTT erred in interpreting the s.62 certificate as having no reasonable interpretation other than that CASC status was insufficient to satisfy the reference to a "charity" therein.

Ground 4 – The FTT erred in law by approaching the matter on the basis of considering what it believed was a reasonable thing to do, and concluded that because WCC did not do that, WCC behaved unreasonably.

Ground 5 – the FTT erred by failing to ask itself the right question. WCC contends that the "right question" for the FTT to ask itself was: "whether the only reasonable course of action in circumstances where (i) HMRC have told the taxpayer that the project qualifies for zero-rating, (ii) CASC's are treated as charities for some tax purposes; and (iii) the taxpayer was a small cricket club with limited means run by unpaid volunteers, was to take further advice on the same question that HMRC have already answered".

39. We shall follow the approach of testing those grounds against the guidance given in *Perrin*, that is we shall consider:

(1) The extent to which there were any errors approach on the part of the FTT in establishing the facts in the light of WCC's assertions as to the basis on which it contends that the reasonable excuse defence to the penalty can be established.

(2) The extent to which there was any error of approach on the part of the FTT in its assessment that those facts did not viewed objectively amount to a reasonable excuse for the error in the zero-rated certificate.

(3) Whether in making that assessment the FTT adequately took into account the experience and other relevant attributes of WCC and the situation in which WCC found itself at the relevant time or times.

Discussion

The FTT's approach

40. Mr Watkinson summarised HMRC's case that the FTT was correct to conclude that WCC had no reasonable excuse as a defence for the imposition of the penalty as follows:

41. First, in relation to the factual position:

(1) HMRC did not *"confirm"* that the construction was zero-rated. Therefore, WCC cannot have "*followed*" such advice as is claimed. The reasonable potential taxpayer in WCC's position, deciding whether to issue the certificate, would not have concluded that HMRC had advised or confirmed that the construction work was zero-rated;

(2) When Ms. Price of WCC completed the certificate on 9 March 2013 she confirmed that WCC was a charity. Ms. Price had not provided a witness statement explaining how she came to tick the box confirming that WCC would use the pavilion solely for a charitable purpose, by a charity, when to her knowledge WCC would be using the pavilion and was not a charity. The reasonable potential taxpayer deciding whether to issue the certificate would not simply have ignored the requirement for use by a charity, knowing that it was not a charity and that it had not informed HMRC that it had any charitable status;

(3) Had WCC looked at VAT Notice 708, to which it was directed, it ought to have been obvious to it that WCC's construction did not qualify since (i) it was not a charity, and (ii) was a CASC; and

(4) In October 2012 WCC became a CASC, WCC knew that it had materially changed its status for tax purposes after seeking comment from HMRC on its proposed certificate, yet chose to make no further enquiry as to the effect that this would have on its ability to issue any zero-rating certificate. The reasonable potential taxpayer in WCC's position deciding whether to issue the certificate would have done so and would not have sought to rely on advice given prior to changing its tax status after so doing. Had WCC returned to VAT Notice 708 it would have seen that CASCs are not typically seen as being similar to village halls.

42. In relation to WCC's grounds of appeal Mr Watkinson submitted as follows:

(1) Whilst at [18] the FTT initially considered the apparent conundrum created by the absence of a "legitimate expectation" it was clear that the FTT expressly considered the "reasonable excuse" proffered regardless of whether or not it amounted to a "legitimate expectation" and the FTT did not circumscribe the notion of reasonable excuse by reference to that concept.

(2) The FTT did not lay down a principle of law that for advice to be relied upon in the context of a reasonable excuse defence it must be definitive. The FTT did not do so because it was never taxed with that question. Rather, the FTT had to deal with WCC's particularised factual contention as recorded at [17]. The FTT therefore had to assess whether WCC's pleaded contention, that definitive advice was given and was followed, was made good on the evidence. The FTT decided at [21] and [22] that it was not.

(3) The FTT was not asked to determine WCC's appeal on anything other than the recorded basis, which was that the advice it had received was, in fact, definitive. Accordingly, once the FTT had dismissed that case on the facts there could be no error of law by not addressing the potential law relating to an alternative case in which the advice was not said to be definitive.

(4) The FTT found at [25] that the certificate was explicit in asking for confirmation that the building would be used solely for a relevant charitable purpose, namely by a charity, and that WCC had inserted its CASC number. The FTT therefore found that, even if WCC had previously had a reasonable excuse, that excuse did not apply once it had completed the certificate [25]. This followed the guidance in *Perrin* at [81(3)] re determining cessation of a reasonable excuse.

(5) WCC's complaint is framed as being that the FTT erred in interpreting the certificate as having no reasonable interpretation other than that CASC status was insufficient to satisfy the reference to a "charity" therein. On WCC's case before the FTT it had never interpreted the word "charity" in the certificate as including a CASC. WCC never relied upon, or evidenced, any such belief.

(6) The FTT was not seeking to set out any decision on whether a CASC could be a charity for the purposes of the exemption, since it was never taxed with that question. Even if the FTT had been making such a decision it would have been bound to find that a CASC could not be a charity for the purposes of the exemption by the UT's decision in *Eynsham*.

(7) The FTT's conclusion to the effect that a "charity" meant just that is unimpeachable. Even if the interpretation of the certificate can be said to be a matter of law it was plainly to be approached by reference to the common understanding of what a "charity" is, and that is what the FTT did.

(8) The FTT correctly made a value judgment as to what was a reasonable thing to do in the circumstances and it was not required to ask the question posed under WCC's fifth ground of appeal.

43. Contrary to these submissions, we have concluded that the FTT erred in its approach to determining the reasonable excuse issue in this case for the following reasons.

44. In essence, the FTT's approach was to consider WCC's reliance on what was said in HMRC's letter of 30 March 2012, which did not deal with the question as to whether WCC was a charity, separately from the question as to the basis on which WCC completed the zero-rated certificate by confirming that the building was to be used solely for a relevant charitable purpose by a charity. The FTT concluded that because HMRC's letter did not provide definitive advice a reasonable excuse had not been established at that point. It then went on to consider the completion of the certificate, but solely on the basis that even if the reliance on HMRC's letter provided a reasonable excuse, that no longer applied once WCC completed the certificate by giving the confirmation referred to above.

45. However, in our view there was only one question for the FTT to answer, namely whether WCC had a reasonable excuse for completing the confirmation set out at paragraph 28 above in the manner it did in the light not only of the terms of HMRC's letter but also all the other relevant circumstances prevailing at the time that the certificate was completed.

46. Contrary to the FTT's reasoning at [25] and Mr Watkinson's fourth submission summarised at paragraph 41(4) above, this was not a case where the correct approach was to consider whether there may have been a reasonable excuse at an earlier point which subsequently ceased to exist and in our view the FTT fell into error in considering the issue in that way.

47. Furthermore, in our view the FTT was wrong to approach the question of the reasonableness of WCC's reliance on the letter of 30 March 2012 purely on the basis of whether it contained definitive advice or not. In our view, that was an unduly narrow approach to the terms of the letter.

48. As we have said, in our view the correct question to be asked was whether what was said in that letter, taken together with all the other relevant circumstances provided a reasonable excuse for WCC completing the certificate in the way that it did.

49. We do not accept Mr Firth's submission that the FTT circumscribed the notion of reasonable excuse by its reference to the concept of legitimate expectation. The FTT made it clear at [18] that it considered whether the terms of the letter provided a reasonable excuse even though the ingredients necessary to constitute a legitimate expectation were not present in this case.

50. However, in our view the FTT did limit its consideration of HMRC's letter to the question as to whether the letter contained advice that was definitive. In this respect, we think the FTT was unduly influenced by HMRC's statement in the letter that it could not provide a definitive response. The fact that HMRC profess to have a policy of not providing a definitive response and say so in their letter is not in itself a bar to the taxpayer relying on was said in the letter as constituting a reasonable excuse. The question is was it reasonable for someone in WCC's position to put reliance on what was said in the letter in the light of all the other relevant circumstances.

51. When it comes to those other relevant circumstances, as we have indicated, it was necessary for the FTT to consider why WCC completed the certificate by stating that it was a charity but putting in a CASC number. However, in our view the FTT did not in substance grapple with that issue in its reasoning at [25]. What the FTT said was that if WCC thought that the statement it made on the certificate was at odds with HMRC's letter of 30 March 2012 it should have sought assistance in resolving the issue. However, it made no findings as to what WCC thought when it made the statement. The FTT therefore left the point open and accordingly did not engage with the question as to why WCC genuinely thought it qualified for relief and did not consider the answer to that question in the context of the other findings it made in the Decision.

52. In particular, the FTT did not consider that question in the context of its finding that Mr Kellock was an honest witness who genuinely thought that WCC was entitled to issue the zero-rated certificate and asked Ms Price to complete it accordingly. Nor did the FTT consider in that context the fact that WCC had stated in its letter of 22

March 2012 referred to at [25] above that it was a "non-profit making" body. HMRC did not in its response mention that such a status was not in itself sufficient to meet the requirements for zero-rating, but WCC subsequently registered as a CASC.

53. We reject Mr Watkinson's submissions to the effect that the FTT's task was limited to deciding the reasonable excuse issue purely on the basis that the only reason put forward by WCC was that the advice it had received from HMRC was definitive. It seems to us, as we have said above, that although that was the way that the FTT interpreted WCC's case, it is clear from what is recorded by the FTT at [17] that WCC's case was that it sought assistance and advice from HMRC and that it was reasonable for it to rely on what HMRC said in its response to WCC's query.

54. In our view in reasonable excuse cases, where in most cases the taxpayer is unrepresented (or not legally represented), a considerable degree of flexibility and informality is to be expected (see Rule 2(2)(b) of the First-tier Tribunal (Tax Chamber) Rules 2009 (as amended). The FTT should not approach the issues to be determined by applying an over legalistic and narrow approach based on a strict interpretation of a taxpayer's pleadings. In this kind of case, the correct approach is, as we have said, to look at all the relevant circumstances and put the central question as to whether it was reasonable for WCC to have relied on what was said in HMRC's letter in the context of the circumstances prevailing at the time the certificate was completed. Those circumstances would include the fact that WCC had, subsequent to HMRC's letter, registered as a CASC and put its CASC number on the certificate where it was asked to provide a charity registration number.

55. We reject Mr Watkinson's submission that the question as to whether a CASC could be a charity was not relevant. In our view, that is an issue which is highly relevant to the question as to why WCC ticked the box on the certificate to the effect that it was a charity and then gave its CASC number. As we have said, the question for the FTT, which it did not address, was whether it was reasonable for a person in WCC's position to complete the certificate in that way, taking into account its findings that WCC had an honest and genuine belief that the requirements for the issue of the certificate were met.

56. As we have observed, the question as to whether a CASC could qualify as a charity for the purposes of this exemption has been subject to a continuing legal debate. In *Eynsham*, the FTT answered that question in the affirmative, the Upper Tribunal decided otherwise and the matter is now before the Court of Appeal. It is clearly not a straightforward question of the kind to which a taxpayer could be reasonably expected to know the answer. Certainly, it could not be said that any misunderstanding of the law by WCC was "entirely the product of basic ignorance of value added tax law" (*per* Simon Brown J in *Neal v Customs and Excise Commissioners* [1988] STC 131 at 136). Therefore, the fact that the FTT would have been bound to say if it had considered the point that a CASC was not a charity on the basis of the Upper Tribunal's decision in *Eynsham* does not determine the issue. The question was whether in all circumstances it was reasonable for WCC to proceed on the basis of its genuine belief that the works concerned qualified for zero-rating.

Remaking the Decision

57. We may only interfere with the Decision if there has been an error of law. We have concluded that the FTT did make errors of law, in the sense of errors of approach as to the application of the question as to what in this case constituted a reasonable excuse. We have also concluded that those errors are so material that we should exercise our powers under s 12 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") to set aside that part of the Decision.

58. We have also considered whether having decided to set aside the Decision on this point, we should remit it to the FTT or whether we should remake it ourselves, again exercising our powers under s 12 TCEA in that regard.

59. We have decided that it would be disproportionate to remit this matter back to the FTT and thereby incurring the extra expense and delay of another hearing. Although one of the errors on the part of the FTT that we have identified is a failure to make a factual finding as to the basis on which WCC gave the confirmation on the certificate set out at [28] of the Decision, we are satisfied that we can remake the decision on the basis of the evidence that was before the FTT.

60. Turning first to HMRC's letter of 13 March 2012, in our view it was reasonable for a taxpayer in WCC's position, bearing in mind that it was, as the FTT found, run by a group of volunteers with little apparent expertise on matters of indirect taxation, to rely on what was said in HMRC's letter as constituting a reasonable excuse for having completed the zero-rated certificate in the way that it did for the following reasons.

61. HMRC's answer to the queries raised by WCC focused on the requirements to constitute a village hall or similar building, as set out in sub- paragraph 14.7.4 of VAT Notice 708. In our view, HMRC's statement that the pavilion appeared to meet the requirements in that regard was sufficiently clear and without qualification other than to advise WCC to read the notice itself, which the FTT found it did, but in our view it would be reasonable for a taxpayer in WCC's position to take the view that its pavilion would satisfy those requirements. For what it is worth, the description of WCC gave in its letter of 22 March 2012 of the use to which the pavilion will be put is strikingly similar to the pavilion in *Eynsham*, which the Upper Tribunal held met the "village hall or similar" requirement.

62. As has been mentioned above, the letter said nothing about the need to be a "charity", although of course VAT Notice 708 did provide some guidance on that point. The key question is therefore whether the action WCC took in completing the declaration to the effect that the building must be used for charitable purpose by a charity was a reasonable course of action for it to take in the circumstances without seeking further advice on the "charity" question.

63. In our view that was a reasonable course of action. WCC had been quite open in its letter in disclosing its status as a "non-profit making" organisation. HMRC decided to answer the queries that were raised, notwithstanding the fact that its policy

was not to do so situation such as this. Therefore, having had such clear advice on the "village hall or similar" issue and without any indication from HMRC that there were any other conditions that WCC should consider, in our view it was reasonable for WCC to proceed on the basis that the works concerned qualified for zero-rating. That was against a background where it had maintained its status as a "non-profit making" organisation and indeed had registered as a CASC. Had it taken further advice on this issue, bearing in mind the legal debate which is still ongoing on the question as to whether a CASC is a charity for VAT purposes, it may well have been the case that WCC would have been advised that CASC status was sufficient. That advice would have been given in circumstances where HMRC, despite having the opportunity to do so, had not suggested that WCC's status as a "non-profit making" organisation was a bar to the works being zero-rated. In those circumstances, proceeding on the basis that the certificate could properly be given was within the reasonable range of decisions open to WCC at the time.

64. In our view, all of those factors are consistent with the FTT's finding that WCC had an honest belief that the works qualified for zero-rating. Whilst we accept that an honest belief is not in itself sufficient, the circumstances which we have mentioned above in our view establish that viewed objectively those circumstances amounted to a reasonable excuse. We therefore draw the inference from the evidence that Mr Kellock did not consider it necessary to seek any further advice at the time he instructed Ms Price to complete the certificate and, in the circumstances, that was a reasonable course of action to take.

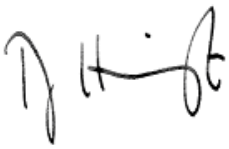
65. We therefore find that in the circumstances there is a reasonable excuse for WCC having given the certificate in the form that it did and accordingly the penalty must be discharged.

Postscript

66. In concluding we make an observation on the remarks of the FTT at [24] of the Decision. We do not think HMRC should be criticised for deciding to answer WCC's queries and they are to be encouraged to answer similar requests in the future. It is unfortunate from their perspective that in this case the letter they wrote was not as comprehensive in its answers as it might have been.

Disposition

67. The appeal is allowed.



JUDGE TIMOTHY HERRINGTON **JUDGE GUY BRANNAN**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 10 February 2021