



TC04622

Appeal number: TC/2014/00444

VATA 1994 – Schedule 10 paragraph 7(1) – Schedule 8 Group 5 note 6 – Articles 2, 9, 32 and 33 of the VAT Directive – assessment for output tax on seller in respect of sale of property to a charity – charity having objects of providing facilities for and furthering religious education and doctrine of Orthodox Church – seller had elected to opt to tax property – output tax not charged in reliance upon charity’s declaration of intended use for ‘relevant charitable purpose’ – whether in fact the property was to be used ‘otherwise than in the course or furtherance of the business’ – no – whether charity carrying on as a business activity – yes – whether temporary rental of rooms was ‘business use’ so as to prevent disapplication of option to tax – yes – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**THE TRUSTEES OF THE INSTITUTE FOR ORTHODOX Appellants
CHRISTIAN STUDIES, CAMBRIDGE**

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER GILL HUNTER**

**Sitting in public at Fox Court, Grays Inn Road, London WC1X 8HN on 8
January 2015**

Professor David Frost for the Appellant

Mr Bernard Haley, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

5 1. The Institute for Orthodox Christian Studies (“the Appellant”) appeals, as a third party, against the decision of the Respondents (“HMRC”) to raise an assessment for VAT output tax, on the sale, in January 2013, of 25/27 High Street, Chesterton, Cambridge, (“the Property”) against the seller, the Trustees of the Book Production Consultants Retirement and Death Benefit Scheme, a VAT registered entity.

10 2. The assessment was issued following HMRC’s decision that the Appellant’s declaration, that it intended to use the Property for ‘relevant charitable purposes’ was incorrect and therefore invalid, because the seller had elected to waive the VAT exemption in respect of the Property and the requirements of Schedule 10 paragraph (7) (1), which if satisfied would allow the disapplication of the option to tax for
15 supplies where a property is to be used solely for non-business purposes, had not been met.

3. HMRC maintain that at least part, if not the majority of the Property, was to be rented out by the Appellant, and that because this constituted a business use, the declaration that it gave to the seller that it intended to use the Property for ‘relevant
20 charitable purposes’ was invalid.

4. The grounds of the Appellant’s appeal are that the Property was used in the fulfilment of the charity’s core objects. The Appellant says that it is using the Property otherwise than in the course of furtherance of a business and that:

25 i. Although it charges fees for courses and other facilities it provides in pursuing those objects, the courses and facilities are substantially subsidised by government grants and donations and by the time and skills provided to the Appellant by volunteer staff.

30 ii. In letting out rooms for a limited period to cover ongoing overheads pending the commencement of major conversion and refurbishment works, the Appellant could not reasonably be said to have been engaged in a business activity.

5. The Appellant says that it did not intend to and has not used the premises for business purposes and that it has fully complied with the provisions of Schedule 10 paragraph (7)(1).

The Legislation

35 6. Value Added Tax Act (“VATA”) 1994, Schedule 10, paragraph 7 provides:

“7 (1) An option to tax has no effect in relation to any grant made to a person in relation to a building or part of a building intended by the person for use-

(a) solely for a relevant charitable purpose, but

(b) not as an office.

(2) In relation to the expression “relevant charitable purpose”, see the certification requirement imposed as a result of note 12 of Group 5 of Schedule 8 by paragraph 33 of this schedule.”

5 Note 12 states:

“Where all or part of a building is intended for use solely for a relevant residential purpose or a relevant charitable purpose-

10 (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

15 (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.”

7. VATA 1994 Schedule 8 Group 5 Rule 6 defines use for “relevant charitable purpose” as use by a charity:

“(a) otherwise than in the course of furtherance of a business

20 (b) ...”

8. VATA 1994 s 94(1) states:

“In this Act ‘business’ includes any trade, profession or vocation.”

25 9. HMRC’s Notice 742, which provides guidance on the issue states:

“3.5 Buildings to be used solely for a relevant charitable purpose.

30 Your option to tax will not apply if you supply a building, or part of a building, and the purchaser or tenant informs you before you make your supply that they intend to use it solely for a relevant charitable purpose, other than as an office for general administration for example, head office functions of the charity. Whilst there is no requirement for a formal certificate to be given, we strongly recommend that you obtain confirmation of the intended use in writing and retain it with your VAT records.

35 Where part of a building is intended to be used solely for a relevant charitable purpose (other than as an office) and part is not, your option to tax will not apply to the part used for a relevant charitable purpose, provided that the different functions are carried out in clearly defined areas. In these circumstances the value of your supply should be fairly apportioned between the exempt and taxable elements.”

40 10. HMRC’s Notice 701/1 provides guidance as to whether or not a charity is undertaking non-business activities for the purpose of determining whether its activities are solely for a relevant charitable purpose. The notice states:

“4. Although charities may not be deemed to have any business activities under other laws, the definition of business for VAT purposes is governed by specific rules and

regulations. These rules and regulations are based on European Community VAT law, as well as UK VAT law, and the findings of many VAT Tribunal and High Court decisions. This means that even though an activity may be performed for the benefit of the community or in the furtherance of charitable aims and objectives, it may still be deemed a business activity for the purposes of VAT.

‘Business test’

An organisation that is run on a not-for-profit basis may still be regarded as carrying on a business activity for VAT purposes. The normal questions which need to be considered when determining whether an activity is business for VAT purposes or not are:

- a. Is the activity a serious undertaking earnestly pursued? (This considers whether the activity is carried on for business or daily work rather than pleasure or daily enjoyment.)
- b. Is the activity an occupation or function which is actively pursued with reasonable or recognisable continuity? (When considering this test you should consider how frequently the supplies will be made.)
- c. Does the activity have a certain measure of substance in terms of the quarterly or annual value of taxable supplies made?
- d. Is the activity conducted in a regular manner and on sound and recognised business principles?
- e. Is the activity predominately concerned with the making of taxable supplies for a consideration?
- f. Are the taxable supplies that are being made of a kind which, subject to differences of detail, are commonly made by those who seek to profit from them?

When considering these questions please remember that exempt supplies as well as taxable supplies are business.

The activity may still be business if the amount charged does no more than cover the cost to the charity of making the supply or where the charge is less than cost. If the charity makes no charge at all the activity is unlikely to be considered business.”

Background

The Charity

11. The Appellant was incorporated in 1999 as a private company and as a charity, registration number 1076519, with a Memorandum and Articles of Association that define it as a charity whose aim is to further religious education and knowledge of the doctrines, history and culture of the Orthodox Church. It provides higher education principally for Christian clergy and laity from Orthodox Churches in Eastern Europe, the Middle East, Russia and Greece. Its functions also include meeting the needs of developing Orthodox parishes in the United Kingdom. It is, by its constitution, required to offer courses leading to university degrees at all levels, BA, MA, MPhil and PhD, which it undertakes through the Cambridge Theological Federation or a similar ‘recognized body’. It submits students for degrees to the University of Cambridge, to Anglia Ruskin University and to the University of Durham. 13. The Institute’s Memorandum of Association states that in furtherance of its objectives it shall have power to (inter alia):

“5 (i) To raise funds and to invite and receive contributions from any person or persons whatsoever by way of subscription donation and otherwise, provided that in raising funds the Institute shall not undertake any permanent trading activities and shall conform to any relevant statutory regulations.

5 7. The income and property of the Institute from wherever derived shall be applied
solely towards the promotion of the objects of the Institute as set forth in this
Memorandum of Association, and (subject as herein provided) no portion thereof shall
be paid or transferred, directly or indirectly, by way of dividend, bonus or otherwise by
10 way of profit to the members of the Institute, and no director shall be appointed to any
office of the Institute paid by salary or fees or receive any remuneration or other benefit
in money or moneys worth from the Institute.”

12. The annual accounts of the Appellant filed with the Charity Commission details the
administration and primary activities of the Institute. It is run by a group of Directors who are
appointed by a General Meeting of the Institute, except for one Director appointed by the
15 Cambridge Theological Federation. They meet regularly for the purposes of making strategic
decisions but delegate the day to day running to the Principal who manages the Charity in
consultation with an Executive Committee.

The accounts state that the Institute:

20 “meets well over half its annual budget from charitable donations from individuals and
from various trusts and corporate bodies at home and abroad, for the purposes of
promoting theological education and knowledge of the doctrines, history and practices
of the Orthodox Church at all levels, from pre-university training, through Bachelors’
and Master of Arts degrees, up to doctoral qualifications. By its Distance Learning
25 programmes it makes its teaching resources available in English to students world-
wide, who undertake two year courses taught by means of the internet, namely the
Certificate and the Diploma in Orthodox Christian Studies, courses that are at the level
respectively of first and second years of an undergraduate degree. Through its website
the Institute makes available worldwide and without charge, videos of lectures on
30 topics of general interest given by major Orthodox speakers at its Summer School and
at Community Days throughout the year. Its course for adults introductory to Orthodox
belief, THE WAY, is widely used by churches in the English speaking world, has been
adopted for adult catechesis throughout the Patriarchate of Romania, and is currently
being translated under Episcopal sponsorship for use in Greece. The Institute also
35 organises national and international conferences, colloquia and summer schools in its
specialist fields of study and supports appropriate publications. It also sponsors classes
in relevant ancillary studies such as the art of icon painting. It is the only body teaching
in English the beliefs, history, culture and practice of the Orthodox Church at all these
levels in Western Europe.

40 The Institute justifies its charitable status by providing education for all students at far
less than the cost of mounting its courses and it also offers scholarships, bursaries and
the accounts show that no remuneration was paid to any of the Directors in the year,
not were any expenses reimbursed to them. The average weekly number of staff
employed by the charity during the year was four, usually made up of two resident
qualified staff and two part time tutors, a chaplain and associate chaplain.”

45 13. The Institute receives government funding from the Higher Education Funding
Council to support its teaching. Because it is non-profit making, it subsists largely on

charitable donations that subsidise its teaching operations. The principals of the Institute state in their witness statements that the Institute does not undertake any activities other than in furtherance of its educational mission and makes no vatable supplies. In consequence, it is not registered for VAT. Payment is made by students for theological education and tutorials but fees charged for degrees offered by the three universities are paid directly to the universities by its students.

The Charity's financial activities

14. An analysis of the Institute's accounts for the five year period 2008-09 to 2012-13 show its income and expenditure to be as follows:

10 2008-09

<u>Income</u>		<u>Expenditure</u>	
Donations	158,681	Staff (3) costs	107,548
Fees from students	32,374	Other costs	96,963
Investment income	93	Governance	600
Total :	191,148	Total :	205,111
Summary :		<u>Net movement (£13,525)</u>	

2009-10

<u>Income</u>		<u>Expenditure</u>	
Donations	146,293	Staff (4) costs	120,762
Fees from students	61,281	Other costs	99,687
Investment income	15	Governance	600
Total :	207,589	Total :	221,049
Summary :		<u>Net movement (£13,460)</u>	

2010-11

<u>Income</u>		<u>Expenditure</u>	
Donations	74,003	Staff (5) costs	133,230
Legacies	362,243	Other costs	122,241
Fees from students	45,174	Depreciation	434

Investment income	4,115		
Total :	485,535	Total :	255,905
Summary :		<u>Net movement £229,630</u>	

2011-12

<u>Income</u>		<u>Expenditure</u>	
Donations	46,715	Staff (5) costs	166,853
Fees from students	79,667	Other costs	115,514
<u>Legacies</u>	<u>310,000</u>	Depreciation	490
Investment income	6,535		
<u>Total :</u>	<u>442,917</u>	<u>Total :</u>	<u>282,857</u>
Summary :		<u>Net movement £160,060</u>	

2012-13

<u>Income</u>		<u>Expenditure</u>	
Donations	32,054	Staff (4) costs	143,784
Fees from students	64,785	Other costs	125,078
Legacies	8,032		
Investment income	1,101		
Rental income	28,128		
<u>Total :</u>	<u>134,100</u>	<u>Total :</u>	<u>268,862</u>
Summary :		<u>Net movement : (£134,762)</u>	

5 15. The background to the Institute's purchase of the Property is that in January of 2011, the trustees were informed that they were required by the owners to vacate Wesley House, Cambridge, the premises which the Institute had rented since its inception in 1999, because the premises were to be sold.

10 16. The Property, 25/27 High Street, is a three-storey building consisting of sixteen rooms of various sizes. It was available to purchase and considered adequate for the Institute's needs, having potential for teaching rooms, library accommodation, student

study areas, storage for a large collection of books, possibilities for library expansion, for further lecture and seminar rooms, and (with planning permission) an opportunity to develop limited accommodation for students and visiting scholars on the top floor.

5 17. The Trustees of the Institute contemplated making an offer for the Property, but on the understanding that the purchase would be exempt from Valued Added Tax and Stamp Duty, on the basis that the building was to be used for charitable purposes. To fund the purchase the Institute had to raise the £800,000 through loans from benefactors and its own cash resources.

10 18. The Appellant's fund-raising brochure, which was sent to its supporters and posted on its website, set out the purposes to which each room in the three-storey building would be devoted: provision for library and study areas, for a chapel, for lecture and seminar rooms, staff studies, for a student common room, and (subject to planning permission) some accommodation for residential students and visiting scholars.

15 19. The Institute was able to raise the purchase monies by means of an interest-free mortgage repayable over five years of £350,000 from the Maurice and Hilda Laing Trust, a further loan on similar terms of £160,000 from a Munich based charity, Nicea, and £40,000 in interest-free loans from two individuals, with no date fixed for their return. The remaining £250,000 for purchase of the Property came from its own
20 resources made up primarily of a bequest made to the Institute some years earlier.

20. The seller took professional advice, which confirmed that provided the Property was to be used for 'relevant charitable purposes' and the trustees gave a declaration to that effect, VAT need not be charged. The Appellant contacted HMRC's Bootle office, which advises charities, and was referred to Public Notices 742 and 701/1 and
25 received similar confirmatory advice. Reverend Deacon Dragos Herescu, secretary of the Institute says in his witness statement that he was told that if the building was to be used for charitable purposes and if the office space amounted to not more than 5% of the property, VAT was not chargeable on the transaction.

30 21. The Institute required vacant possession of the building but some of the rooms were occupied by business tenants on leases which had been excluded from the security of tenure provisions in the Landlord and Tenant Act 1954 and were determinable on three months' notice.

35 22. Having established that the Institute would be able to raise the required capital to purchase the Property the trustees offered the asking price for the Property, subject to the tenants being given notice to vacate.

40 23. Professor Frost, the principal of the Appellant Institute, in his witness statement says that at the time negotiations were taking place, it had become obvious that, because of the impact of the recession, it was likely that cash-flow would be a problem and that the Institute would not immediately have the necessary resources to convert the Property to its projected use. The trustees endeavoured to provide for this by negotiating bank overdraft facilities against its anticipated equity in the building,

but the bank's terms (that the Appellant give a first mortgage on the Property) proved impossible, because the Laing Trust would already hold a first mortgage over the Property. The trustees therefore proposed that for a temporary period those tenants who wished to remain would be offered new short-term tenancies subject to a landlord option to break after three months. The purpose was to raise monies to offset ongoing overheads until such time as the conversion works started, rather than allow rooms to remain idle and unoccupied.

24. Professor Frost says he again contacted the Bootle office of HMRC and put the problem to them, asking for confirmation, that in accordance with their published advice, it was permissible for a charity to let out temporarily unused space, without the rental being regarded as a business (albeit exempt) supply. He says HMRC advised that it was a fiduciary duty of Trustees of the Charity to maximise its assets, so that short-term letting of space that would otherwise lie vacant was not only permissible (as their literature had already indicated) but might also be necessary pursuant to the Trustees' legal responsibilities – provided that all income was directed to furthering the purposes of the Charity.

25. Professor Frost informed the seller that tenants who had not arranged to vacate on the termination of their lease could remain for an interim period after the expiry of their tenancy under short-term leases, but that this would be subject to the Appellant having possession after three months' notice.

26. It was therefore agreed that the contract for sale would contain a provision that the property was sold subject to the occupational leases but that the seller would, four days after exchange of contracts, give the tenants notice to quit terminating their tenancies on 30 April 2013.

27. The contract contained provisions relating to the VAT treatment of the transaction which recorded that the seller had made an option to tax the Property, but that the Appellant was a registered charity. The contract provided:

“10.3 The Buyer warrants that it intends to use the Property solely for a relevant charitable purpose as referred to in the VAT Act Schedule 8 Group 5 Note (6) and accordingly the parties consider that the Seller's option to tax has no effect and that the Seller is not required to charge VAT on the price of the Property.

10.4 If HM Revenue and Customs properly issue a valid decision to the effect that the transaction provided for by this contract constitutes or includes a supply of goods and/or services for the purposes of the VAT Act, or if the Seller is assessed to VAT in relation to the sale of the Property, the Buyer will immediately, on being notified by the Seller of such proper and valid decision or assessment, pay the Seller the VAT which is attributable to the sale.

10.5 The Buyer will on demand pay the Seller an amount equal to any interest, penalty or surcharge which is properly imposed on the Seller by HM Revenue and Customs as a result of any breach of any obligation on or warranty made by the Buyer in this contract, together with any costs incurred by the Seller in connection with such interest, penalty or surcharge.”

28. Contracts were exchanged on 17 January 2013 and completion agreed for 7 February 2013.

29. Break notices were given to the occupational tenants on 24 January 2013. Some tenants left but others decided to stay on; a major tenant subsequently vacated an annexe for their own bought premises, so that it remained unoccupied pending the possibility of a new tenant moving in on the same limited basis.

30. In June 2013, HMRC's compliance office in Glasgow informed the seller that there were inaccuracies in its March 2013 VAT return. HMRC said that 25/27 Chesterton House was subject to an option to tax but had been sold exempt on the strength of what was effectively an incorrect and invalid declaration that the building would be used for relevant charitable purposes by the Institute. HMRC raised an assessment for £133,333.33 output tax due on the sale based on the 'deemed VAT inclusive' consideration received by the seller of £800,000.00.

31. HMRC said in its decision letter dated 20 June 2013, that based on the information provided by the Appellant and obtained from its website the premises had been used for business purposes:

- i. Two thirds were rented to independent tenants (for exempt rent).
- ii. The other third is used for theological education and tutorials. The website indicated that payment was made for this which again indicated a business supply.
- iii. Given that the property was the prime or only location for the Institute it was highly unlikely that there was not a general office administrative area which would be ineligible for a disapplication of an option to tax.

32. HMRC also said that although Orthodox services took place as part of the provision of theological education, this could be regarded as an additional supply derived from the consideration for the tutorials and therefore may not be non-business. The fact that the Institute was a religious charity of itself had no bearing on the VAT treatment of its activities.

33. At the request of the Appellant as a third party, a statutory review of the decision was undertaken pursuant to the provisions of the VAT Act 1994 Section 83A-G. The Trustees explained that if the seller had to account for VAT on the sale of 25/27 High Street, this would trigger the indemnity clause in the contract which provided that the Institute would have to bear the cost of the VAT, which in turn would most likely result in the collapse of the Charity. The Institute responded to HMRC's reasons for rejecting the disapplication of the option to tax, saying:

- i. The rooms were rented out on a temporary basis only, under leases excluded from the security of tenure provisions of the Landlord and Tenant Act 1954, and were also subject to a landlord break option. The rental income was not business income but money to be used to offset the Institute's overheads, pending conversion of the building. The trustees

5 were simply endeavouring to comply with their obligations to minimise costs and preserve the resources of the Institute. The trustees had consulted HMRC's office at Bootle, having received advice that the trustees had a statutory duty to maximize the assets of the Charity, and found from information on HMRC's website for charities that the Institute was able to rent out unoccupied rooms and receive interim rents rather than allow rooms to remain idle until they could be taken into use, without that being regarded as a commercial supply.

10 ii. On the issue of 'charging fees', the Appellant said that this appeared to be a simple misunderstanding of information given on the Institute's website as to the cost of degree courses taught by the Institute. Degrees were awarded by accredited universities and students paid fees to those universities through the Cambridge Theological Federation, of which the Institute was one of eight Members. The Universities (and through them
15 the Members of the Federation) receive fees for teaching and necessary facilities, which are supplemented by grants according to the number of students, from the Government's Higher Education Funding Council, some of which is directed to the Federation and then to the constituent members of the Federation to fund teaching.

20 iii. There is no designated area to carry out general administration. Office work is shared between staff.

34. HMRC, in its review letter dated 1 October 2013, appear to have accepted the Appellant's arguments in respect of points (ii) and (iii) of the decision letter, but did not accept the explanations provided by the Appellant in respect of point (i).

25 35. The Appellant lodged an appeal with Tribunal on 15 January 2014.

Evidence

30 36. The evidence included witness statements from Professor Frost and Rev Deacon Dragos Herescu, a copy of the Institute's Memorandum and Articles of Association, a copy of the contract relating to the purchase transaction, copy correspondence between the parties and a copy of a standard letting agreement. The Charity's accounts (which were not produced at the hearing but are readily available from the Charity Commission's website). Professor Frost gave oral evidence to the Tribunal.

Appellant's Case

35 37. The Appellant's grounds of appeal are as set out in paragraphs 4 and 33 above. The Appellant argues that the Property, 25/27 High Street, is used solely to further its charitable activities in terms of providing facilities which enable those activities to be better carried out. The predominant purpose of its activities is not to receive consideration for providing those activities, but to fulfil its charitable objects of promoting religious and theological education. Its activities generally, and the
40 temporary letting of rooms did not constitute a "business activity." The Appellant

says that in undertaking its charitable activities, it is not making a supply “in the course or furtherance of any business”.

HMRC’s Case

5 38. Mr Haley for HMRC said that because two thirds of the Property was rented out, whether on a temporary basis or not, this was a business use albeit exempt from VAT. HMRC therefore consider the supply of the Property from the seller to the Appellant to be a transaction on which output tax should have been charged and accounted for. HMRC in their statement of case and Mr Haley at the hearing did not pursue points (ii) and (iii) as contained in the decision letter of 20 June 2013.

10 **Conclusion**

15 39. We have to decide whether or not, at the time when the relevant supplies were made, that is on exchange of contracts for the purchase of 25/27 High Street, the Appellant intended to use the Property for a ‘relevant charitable purpose’, that is to say, for use by the Appellant ‘otherwise than in the course or furtherance of a business carried on by it’. We also have to decide whether the renting out of rooms in the Property amounts to business use. If it does, the requirements of VATA 1994 Schedule 10 paragraph 7 (1) would not be satisfied and VAT should have been charged and accounted for by the seller.

20 40. Neither the Appellant, nor HMRC in their submissions at the hearing, cited any case law authorities on the issue of what constitutes a business activity. However we take guidance from the case of *Customs & Excise Commissioners v Lord Fisher* [1981] STC 238, one of the leading cases on what constitutes business activity and the discussion of that case in the House of Lords decision in *Institute of Chartered Accountants in England and Wales v Customs & Excise Commissioners* [1999] STC 25 398. There is reference to six indicia suggested as being the test to determine the question of whether an activity amounts to “a business”. Those indicia, as summarised by Lord Slynn in the *ICAEW* case form the basis of HMRC’s “business test” as set out in paragraph 11 above.

30 41. There is a presumption that any supply of goods or services in return for a consideration amounts to a business activity, and this is so even if services are subsidised or there is no intention to make a profit: *Riverside Housing Association Ltd v HMRC* [2006] STC 2072; *Customs & Excise Commissioners v Morrison’s Academy Boarding Houses Association* [1978] STC 1; and *Rompelman v Minister van Financiën* (Case 268/83) [1985] ECR 655.

35 42. Therefore the onus is on the Appellant to show that the nature of its activities is such that it is not carrying on a business activity, notwithstanding that it is supplying services for a consideration and renting out accommodation.

Business activity

40 43. As is clear from the authorities, particularly those decided in the context of what amounts to an ‘economic activity’ (the concepts of ‘economic activity’ and ‘business

activity' being the same for the purposes of the European Directive's definition of a 'taxable person ('a person who independently carries out .. any economic activity whatever the purpose or results of that activity'), in addition to applying the indicia in *Lord Fisher*, there has to be inquiry into the "wider picture" and it is necessary to take into account the fact that the institute's activities are charitable activities, even though the charitable purpose of the activities cannot alter the nature of those activities for VAT purposes.

44. Further, the absence of a profit motive does not lead to the conclusion that the activities are not a business activity, but it is a factor to be taken into account when discerning objectively the nature of the activities in question. If two institutions provide private education, one established as a charity and the other not, the fact that one of them is carrying out its charitable purposes cannot be the determining factor in deciding the question of whether it is engaged in an economic activity. It is necessary to have regard to the nature of the activity, not the motive for it. For the same reason, the question is not determined by whether the purpose, or a purpose, of the activity is to make a profit - if by its nature the activity is an economic activity, the absence of a profit motive does not of itself result in it becoming something other than an economic activity

45. The authorities do not state that any activity carried out for remuneration on a permanent basis must be an economic activity if it is carried out for consideration: an activity carried out for consideration will not be an economic activity if that is not its intrinsic nature. The question is whether the intrinsic nature of what the Appellant does prevents it from carrying on an economic or business activity.

46. In summary, the authorities hold that:

- i. an activity whereby a supply is made for a price is not necessarily a business activity;
- ii. that it is necessary to identify in objective terms what the activity is in order to determine whether it is an business activity;
- iii. that to identify what that activity is, it is necessary to look, not at purpose or results, but at the entirety of what it is and the context in which it is carried out.

47. In the Court of Justice of the European Union ('CJEU') judgment in *European Commission v Finland* (Case C-246/08) [2009] ECR I-10605, the principles set out, and which take precedence over domestic precedent, provide guidance on what amounts to economic activity.

48. The court said that the term 'economic activity' must be construed widely and has to be considered without regard to the activity's purpose or results. An economic activity as a general rule is an activity which is 'permanent and ... carried out in return for remuneration ... received by the person carrying on the activity'. Whilst that general rule acknowledged that supplying services for payment was not on its own enough for there to be economic activity, if the supply was for consideration as part of

a legal relationship including reciprocal performance that was sufficient to make it part of an economic activity.

49. In *Customs and Excise Comrs v St Paul's Community Project Ltd* [2004] EWHC 2490 (Ch), [2005] STC Evans-Lombe J, in the course of his judgment, reviewing all the authorities, said as to the approach to be taken by the Tribunal in determining whether an activity is or is not a business (at [51]):-

“I accept that the overall policy of the Sixth Directive requires that the word ‘business’ must be given a very wide meaning so that it is not confined to profitable enterprises or enterprises intended to be conducted at a profit at some point. The intention, or apparent intention, of those conducting the enterprise in question must be disregarded. It is the intrinsic nature of the enterprise, as established by evidence of what is actually being performed in order to advance it that is important in arriving at a conclusion whether or not a particular undertaking constitutes a business.”

50. On the facts as presented, we accept that:

- i. The greater part of the Appellant’s activities involve the carrying out of charitable activities - its principal objective is to provide higher education principally for the laity of Orthodox Churches and Christian Clergy. There are, as far as can be ascertained, no other charities in the UK with similar charitable objectives. Its objectives are achieved by the facilities, courses and activities it provides.
- ii. It charges fees which meet part of its operational expenses, supplemented by contributions from donors; the fact that the Institute was managed so as not to give rise to a profit points away from economic activity.
- iii. The Appellant’s acquisition of the Property, 25/27 High Street, was partly funded by borrowing and in part by donations. A commercial organisation would not depend on donations to fund capital expenditure in whole or part.

51. Of the *Lord Fisher* indicia, it is arguable that three (d, e, and f) are not met:

- d) The Institute was not conducted on sound and recognised business principles in view of its reliance on volunteers and donations. No part of its fees was expended on the acquisition of capital assets.
- e) The intrinsic nature and predominant purpose of its activity is providing courses and activities and to assist in defraying its operational costs, fees are received through its membership of the Cambridge Theological Federation.
- f) The supplies it makes are in pursuance of its predominant objectives of promoting the Orthodox Church and its teachings and the courses it provides are probably unique and not of a kind commonly provided by others.

52. We do not conclude however, that the Institute can be regarded, by reason of the fact that it relies on donations and volunteers and charges fees at a level which only covers operating costs, as a charitable and concessionary activity, and therefore not engaged in economic activity. The fees it receives cannot be regarded as anything

other than consideration for the teaching and other supplies it makes. We accept that the fees are at a lower level than they may have been had the Institute been seeking to profit, but in terms of its annual income they represent a significant amount. Further, the predominant purpose of its activity is not a determining factor.

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Renting of rooms

53. The declared intention of the trustees when purchasing the Property was to provide religious education in return for payment and also, in time, living accommodation for some of the students. The provision of these services for consideration must in our view be regarded as a business activity. Although the temporary letting of rooms which otherwise would remain idle and empty was to subsidise the Institute's costs and cover ongoing overheads pending the commencement of major conversion and refurbishment works, the lettings were to individuals or companies not connected to the Charity's activities. Although there may not have been any intention to let out the rooms to unconnected third parties on any kind of continuous or permanent basis, the lettings could not be anything other than business activity. Indeed the intention on the part of the trustees to eventually let rooms to students, whether at a rent or otherwise, would in the overall context of fees paid for courses be regarded as a business.

54. For the above reasons our decision is that the Property at 25/27 High Street was not intended for use or used by the Appellant solely for a 'relevant charitable purpose' and not 'otherwise than in the course of furtherance of a business'.

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55. We therefore dismiss the appeal and confirm the assessment for £133,333.33 output tax due on the sale of 25/27 High Street, Chesterton, Cambridge.

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.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 3 SEPTEMBER 2015