Neutral Citation Number: [2021] EWCA Civ 225

Case No: A3/2019/3012

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
Mr Justice Nugee and Upper Tribunal Judge Timothy Herrington
UT 2018/0038

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 February 2021

Before:

LORD JUSTICE HENDERSON
LORD JUSTICE SINGH
and
LADY JUSTICE SIMLER

- -

Between :

EYNSHAM CRICKET CLUB	**Appellant**
- and -	
HER MAJESTY'S REVENUE & CUSTOMS	**Respondent**

- -
- -

Mr John Brinsmead-Stockham (instructed by **Hogan Lovells International LLP**) for the **Appellant**
Mr Howard Watkinson (instructed by **General Counsel and Solicitor to HMRC**) for the **Respondent**

Hearing dates: 19 and 20 January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.

Lady Justice Simler:

Introduction

1. This appeal concerns the question whether supplies of construction services in the course of building a new cricket pavilion to a "community amateur sports club" (referred to below as a "CASC") such as Eynsham Cricket Club ("the Club"), qualify for zero-rating for the purposes of value added tax ("VAT") pursuant to Item 2, Group 5, Schedule 8 to the Value Added Tax Act 1994 ("the VAT Act"). The amount at stake on this appeal is modest though important to the Club, but the point of principle raised has wider significance for other cases involving local and community-based sports clubs, as will become apparent.

2. The answer to the question whether the Club was entitled to have the construction services supplied to it on a zero-rated basis depends on whether it was at the material time a "charity" for the purposes of Schedule 8 to the VAT Act. That in turn depends on (i) whether the Club was "established for charitable purposes only" pursuant to Schedule 6 to the Finance Act 2010 ("the FA 2010"); (ii) whether section 6 of the Charities Act 2011 ("the CA 2011") applied and had the effect of preventing the Club from being treated as "established for charitable purposes" under Schedule 6 FA 2010; and (iii) whether the Club satisfied the other conditions, and in particular, the "registration condition" in paragraph 3 Schedule 6 FA 2010. There were also factual questions raised at earlier stages (including whether the new pavilion was intended for use solely by the Club "otherwise than in the course or furtherance of a business" and/or as "a village hall or similarly in providing social or recreational facilities for a local community") but these have now been finally resolved. Finally, if the Club was not entitled to treat the supply of construction services as zero-rated for UK VAT purposes, it has argued that this would constitute a breach of well-established EU law principles of equal treatment and/or fiscal neutrality.

3. By a revised decision dated 29 December 2017, the First-tier Tribunal (Tax Chamber) (Judge Jonathan Richards and Susan Lousada, "the FTT") would have held that the Club was a charity within the meaning of Schedule 6 FA 2010 (and satisfied all relevant conditions, including the registration condition) but for its finding that the Club was not in fact established for charitable purposes only (because it had a subsidiary purpose of providing social facilities to the residents of Eynsham that was not charitable). The FTT upheld the Club's appeal on all other disputed points save that relating to equal treatment and fiscal neutrality.

4. The Club appealed to the Upper Tribunal, and at a preliminary case management hearing, the charitable purposes finding was conceded by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to have been made in error of law for reasons that do not concern us on this appeal. HMRC were thereafter treated in substance as the appellants on the substantive appeal to the Upper Tribunal.

5. By a judgment dated 1 October 2019, which is the judgment under appeal, Nugee J and Upper Tribunal Judge Timothy Herrington ("the UT") upheld the conclusion of the FTT that the Club is not a charity, but on different grounds, and dismissed the Club's appeal. In summary, and so far as relevant to this appeal, the UT held:

i) Despite the Club being established for charitable purposes only as a matter of fact, the deeming provision in section 6 CA 2011 applied and had the effect that as a CASC, the Club was to be treated as not established for charitable purposes and hence could not be a charity within the meaning of Schedule 6 FA 2010.

ii) The principle of fiscal neutrality does not apply to differential VAT treatment as between the recipients (the Club on the one hand and other similar cricket clubs registered as charities but not CASCs on the other) of construction supplies. The recipients were not traders in competition with each other, and the principle did not extend to them. Nor could the principle of equal treatment be invoked in circumstances where a body that is a charity is not objectively the same as a body that is not a charity.

Both of those conclusions are challenged as wrong in law by the Club on this appeal. Moreover, the Club challenges the UT's approach to the jurisdiction condition (relied on to provide independent support for its conclusion on the first issue) as will appear below.

6. Mr John Brinsmead-Stockham instructed by Hogan Lovells International LLP appeared on behalf of the Club, as they did below. Mr Howard Watkinson instructed by General Counsel and Solicitor to HMRC appeared as below. I am grateful to both counsel and those instructing them for the clarity and care with which their cases have been presented, and express particular gratitude to Mr Brinsmead-Stockham and Hogan Lovells who have acted on a pro bono basis throughout.

Factual background

7. The facts are no longer of central importance and are not in issue on this appeal. In short, the Club is a local village, amateur cricket club in Oxfordshire, run by volunteers. It is an unincorporated association.

8. Since 2003, the Club has been registered with HMRC as a CASC within the meaning of what is now section 658 of the Corporation Tax Act 2010. The concept of a CASC as a special tax entity was first introduced by the Finance Act 2002 (section 58 and Schedule 18). This came into force with effect from 1 April 2002 and provided certain tax reliefs for CASCs, none of which concerned VAT. The effect of the CASC legislation when enacted, which created a statutory entity for the purposes of taxation treatment only, was to give CASCs some but not all of the tax benefits available to charities, but with less administrative burden.

9. On 20 February 2012, the Club's pavilion was destroyed by fire in a suspected arson attack. There was an extensive fund-raising effort by the Club and building contractors were engaged to build a new pavilion. The relevant construction services were supplied in the period 3 June 2014 to February 2015 and the new pavilion was completed in May 2015. Although initially invoices were issued on the basis that the services were zero-rated, following discussions with HMRC, the contractor sought to charge VAT at the standard rate. The Club paid all invoices in full, including the VAT element (£176,772.40 for the construction services together with VAT of £35,344.48) but challenged HMRC's treatment of the VAT element which it maintained should have been zero-rated.

10. By letter dated 21 May 2015 HMRC issued a final decision that the Club was not entitled to benefit from zero-rating of the construction services. The Club appealed that decision.

The relevant provisions

11. Member states are (and have been since their accession to the EU) entitled to provide for certain supplies of goods and services to be exempt from VAT provided the measure was adopted for clearly defined social reasons, for the benefit of the final consumer, and accords with the general principles of law that form part of the order of the EU (for example principles of legal certainty, proportionality, equal treatment and fiscal neutrality). Thus Article 110 of Council Directive 2006/112/EC (known as the Principal VAT Directive) provides:

> "Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.
>
> The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."

12. The UK's zero-rating regime does not, in domestic terms, operate as an exemption, but it operates as an exemption with a right of refund in EU law. Such provisions, as exemptions with deductibility, derogate from the general principle that VAT is paid at the standard rate on all supplies and are required to be strictly construed, albeit "in a manner which is consistent with the objectives which underpin them and not in such a way as to deprive them of their intended effects." (*SAE Education Ltd v Revenue and Customs Commissioners* [2019] UKSC 14, [2019] 1 WLR 2219 at [42]).

13. The UK has provided for zero-rating in section 30 VAT Act in respect of the supply of those goods or services which are of a description for the time being specified in Schedule 8 VAT Act (originally enacted as section 18 and Schedule 3 Finance Act 1989, and so pre-dating January 1991). Group 5 of Schedule 8 provides for the zero-rating of the "Construction of buildings, etc." The present appeal is concerned with Item 2 of Group 5, which provides for zero-rating to apply to:

> "The supply in the course of the construction of –
>
> (a) a building …. intended for use solely for ….. a relevant charitable purpose; or
>
> (b) …,
>
> 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"

(Item 4 of Group 5 makes clear that if a builder is treated as supplying a zero-rated service consisting of the construction of a building falling within Item 2, then the builder's supplies of building materials used in the construction of that building are also zero-rated.)

14. Note 6 to Group 5 defines what is meant by the phrase "relevant charitable purpose" in this provision, as follows:

> "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."

Accordingly, for there to be use for a relevant charitable purpose, there must be "use by a charity" in one or both of the ways identified in Note 6.

15. The relevant definition of "charity" for VAT purposes is provided by paragraph 1, Part 1, Schedule 6 FA 2010 (which applies to the enactments – including relating to VAT – listed in paragraph 7 Schedule 6) as follows:

> "(1) For the purposes of the enactments to which this Part applies "charity" means a body of persons or trust that –
>
> (a) is established for charitable purposes only,
>
> (b) meets the jurisdiction condition (see paragraph 2),
>
> (c) meets the registration condition (see paragraph 3), and
>
> (d) meets the management condition (see paragraph 4).
>
> (2) For the purposes of the enactments to which this Part applies –
>
> "charitable company" means a charity that is a body of persons;
>
> "charitable trust" means a charity that is a trust.
>
> (3) Sub-paragraphs (1) and (2) are subject to any express provision to the contrary.
>
> (4) For the meaning of "charitable purpose", see section 2 of the Charities Act 2011 (which –
>
> (a) applies regardless of where the body of persons or trust in question is established, and
>
> (b) for this purpose forms part of the law of each part of the United Kingdom (see sections 7 and 8 of that Act))."

16. Schedule 6 FA 2010, paragraph 33 makes provision for the coming into force of different parts of the Schedule as follows:

> "(1) Part 1 is treated as having come into force on 6 April 2010.

> (2) But the definitions of "charity", "charitable company" and "charitable trust" in that Part do not apply for the purposes of an enactment in relation to which, on that date, another definition applies until such time as that other definition ceases to have effect on the coming into force of provision made by or under Part 2."

17. Article 5 of The Finance Act 2010, Schedule 6, Part 1 (Further Consequential and Incidental Provision etc) Order 2012 (SI 2012/735) (referred to below as "the Order"), which came into force on 1 April 2012, provides:

> "Definition of "charity" for the purposes of value added tax
>
> (1) The definition of "charity" in section 1(1) of the Charities Act 2011 ceases to apply for the purposes of enactments relating to value added tax to which it would otherwise apply.
>
> (2) Accordingly, by virtue of paragraph 33(2) of Schedule 6 to the Finance Act 2010, the definition of "charity" in Part 1 of that Schedule applies for the purposes of those enactments."

Accordingly, with effect from 1 April 2012 the definition of "charity" for VAT purposes ceased to be that provided by section 1 CA 2011 and was provided by Schedule 6 FA 2010.

18. The concept of "charity" and "charitable purpose" is dealt with by sections 1 to 4 CA 2011. Since certain other provisions of the CA 2011 (and in particular, section 6) are also important in the context of the appeal, I set these out in full below:

> "**1 Meaning of "charity**"
>
> (1) For the purposes of the law of England and Wales, "charity" means an institution which –
>
> (a) is established for charitable purposes only, and
>
> (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.
>
> (2) The definition of "charity" in subsection (1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment.
>
> **2 Meaning of "charitable purpose**"
>
> *(*1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which –
>
> (a) falls within section 3(1), and
>
> (b) is for the public benefit (see section 4).
>
> (2) Any reference in any enactment or document (in whatever terms) –
>
> (a) to charitable purposes, or

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

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

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

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

3 Descriptions of purposes

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

…

(g) the advancement of amateur sport …

(m) any other purposes –

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

(2) In subsection (l) –

…

(d) in paragraph (g), "sport" means sports or games which

promote health by involving physical or mental skill or exertion…

4 The public benefit requirement

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

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

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

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

…

6 Registered sports clubs

> (1) A registered sports club established for charitable purposes is to be treated as not being so established, and accordingly cannot be a charity.
>
> (2) In subsection (1), "registered sports club" means a registered club within the meaning of Chapter 9 of Part 13 of the Corporation Tax Act 2010 (community amateur sports clubs).
>
> …
>
> **10 Ecclesiastical corporations etc. not charities in certain contexts**
>
> (1) In the rest of this Act, "charity", except in so far as the context otherwise requires, has the meaning given by section 1(1).
>
> …
>
> **11 Charitable purposes**
>
> In the rest of this Act, "charitable purposes" means, except in so far as the context otherwise requires, purposes which are exclusively charitable purposes (as defined by section 2(1))."

19. It has been common ground throughout the proceedings below that the Club satisfied the "jurisdiction" and "management" conditions. Like the UT, I consider it helpful nonetheless to set these out, together with the "registration" condition. The "jurisdiction" condition referred to in paragraph 1(1)(b) Schedule 6 FA 2010 is set out at paragraph 2 Schedule 6 FA 2010 as follows:

> "**2 Jurisdiction condition**
>
> (1) A body of persons or trust meets the jurisdiction condition if it falls to be subject to the control of –
>
> (a) a relevant UK court in the exercise of its jurisdiction with respect to charities, or
>
> (b) any other court in the exercise of a corresponding jurisdiction under the law of a relevant territory.
>
> (2) In sub-paragraph (1)(a) "a relevant UK court" means—
>
> (a) the High Court,
>
> (b) the Court of Session, or
>
> (c) the High Court in Northern Ireland.
>
> (3) In sub-paragraph (1)(b) "a relevant territory" means—
>
> (a) a member State other than the United Kingdom, or
>
> (b) a territory specified in regulations made by the Commissioners for Her Majesty's Revenue and Customs."

20. The Registration condition is dealt with by paragraph 3 Schedule 6 FA 2010 and in related provisions of the CA 2011. Paragraph 3 Schedule 6 FA 2010 provides:

> "**3 Registrations conditions**
>
> (1) A body of persons or trust meets the registration condition if-
>
> (a) in the case of a body of persons or trust that is a charity within the meaning of section 10 of the Charities Act 2011, condition A is met and
>
> (b) in the case of any other body of persons or trust, condition B is met.
>
> (2) Condition A is that the body of persons or trust has complied with any requirement to be registered in the register of charities kept under section 29 of the Charities Act 2011.
>
> (3) Condition B is that the body of persons or trust has complied with any requirement under the law of a territory outside England and Wales to be registered in a register corresponding to that mentioned in sub-paragraph (2)."

21. The Management condition is dealt with by paragraph 4 Schedule 6 FA 2010 and provides:

> "**4 Management condition**
>
> (1) A body of persons or trust meets the management condition if its managers are fit and proper persons to be managers of the body or trust."

The decision of the Tribunals below

22. On the main question of statutory construction, the FTT accepted the Club's case that it was possible for the Club to be both a CASC and a charity for the purposes of paragraph 1 Schedule 6 FA 2010, notwithstanding the apparent width of the deeming provision in section 6 CA 2011. Its core reasoning on this issue, can be summarised as follows.

23. Parliament deliberately enacted two separate definitions of "charity" in the FA 2010 (the concept of "a Finance Act charity") and in the CA 2011 (the concept of "a Charities Act charity") respectively. These are relevant to completely separate matters (tax benefits for the former and regulatory requirements for the latter). Though the FA 2010 definitions cross-refer to the CA 2011 definitions, they were not intended to be aligned. The question whether the Club was established for charitable purposes only is to be found by applying section 2 CA 2011 but paragraph 1(4) Schedule 6 treats section 2 CA 2011 like a dictionary in order to provide the meaning of "charitable purposes" for the purposes of the FA 2010 definition.

24. The effect of section 6 CA 2011 is that a CASC established for charitable purposes is treated as not so *established* with the result that a CASC cannot be a Charities Act charity. But the deeming provision (section 6) does not alter the meaning of charitable purposes where it applies (and does not prevent the advancement of amateur sport from

being a "charitable purpose" within section 2 CA 2011). It only applies for the purposes of the CA 2011, meaning an entity cannot be both a CASC and a Charities Act charity for the purposes of the CA 2011. However, section 6 does not prevent a CASC being a Finance Act charity. The FTT found support for that conclusion in the absence of any cross-reference (direct or indirect) in Schedule 6 FA 2010 to section 6 CA 2011 despite cross-references to other provisions of the CA 2011. Moreover, section 2 CA 2011 also cross-refers to other sections, but not to section 6 CA 2011. Parliament explained precisely in Schedule 6 FA 2010 which provisions of CA 2011 were relevant to the Finance Act charity definition and these did not include section 6 CA 2011.

25. The purpose of section 6 CA 2011 (like its predecessor sections 5(4) and 5(5) Charities Act 2006) was to prevent CASCs from being subject to regulation under CA 2011 by preventing them from being Charities Act charities. This could be achieved without section 6 preventing CASCs from being Finance Act charities. The relevance of section 6 CA 2011 therefore, was simply to prevent a CASC from being a Charities Act charity even if the purposes for which it is established amount to charitable purposes that fall within section 2 CA 2011.

26. On the questions of fiscal neutrality and equal treatment the FTT rejected the Club's argument that these principles required the relevant supplies to be treated as zero-rated. The Club had not demonstrated that it was in an objectively similar position to Charlbury Cricket Club for equal treatment purposes. As for fiscal neutrality, the FTT held that this principle relates to supplies of goods and services and provides, in essence, that supplies of similar goods and services should not be treated differently. The Club was seeking to extend the principle to the recipients of supplies by arguing that, since the Club and Charlbury Cricket Club are objectively similar, the supplies of construction goods and services that they received should be treated in the same way for VAT purposes. There was no authority to support the extension of the principle for which the Club contended. Moreover, the FTT was not satisfied that the Club and Charlbury Cricket Club (or any other charitable sports club) were objectively similar.

27. The FTT dismissed the Club's appeal, but as indicated, this was on a basis conceded to have been erroneous. The result was that on the FTT's findings and conclusions, the Club would have been entitled to the zero-rating contended for as a charity despite its registered status as a CASC.

28. The UT reversed the FTT's conclusion that the Club was a charity within Schedule 6 FA 2010. The UT considered that a "purely textual analysis" of the relevant legislation supported the Club's case. The purpose of Schedule 6 FA 2010 was to provide a new definition of "charity" for tax purposes which was distinct from the definition of "charity" for the purposes of charity law generally. This definition is wider than that in CA 2011 because of the need to include bodies established and recognised as charitable in other EU member states, through a wider jurisdiction condition. It is also more restrictive because of the requirement to meet the management condition. Further, there is no cross-reference, express or implied, to section 6(1) CA 2011 in Schedule 6. This is particularly striking given that CASCs are expressly addressed in Part 3 Schedule 6; it would have been very easy to insert an express cross-reference to section 6 CA 2011 but Parliament chose not to do so.

29. The UT rejected many of the arguments advanced by HMRC but found persuasive their argument that there is no indication that the mischief at which Schedule 6 FA 2010 was

aimed was, or included, a desire to return to the position that a sports club could be both registered as a CASC and at the same time, benefit from the tax relief available to charities.

30. The UT considered the legislative history including the fact that when the predecessor Charities Act 2006 ("the CA 2006") was passed, the opportunity was taken, through section 5(4) CA 2006, to make it impossible for such a club to be both a CASC and a charity. The UT held that the purpose of this, in light of the Hansard extracts placed before it, was not only to exempt CASCs from the regulatory burden of being charities, but also to effect a sharp divide between CASCs and charities. Thus the status quo at the time Schedule 6 FA 2010 was enacted, was that a CASC could not be a charity. The UT reasoned that it would be surprising if the same government that enacted section 5(4) CA 2006 had decided to reverse this position without identifying why, or some mischief in the law. The UT concluded that it would be anomalous if this position was reversed; it would mean reverting to a position that Parliament had recently deliberately moved away from on the grounds that it was flawed. Moreover, the previous position would not simply be restored, but rather than being subject to regulatory burden, a CASC would be exempt from the administrative and other requirements applicable to charities by virtue of section 6 CA 2011. The legislation should, if reasonably possible, be construed to avoid that anomalous effect. This was not difficult, as there was no reason why section 6 CA 2011 should not be regarded as a statement of the general law, applicable also to paragraph 1(1)(a) Schedule 6 FA 2010. This would give effect to the statutory purpose.

31. The UT added a "footnote" regarding the jurisdiction condition (in other words, the requirement for an entity to "be subject to the control of… a relevant UK court in the exercise of its jurisdiction with respect to charities"). The UT acknowledged that the point had not been argued by HMRC, (indeed, they had conceded the jurisdiction point) and had not been canvassed with the parties. However, the UT reasoned that the Club not being a charity within CA 2011, was not subject to the control of the High Court in the exercise of its jurisdiction with respect to charities and hence could not meet the jurisdiction condition and be a charity for Schedule 6 purposes. This was regarded as consistent with, and strongly supportive of, the conclusion the UT reached on the main point of construction.

32. As for fiscal neutrality, the UT rejected the Club's case that this principle could be extended to the recipient of supplies; the principle focuses on whether the supplies are objectively similar from the perspective of the typical consumer, so inevitably focuses on the position of the traders in question. The principle does not extend to recipients of supplies who, for social policy reasons, are treated differently for the purposes of some VAT reliefs by statute.

33. The UT also rejected the Club's submissions on equal treatment. It held that a body that is a charity (such as Charlbury Cricket Club) and a body that is not (such as the Club) are not objectively the same.

The appeal

34. There are three grounds of appeal advanced by the Club. These can be summarised as follows:

i) First, the Club contended that the UT was wrong in law in its analysis of the relevant legislation and its effect: the definition of "charity" in CA 2011 expressly excludes CASCs from being charities (section 6 CA 2011) but there is no equivalent exclusion in the definition of "charity" for tax purposes in Schedule 6 FA 2010, and therefore, no bar preventing a CASC from being a "charity" for tax purposes within Schedule 6 FA 2010.

ii) Secondly, the UT was wrong to conclude that the Club failed to satisfy the "jurisdiction condition" in paragraphs 1(1)(b) and 2 Schedule 6 FA 2010. Its finding was procedurally unfair in the circumstances and wrong as a matter of substantive law.

iii) Thirdly, if wrong on the question of construction, the Club contended that the UT erred in law in concluding that there is no breach of the EU law principles of equal treatment and/or fiscal neutrality as those principles apply in the context of VAT, in a situation where the Club was only prevented from qualifying as a "charity" for tax purposes, and thereby denied zero-rating, by the operation of the deeming provision in section 6 CA 2011. The Club contended that another similarly situated local cricket club (such as Charlbury Cricket Club) also in fact established for charitable purposes only but not registered as a CASC, would be entitled to zero-rating of the same construction services, and the two should have been treated in the same way by application of either or both principles.

35. So far as the second ground is concerned, it is regrettable that the jurisdiction condition was considered and addressed by the UT without first canvassing the point with the parties, especially in circumstances where it had been conceded by HMRC. However, Mr Watkinson has now conceded that the point does not in fact provide any independent support for the UT's conclusion that the Club could not be a charity for Schedule 6 FA 2010 purposes, and simply flows from the conclusion already reached by the UT. We agree with him in this respect and consider that the concession was correctly made. In those circumstances, it is unnecessary to consider this point as a separate ground of appeal, and I address it only very briefly below.

36. Accordingly, there are two live issues that arise for determination:

i) First, whether the effect of section 6 CA 2011 is to prevent a CASC from being treated as established for charitable purposes, and thereby to prevent the Club (as a registered CASC) from being a charity within the meaning of Schedule 6 FA 2010 and entitled to the zero-rating of the supplies of construction services sought.

ii) Secondly, and only if the Club fails on the first issue, whether the denial of zero-rating for VAT on the supply of construction services to the Club, which was a CASC established for charitable purposes only as a matter of fact, but is deemed not to be so established, constituted a breach of the EU principles of equal treatment and/or fiscal neutrality.

37. I deal with each issue in turn.

Issue 1: whether the Club is a charity for VAT purposes

38. Before addressing the submissions on this issue, the UT set out the historical development of the definition of "charity" for VAT purposes. Both sides accepted the accuracy of its account, and given its relevance, I gratefully adopt it here:

> "67. Prior to the enactment of the Charities Act 2006, which came into force on 1 April 2008, the definition of a "charity" in English law for the purposes of both charity law and tax law, was derived from the Charitable Uses Act 1601 and subsequent case law. Thus, prior to 1 April 2008, a tribunal interpreting the meaning of "charity" in relation to the VAT legislation had to engage in an exercise of determining what a charity was as a matter of general law.
>
> 68. As recorded by the FTT at [67], in November 2001 the Charity Commission reversed its long-held view that local amateur sports clubs were incapable of being charities and recognised "the promotion of community participation in healthy recreation by the provision of facilities for the playing of particular sports" as a charitable purpose. Therefore, at that stage a cricket club such as ECC may have been capable of recognition for VAT purposes as a charity.
>
> 69. The concept of a CASC was introduced by the Finance Act 2002 (section 5 and Schedule 18). This came into force on 6 April 2002 and provided certain tax reliefs for CASCs, none of which concerned VAT. The effect of the CASC legislation, which in essence created a statutory entity that exists only for the purposes of taxation treatment, was to give CASCs some but not all of the tax benefits available to charities.
>
> 70. Section 1 of the Charities Act 2006 ("CA 2006") provided a statutory definition of charity which was in force between 1 April 2008 and 13 March 2012. The definition was substantially identical to that subsequently to be found in section 1(1) CA 2011 as set out at [29] above. That definition was expressed to be for the purposes of the law of England and Wales, and was therefore of general application, although section 1(2) CA 2006 provided that the definition did not apply for the purposes of an enactment if a different definition of that term applied for those purposes by virtue of that or any other enactment. As there was no separate definition of "charity" at that time for VAT purposes the definition would have applied for the purposes of VATA.
>
> 71. Thus, when section 1 CA 2006 came into force a club such as ECC could continue to be treated as a charity for VAT purposes, even though it might also have registered as a CASC. Consequently, as recognised by the FTT at [68] of the Decision, between 6 April 2002 (when the CASC legislation came into force) until the coming into force of section 5 CA 2006 on 1

> April 2009, as referred to below, it was possible for a local sports club to be both a CASC and a charity.
>
> 72. Section 5 CA 2006 contained in section 5(4) and (5) substantially identical provisions to that now contained in section 6 CA 2011, as set out at [35] above. Therefore, from 1 April 2009, when those provisions came into force, a club registered as a CASC could no longer be a charity for the purposes of the law of England and Wales and could not therefore obtain any kind of VAT relief. The consequence was expressly recognised by the secondary legislation bringing section 5(4) and (5) CA 2006 into force: see The Charities Act 2006 (Commencement No.4, Transitional Provisions and Savings) Order 2008 (SI 2008/945), Article 11(2) of which made provision for the position where a CASC "ceases to be a charity" on 1 April 2009 as a result of the coming into force of section 5(4) CA 2006.
>
> 73. It was common ground that at least one purpose of the enactment of section 5(4) CA 2006 was to absolve CASCs from being subjected to the additional, potentially burdensome, administrative requirements of registering as a charity for charity law purposes under CA 2006. Thus, at the time that section 5(4) CA 2006 came into force a CASC that was charitable could cease to be registered as a CASC, register as a charity and be subject to the administrative requirements of CA 2006 and get the full tax benefits of being a charity; or it could decide not to do so and remain a CASC and obtain the more limited tax benefits available to a CASC.
>
> 74. The position of CASCs remained the same under CA 2011 which came into force on 14 March 2012. CA 2011 was a consolidating Act and made no relevant changes to the law in respect of charities.
>
> 75. It was common ground that the purpose of the enactment of Schedule 6 FA 2010 was to enact a separate definition of "charity" specifically for tax law purposes. Article 5 of the Finance Act 2010, Schedule 6, Part 1 (Further Consequential and Incidental Provision etc) Order 2012 (SI 2012/735) the "Order") provided that in relation to supplies of goods or services made on or after 1 April 2012, the definition of "charity" in section 1(1) CA 2011 ceased to apply "for the purposes of enactments relating to value added tax to which it would otherwise apply" and accordingly the definition of "charity" in Part 1 of Schedule 6 FA 2010 applied for the purposes of those enactments."

39. In light of that history Mr Brinsmead-Stockham submitted to the court that throughout the period from 24 July 2002 to 1 April 2009 it was possible for a CASC to be a charity at the same time. While there was a change in the legislation that prevented a CASC from being a charity for tax or general purposes between 1 April 2009 and March 2012,

the real question is whether that prohibition remained thereafter. Mr Brinsmead-Stockham submitted that if Parliament had intended to exclude CASCs from the definition of charity introduced by Schedule 6 FA 2010 it could easily have done so. Instead, having had a single definition of charity for all purposes, a new and separate definition of charity for tax purposes was introduced. This relied on the same concepts as those used in the CA 2011 definition, but without any reference (whether direct or indirect) to section 6 CA 2011. The wording of Schedule 6 FA 2010 is clear and demonstrates that its effect was to return to the position that applied between 2002 and 2009, namely an entity could at the same time be both a CASC and a charity for VAT purposes. Although section 6 CA 2011 remains relevant to the Club's status for charity law purposes, that provision is not relevant to its status for tax purposes. A CASC can be a charity for tax purposes, but that will be the case if (and only if) the CASC in question satisfies the tax law definition of "charity" in Schedule 6 FA 2010. Thus, the categories of "CASC" and "charity" are distinct but overlapping and section 6 CA 2011 does not operate as an absolute bar to prevent a CASC from being a charity for tax purposes.

40. Mr Brinsmead-Stockham made comprehensive submissions in support of that conclusion and submitted that the FTT's decision on this issue was correct and the UT's was in error. In summary:

(1) He relied on the new and distinct definition of "charity" for tax law purposes provided by Schedule 6 FA 2010, which cross-refers to, but is separate and distinct from, the definition of "charity" (and related concepts) in CA 2006, as subsequently consolidated in CA 2011.

(2) The Schedule 6 definition of "charity" for tax law purposes relies on the concept of "charitable purpose" as defined in section 2 CA 2011: paragraph 1(4) Schedule 6 FA 2010. The concept of "charitable purpose" in section 2 CA 2011 is defined exclusively and exhaustively by reference to sections 3 to 5 CA 2011 and section 2 CA 2011 is expressly subject to section 11. However, there is no reference at all, whether direct or indirect, to section 6 CA 2011. Section 6 CA 2011 is simply not relevant to the definition of "charitable purpose" and is a deeming provision that operates outside that definition of "charitable purpose". So the advancement of amateur sport remains a charitable purpose within section 2 CA 2011 even if section 6 CA 2011 applies and section 6 CA 2011 merely provides that CASCs are treated as not being established for charitable purposes, rather than that a CASC is not established for charitable purposes.

(3) The absence of any cross-reference in Schedule 6 FA 2010 to section 6 CA 2011 is particularly striking given that paragraph 1(4) Schedule 6 FA 2010 cross-refers directly to sections 2, 7 and 8 and indirectly to sections 3, 4 and 5 CA 2011 (through section 2 CA 2011). It would have been easy to include a cross-reference (or a provision equivalent to section 6 CA 2011) in Schedule 6 FA 2010, and therefore the Parliamentary drafter must be taken to have made a deliberate choice not to do so. That is reinforced by the fact that this is not a case where it can be said that CASCs were overlooked in the drafting of Schedule 6, since Part 3 Schedule 6 demonstrates that the drafter had CASCs well in mind.

(4) There is no basis on which to read a reference to section 6 CA 2011 into the express wording of Schedule 6 FA 2010. The natural and ordinary meaning of the words in

Schedule 6 leads to the answer provided by the Club and upheld by the FTT's analysis which was clear and logical: "charitable purpose" in Schedule 6 FA 2010 is a term defined without reference to section 6 CA 2011. That provision is simply not relevant to the determination of whether the Club was established for "charitable purposes" or is a "charity" for the purposes of Schedule 6 FA 2010.

(5) The UT accordingly erred by reading into Schedule 6 a reference to section 6 CA 2011 without any proper basis for doing so. The contextual considerations identified by the UT could not override the natural and ordinary meaning of the words. Further, too much weight was attached to the legislative status quo in circumstances where Schedule 6 changed the legal landscape so that there is no reason to think that Parliament wanted to maintain the status quo. The UT also placed too much reliance on the absence of a statement in the Explanatory Notes or in Hansard (both admissible aids to construction) that Parliament intended to return CASCs to the position that previously applied when, provided they had exclusively charitable objects, they were on an equal footing with charities for all tax reliefs, including VAT. Put simply, there was no conflict between the clear words of the statute and those materials. Moreover, the UT was wrong to attribute the Government's purpose to Parliament.

(6) Mr Brinsmead-Stockham also rejected the UT's suggestion that CASCs would be in a uniquely privileged position as charities on the Club's case and/or that this would be anomalous: Schedule 6 is simply dealing with charitable tax entities which do not need to be regulated as charities by the Charity Commission, given the "management condition" monitored by HMRC, and the requirement for a published list of CASCs over which HMRC have oversight. This brings CASCs into line with a multitude of charities that are exempt from the requirements of registration with the Charities Commission but nevertheless benefit from being classed as charities without such registration (see sections 29, 22 and Schedule 3 CA 2011). There is no anomaly, but even if a minor anomaly results, there is nothing undesirable about it: a club established exclusively for charitable purposes entailing public benefit should be entitled to the tax reliefs available that enhance the public benefit. The Club's construction does not result in manifest absurdity and such anomaly as is found cannot limit the meaning to be attached to the clear language of the statute.

(7) Finally, Mr Brinsmead-Stockham submitted that the UT incorrectly derived the purpose or aim of Schedule 6 as excluding CASCs from the tax charity definition, solely from the context of the enactment of the legislation, as opposed to the wording of the legislation itself which does not reflect this purpose, contrary to *Astall v HMRC* [2009] EWCA 1010, [2010] STC 137 at [44]. The changes introduced by Schedule 6 were to comply with the *Persche* decision and to introduce the "fit and proper persons" test; neither of which leads to the conclusion that Parliament intended to exclude CASCs from the new definition. The need to introduce a new definition of charity for tax purposes to secure compliance with EU law in fact provides a possible reason for allowing CASCs to qualify – Parliament could very well have intended to make CASC status irrelevant for tax purposes to secure compliance with the EU principle of equal treatment.

(8) In conclusion, Mr Brinsmead-Stockham submitted that section 6 CA 2011 is confined to operating within CA 2011 and as a deeming provision, care should be taken not to extend the effect of the deeming provision beyond its statutory purpose

(*Polydor Ltd v Harlequin Record Shops Ltd* [1980] 1 CMLR 669 at [11]; *Fowler v HMRC* [2020] UKSC 22, [2020] 1 WLR 2227 at [27]; and *Szoma v Secretary of State for DWP* [2005] UKHL 64, [2006] 1 AC 564 at [25]. Once Schedule 6 came into force, it was unnecessary to read the section 6 CA 2011 deeming provision into the tax law definition to achieve the purpose of section 6. If the purpose was to prevent CASCs from being subject to administrative and regulatory burdens, it is unnecessary to carry the deeming into the new definition to achieve this in the circumstances described.

41. Mr Watkinson resisted these submissions. While he sought to uphold the UT's conclusion on this issue, he contended that the UT was wrong in its textual analysis of Schedule 6 and its inter-relationship with the CA 2011, and section 6 CA 2011 in particular. His broad submission in short was that there is no reason why section 6 CA 2011 should not be regarded as a statement of the general law, and fully applicable to paragraph 1(1)(a) Schedule 6 FA 2010. The ordinary meaning of the words used in section 6 CA 2011 is clear and unambiguous: the deeming applies for all purposes. There is nothing in the statutory purpose as derived from the words of the statute that militates against the ordinary meaning of the words used. To the contrary, purpose, history and context all support that meaning.

Discussion and analysis of issue 1

42. I start with the proper approach to the exercise of statutory interpretation in this case. Although we were referred by both parties to a large number of cases (some relatively old), both agreed that the following passages reflect a convenient summary of the modern approach to interpretation, including where tax statutes are concerned.

43. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 Lord Bingham of Cornhill described the court's task as follows:

> "8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. …. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem … The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

44. In *Pollen Estate Trustee Co Ltd v Revenue & Customs Comrs* [2013] EWCA Civ 753, [2013] 1 WLR 3785 Lewison LJ (with whom Laws and Macfarlane LJJ agreed) encapsulated the modern approach as follows:

> "24. The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute

> as any other: *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, 999; *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 AC 684 (§ 28). In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: *WT Ramsay Ltd v Commissioners of Inland Revenue* [1982] AC 300, 323; *Barclays Mercantile Business Finance Ltd v Mawson* (§ 29). The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found: (*Barclays Mercantile Business Finance Ltd v Mawson* (§ 32)."

Of course, where there is nothing in the statutory purpose as derived from the words of the statute that militates against the ordinary meaning of the words used, then the ordinary meaning of the words will apply.

45. It is also common ground that the court should seek to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Thus the court will presume that Parliament did not intend a construction that would operate in a way that is unworkable, impracticable, anomalous or illogical (see the observations of Lord Kerr in*, R v McCool (Northern Ireland) (Rev 1)* [2018] UKSC 23; [2018] 1 WLR 2431 at [24] and [25], endorsing passages from Bennion on Statutory Interpretation (2013) (6th edition) at section 312.

46. Adopting that approach and recognising that this is a case where two Acts must be interpreted together in a coherent way, I will start by analysing the words used by Parliament in enacting Schedule 6 FA 2010, having regard to the statutory purpose, legislative history and context of the enactment.

47. Section 30 FA 2010 provides "Schedule 6 contains provision about the meaning of "charity" (and related expressions) and "community amateur sports club"." The two are identified as separate concepts and Schedule 6 itself deals with them separately: charities in Part 1 and CASCs in Part 3. The scheme of Schedule 6 reflected the fact that these are (and were) separate and distinct entities eligible for different tax reliefs. CASCs in particular had never been entitled to VAT relief as CASCs.

48. Schedule 6 introduced a new definition of "charity" for tax purposes. It did this by reference to existing legislation, and by specifically amending, disapplying or repealing other provisions to bring itself into effect. (See the wide powers given to HMRC by

paragraph 29 Schedule 6 to make such consequential provision as appeared appropriate in consequence of or in connection with Part 1 by "repealing, revoking or otherwise amending any enactment or instrument (whenever passed or made)"). In that sense Schedule 6 was not a self-contained or fully independent statutory scheme, as Mr Watkinson submitted.

49. Moreover paragraph 33, which dealt with the commencement of Part 1 (broadly treated as having come into force on 6 April 2010), made clear that the definitions of "charity" and related concepts in Part 1 did not apply for the purposes of an enactment in relation to which another definition applied on 6 April 2010 "until such time as that other definition ceases to have effect on the coming into force of provision made by or under Part 2" (see paragraph 33(2)). Further, pursuant to Article 5 of the Order (set out above) the definition of "charity" in section 1(1) CA 2011 ceased to apply for the purposes of enactments relating to VAT to which it would otherwise have applied on or after 1 April 2012 and the definition of "charity" in Part 1 of Schedule 6 FA 2010 applied for the purposes of those enactments.

50. Paragraph 1(1) Schedule 6 FA 2010 provides that for a body to qualify as a charity for tax purposes it must fulfil four conditions: (a) the charitable purpose condition, (b) the jurisdiction condition, (c) the registration condition and (d) the management condition.

51. This definition of a tax charity was both new and distinct from the definition of "charity" for general purposes in the CA 2011. As the UT observed, the new definition provided by Schedule 6 FA 2010 differed from the CA 2011 definition in two particular respects: first it permitted a charity established under the laws of other EU member states to be treated as a "charity" for tax purposes and so qualify for UK tax reliefs; secondly, it introduced a new management condition requiring the managers of the charity to be "fit and proper persons" in order to qualify for the tax reliefs. Subject to those two points however, there is nothing in the wording of Schedule 6 to indicate an intention to depart significantly from the CA 2011 definition of "charity" in the new definition of "charity" for tax purposes.

52. Although at one point I considered that paragraph 1(3) (which makes the four conditions in sub-paragraph 1 subject to "any express provision to the contrary") might have been an implicit reference to section 6 CA 2011, like the UT I have concluded that is not likely to be the case, and it was not relied on by Mr Watkinson. Had the drafter had section 6 CA 2011 in mind, I consider that the more natural place to express this reservation would have been as a qualification to paragraph 1(4) which contains the cross-reference to the meaning of charitable purpose in section 2 CA 2011. As it is, paragraph 1(3) only qualifies sub-paragraphs (1) and (2) which deal with the definition of "charity" and is likely to have been a belt and braces measure in case there were other express contrary provisions of which the drafter was unaware.

53. Returning to the charitable purpose condition, in order to meet the charitable purpose condition in paragraph 1(1)(a) Schedule 6, the body concerned must be established "for charitable purposes only" and this has the meaning given in section 2 CA 2011 (see paragraph 1(4) Schedule 6). The fact that there are two different definitions of charity in FA 2010 and CA 2011 led the UT to conclude that it was necessary to look with care to see what provisions of CA 2011 were relevant to the Schedule 6 definition and to conclude that the absence of a cross-reference to section 6 CA 2011 was striking. It is certainly true that there are both direct and indirect cross-references in paragraph 1

Schedule 6 FA 2010 to sections 2 to 5 (and 11) CA 2011, but no cross-reference at all to section 6 CA 2011 in paragraph 1(4). However, in my judgment it does not follow that the absence of any reference to section 6 CA 2011 in Schedule 6 FA 2010 means that provision does not apply to Schedule 6 tax charities. To the contrary, in my judgment, there is no express cross-reference to section 6 CA 2011 in Schedule 6 because there is no need for any such cross-reference. For the reasons that follow, I agree with Mr Watkinson that section 6 CA 2011, which was in force before Schedule 6 was enacted, stands as a statement of the general law of England and Wales for all purposes, unless and until expressly disapplied.

54. Section 6(1) CA 2011 (which provides that a registered sports club established for charitable purposes "is to be treated as not being so established, and accordingly cannot be a charity") is undoubtedly a deeming provision but there is nothing in the words of this section which limit or confine its effect in any way, still less to the operation of the CA 2011. The Club's case entails reading words into section 6(1) CA 2011 (such as "for the purposes of this Act"), words which are simply not there. Instead the language used is general and there is no ambiguity. As a statement of the general law it could not have been clearer: it applies without limitation, and therefore, for all purposes. No cross-reference between section 6 and paragraph 1(1) (a) Schedule 6 was necessary because, on the natural and ordinary meaning of the words used in section 6, its effect is that a CASC is for all purposes, and not just regulatory and administrative purposes, to be treated as not being established for charitable purposes and therefore cannot satisfy the charitable purpose condition in paragraph 1 Schedule 6 FA 2010. As a statement of the general law, there was no reason for section 6 to be directly or indirectly incorporated into the FA 2010. It stands on its own as a provision for all purposes unless disapplied.

55. That being so, it is necessary to consider whether there is any provision in Schedule 6 that limits or disapplies the effect of section 6 CA 2011. None was identified by the parties, and it is clear that there is nothing in Schedule 6 that disapplied or in any way limited the effect of section 6 CA 2011. Furthermore, the secondary legislation that brought the new definition in Schedule 6 into effect (Article 5 of the Order referred to above), provided that in relation to supplies of goods or services made on or after 1 April 2012, the definition of "charity" in section 1(1) CA 2011 ceased to apply for the purposes of enactments relating to VAT to which it would otherwise apply and accordingly the definition of "charity" in Part 1 of Schedule 6 FA 2010 applied for the purposes of those enactments. But nothing in the Order disapplied section 6 CA 2011.

56. Accordingly, as Mr Watkinson submitted, while paragraph 1 Schedule 6 FA 2010 defines a charity for the purposes of VAT as a body established for charitable purposes only, in the absence of any provision capable of disapplying section 6 CA 2011, section 6 CA 2011 operates to deem a CASC as not being established for charitable purposes and therefore not a charity.

57. For all these reasons, I do not accept the submissions made on behalf of the Club, or the reasoning of the UT that a textual analysis of the legislation does not suggest that paragraph 1 Schedule 6 FA 2010 was intended to bring into the definition of a charity for tax purposes the effect of section 6 CA 2011.

58. The conclusion I have reached is also consistent with the broader legislative context, history and purpose of these enactments.

59. The statutory definition of charity provided by section 1 of the CA 2006 (in force between 1 April 2008 and 13 March 2012) was of general application to the law of England and Wales, and applied for all purposes, including tax and more particularly, VAT purposes. Between 6 April 2002 when the special regime for CASCs came into force, and 1 April 2009 when section 5 CA 2006 came into force, it was possible for a local amateur sports club to be both a CASC and a registered charity.

60. However, from 1 April 2009 section 5(4) CA 2006 came into force. This was the predecessor of section 6 CA 2011, and from then a club registered as a CASC was treated as not being established for a charitable purpose and so could no longer be a charity for *any* purpose of the law of England and Wales, including for VAT. It is not disputed by the Club that from 1 April 2009 accordingly, a club registered as a CASC could not obtain any form of VAT relief because the deeming provision in section 5(4) CA 2006 meant it ceased to be a charity. (See also the transitional provisions in article 11(2) of the Charities Act 2006 (Commencement No.4, Transitional Provisions and Savings) Order 2008, SI 2008/945 (as enacted) under which a CASC "ceased to be a charity" on 1 April 2009 as a result of that section coming into force). Parliament's decision to exempt CASCs that would otherwise qualify as charities from the potentially burdensome administrative requirements of registering as a charity, made it impossible for a club to be both a registered CASC and a charity at the same time. As the UT said, a sharp divide between the two was effected from 1 April 2009 onwards, and existing CASCs had to choose whether to cease their CASC registration and register as charities (provided they were eligible) with the attendant administrative requirements but also the full tax benefits allied to that status; or to remain as CASCs capable of accessing only the more limited tax reliefs available to CASCs, but without the potential administrative burdens of being a charity.

61. The CA 2011 introduced with effect from 14 March 2012, was a consolidating Act that made no relevant changes to the law of charities. Once in force, section 6 CA 2011 continued to prevent CASCs from being treated as established for charitable purposes, and therefore from being charities.

62. Schedule 6 FA 2010 came into force on 1 April 2012. Its clear purpose was to introduce a new and distinct definition of "charity" for tax law purposes in order to comply with the ECJ's judgment in *Hein Persche v Finanzamt Lüdenscheid* Case C-318/07 [2009] ECR I-359, requiring the extension of UK charitable tax reliefs to bodies equivalent to charities and CASCs in other European and EEA member states, as the Explanatory Notes to FA 2010 made clear. The Explanatory Notes and other extrinsic aids to interpretation were looked at and considered by the UT but only to assist in identifying the mischief at which the legislation was aimed. The Explanatory Memorandum to the Order also explained the background to *Hein Persche* and that Article 56 of the Treaty precludes legislation of a member state which restricts the benefit of a tax deduction to gifts made to bodies established in that member state without the possibility of the taxpayer showing that a gift made to a body established in another member state satisfies the relevant legislative requirements for the grant of the same tax benefit. The Explanatory Memorandum to the Order also made clear that the new definition was more restrictive and would help protect the UK exchequer from non-compliance and fraud, by introducing an additional "fit and proper" test for the management of the charity. However, as Mr Watkinson emphasised, nothing in these documents evidenced any intention by Parliament to take what would have been the radical step, of putting

CASCs with exclusively charitable objects and charities back on an equal footing for all tax reliefs, including VAT. There is simply nothing in that material to suggest that this was part of the mischief to which Schedule 6 FA 2010 was directed.

63. Moreover, if Mr Brinsmead-Stockham's construction were correct, CASCs would be the only type of body that would be entitled to the tax reliefs available to charities without having to register as a charity or fit within an express exception. That, in my judgment, would be anomalous.

64. I can see nothing in the clear and unambiguous language of Schedule 6 FA 2010, (or indeed in the Explanatory Notes and Memorandum) to indicate that Parliament intended a fundamental change in the earlier, deliberate approach adopted in relation to CASCs with effect from 1 April 2009, in order to return to a position where a club could be both a CASC and a charity at the same time. If Parliament had intended to modify the regime introduced in 2009 in this way, I would have expected this to have been done expressly and clearly by disapplication or repeal of the relevant provisions. I would also have expected some indication of this policy objective to be reflected in the Explanatory Notes, Explanatory Memoranda or in the Hansard debates at the time. The absence of any reference whatever to such a fundamental policy change suggests strongly that there was no such policy change at all. That is not to displace the clear meaning of the statutory provisions, or to put too much weight on these features. As I have already indicated, I regard the meaning of section 6 CA 2011 as clear: a CASC is for all purposes to be treated as not established for charitable purposes and accordingly, cannot satisfy the requirement in paragraph 1(1)(a) Schedule 6 FA 2010 of being established for charitable purposes only.

65. Finally, I should deal briefly with the footnote added by the UT at paragraph 123 of the judgment in relation to the jurisdiction condition.

66. The consequence of the deeming provision in section 6 CA 2011 is that a CASC cannot be a charity. It follows from the fact that it cannot be a charity that it is not subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. The jurisdiction condition in Schedule 6 FA 2010 is identical to that in section 1(1)(b) CA 2011. Accordingly, if a CASC does not satisfy the condition in CA 2011, it cannot satisfy it in FA 2010. As already indicated, this point adds nothing to the debate and provides no independent support for the conclusion I have already reached. To the extent that the UT appeared to derive independent support for their analysis of the correct construction of Schedule 6 FA 2010 and section 6 CA 2011 from this point, I do not think they were correct to do so. It is not independent of the earlier analysis but simply a consequence of it.

67. For all these reasons, and in agreement with the conclusion reached by the UT, the Club cannot be a charity for the purposes of Schedule 6 FA 2010 and cannot as a matter of domestic law obtain the benefit of zero-rating on the supply of the relevant construction services.

Issue 2: does the denial of zero-rating in these circumstances breach the EU principles of equal treatment and/or fiscal neutrality.

68. My conclusion on the first issue means that it is necessary to address the argument advanced on behalf of the Club, based on principles of EU law.

69. Although the two principles of equal treatment and fiscal neutrality are related, they are nonetheless distinct principles as Mr Brinsmead-Stockham emphasised. The principle of equal treatment requires that similar situations must not be treated differently unless such difference is objectively justified: see *Marks & Spencer v HMRC* (Case C – 309/06) [2008] STC 1408 at [51]. The principle of fiscal neutrality by contrast, precludes treating similar goods and supplies of services which are in competition with each other, differently for VAT purposes; but the similar nature of the two supplies of services entails the consequence that they are in competition with each other so that it is not necessary to demonstrate the "actual existence of competition between two supplies of services" or the "existence of distortion of competition" in order to show a breach of this principle: see *Rank Group plc v HMRC* (Cases C – 259/10 and 260/10) [2012] STC 23 at [32] to [36].

70. Mr Brinsmead-Stockham contended that the only basis on which the Club is not entitled to zero-rating of the relevant construction services is that it was registered as a CASC and as a consequence prevented from being a charity for VAT purposes by virtue of the deeming provision in section 6 CA 2011. The deeming provision is the only thing stopping the Club (which as a matter of fact was established for charitable purposes only) from being a charity and obtaining the same VAT treatment as a charity to which the deeming provision does not apply. This, he submitted, constitutes a clear breach of the principles of equal treatment and fiscal neutrality on the basis that the classification of an entity for the purposes of UK domestic law as either a charity or a CASC, can be of no significance for the purposes of EU VAT law and yet it results in otherwise identical supplies being subject to different rates of VAT. In those circumstances Mr Brinsmead-Stockham submitted that the court is obliged to construe the relevant UK legislation in a conforming way and must hold that the Club is entitled to the zero-rating sought.

71. Mr Brinsmead-Stockham accepted, as he did below, that his argument is dependent on the principle of fiscal neutrality applying not only to the suppliers of the construction services, but also to the recipients of those services. This would be an extension to the principle as it is currently understood and he accepted that he could not identify any authority to support such an extension. Nonetheless in writing he submitted that there is no reason in principle why fiscal neutrality could not apply to prevent a distortion of competition on the basis of the consumer's status, rather than the status of the supply or the supplier. Here the principle is engaged because there is different treatment as between two recipients of the relevant construction services, the Club on the one hand and Charlbury Cricket Club on the other, and the only reason for the different treatment is the Club's registration as a CASC meaning it is deemed not to be a charity. This is not a relevant distinction for EU VAT purposes. The resulting distortion of competition means the principle of fiscal neutrality is engaged. Separately, the unjustified differential treatment between the two clubs breaches the principle of equal treatment.

72. The UT rejected both arguments. It held:

> "181. We reject Mr Brinsmead-Stockham's submission that the principle of fiscal neutrality can be extended to the recipient of supplies. As the authorities clearly demonstrate, the principle focuses on whether the supplies are objectively similar from the perspective of the typical consumer, so inevitably the focus must be on the position of the traders in question. Clearly, ECC and Charlbury Cricket Club are not traders who are in competition with each other.

> As HMRC submitted, the principle does not extend to recipients of supplies who, for social policy reasons, are treated differently for the purposes of some VAT reliefs by statute. That conclusion is sufficient to dispose of ECC's arguments on the principle of fiscal neutrality.
>
> 182. As far as the principle of equal treatment is concerned, a body that is a charity, that is in the example in this case Charlbury Cricket Club, and a body which is not, ECC in this case on the basis of our earlier findings in this decision, are not objectively the same and we do not consider that *Kingscrest* is authority for the contrary proposition. That case was simply concerned with the question as to whether there was a breach of the principle of fiscal neutrality in circumstances where there was different treatment of bodies which were both, according to an independent concept of EU law, charitable organisations."

73. Although in writing Mr Brinsmead-Stockham challenged both conclusions as in error of law, he did not press the argument in relation to fiscal neutrality for the reasons indicated above but reserved his position for a future occasion.

74. So far as the equal treatment principle is concerned the Club submitted that the UT made a number of errors in rejecting its argument. Mr Brinsmead-Stockham submitted that the UT failed properly to apply the principle established by the CJEU in *Kingscrest Associates and Montecello v CCE* (Case C- 498/03) [2005] STC 1547 that the domestic classification of an entity as a "charity" is not relevant to the application of the principle of equal treatment. What matters is the substance of the two situations that are being compared (see *Kingscrest* at [52] to [55]). Here the two clubs were in objectively the same situations for the purposes of the principle of equal treatment: they are both local cricket clubs playing in the same local leagues and both satisfied all of the requirements to be charities for UK law purposes as a matter of fact. The fact that the domestic legislation classifies the two clubs differently (one as a charity and the other not despite both being established for charitable purposes only) is not enough to justify the differential VAT treatment. There must be a substantive justification. Here there was none. Mr Brinsmead-Stockham relied on *Rank* as authority for the proposition that regulatory differences could not have been relied on to explain the differential treatment, but in any event he submitted that HMRC have not previously pleaded this as objective justification. Issues of whether the regulatory regime is necessary and proportionate have not therefore been ventilated and it is now too late to advance this as an argument. Accordingly, Mr Brinsmead-Stockham submitted that there was no tenable objective justification put forward by HMRC, leading to the conclusion that, if section 6 CA 2011 is held to apply to the FA 2010 tax charity definition, this would breach the principle of equal treatment.

75. I do not accept these submissions. This case is not concerned with a harmonised VAT exemption for EU law purposes engaging harmonised concepts such as was in issue in *Kingscrest* and *Rank*, but with a domestic VAT exemption permitted and respected by Article 110.

76. The FA 2010 and CA 2011 together reflect a domestic social policy choice made by Parliament to treat a CASC and a charity as separate and different entities, governed by different regulatory regimes and eligible for different tax treatment. Although there are similarities between the two clubs as Mr Brinsmead-Stockham contended (in terms of their purposes and activities), what is material for VAT purposes is the regulatory

regime (together with its burdens) under which the two clubs have chosen to operate. The legislation permits VAT relief to be afforded to bodies that qualify as and are registered as charities, and so are subject to the High Court's charity jurisdiction, but not to bodies that chose not to do so. For those bodies that chose not to do so, Parliament has allowed for a different option: they can register as a CASC in order to obtain different tax reliefs (though not from VAT) and lesser regulatory burdens, but then cannot qualify as a charity. The two clubs are therefore materially different, or to put it another way, their relevant circumstances are neither similar, nor the same.

77. In any event the difference in VAT treatment is objectively justified. The difference between the two clubs is a substantive difference, and not just a question of deeming. A charity like Charlbury Cricket Club has chosen to submit to the regulatory regime governing charities with the greater burden that imposes, and is accordingly entitled to the VAT relief in question. The Club by contrast has chosen to operate within the CASC regime. That is a choice made for good administrative and tax reasons, but the consequence of choosing to operate within the CASC regime is that the VAT relief sought is not available. The two regimes are different, both in terms of the burdens and reliefs available, and the difference in treatment as between the two clubs is objectively justified by the different regimes they have chosen to operate within.

78. I do not accept the argument advanced by Mr Brinsmead-Stockham that it is too late for HMRC to rely on the different regulatory regimes by way of objective justification. He accepted this was not an evidential point, and his complaint was in reality a pleading point. But in my judgment, this is a question of assessing the legislation that created the two separate regimes. The regulatory differences are inherent in the legislation, and objective justification is a matter for the court to assess. For the reasons I have given the principle of equal treatment does not require the two materially different entities to be treated in the same way; and there are objectively justifiable reasons afforded by the two separate regulatory regimes that apply, for the differential VAT treatment in this case.

79. For all these reasons if my Lords agree, I would dismiss the appeal.

Lord Justice Singh

80. I agree.

Lord Justice Henderson

81. I too agree.