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TC03750

Appeal number: TC/2013/02090

VAT – item 2 Group 5 Sch 8 - building intended for relevant charitable or residential purpose

- *whether use in course of an economic activity - Finland C-246/08 considered: whether supply for consideration is sufficient for economic activity*
- *whether accommodation used for Bible School and short conferences was residential accommodation for students or school pupils*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CAPERNRWAY MISSIONARY FELLOWSHIP OF TORCHBEARERS **Appellant**

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
MRS SHAMEEM AKHTAR**

Sitting in public at 45 Bedford Square WC1 on 1, 2 & 3 April 2014

Laurent Sykes, instructed by Vinson & Elkins LLP, for the Appellant

Raymond Hill and Philip Hicks, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Capernwray, a company limited by guarantee, is a charity whose first object is to advance the Christian faith. Its Mission Statement is to “proclaim the transforming presence of Jesus Christ through biblical teaching and practical training, equipping men and women for service in His church worldwide”.

2. Capernwray occupies Capernwray Hall which comprises a number of buildings centred around the 19th century mansion set in some 175 acres near Carnforth in Lancashire. It is near both the Lake District and the Yorkshire Dales. It is plainly a delightful place. Here, in pursuit of its mission, Capernwray provides a variety of residential conferences and courses.

3. These courses include term time bible study courses and shorter biblically based Christian conferences and courses in the holidays. Capernwray makes a charge for the courses, but does not aim to make a profit. Volunteers assist Capernwray’s staff with the running of the site and the courses.

4. In addition to the main house there is a sports hall, a swimming pool, a dining room and kitchen, staff accommodation (in flats in the buildings and cottages on the estate) and a Conference Hall. It is the Conference Hall which is the subject of this appeal. The appeal concerns whether the supply of the building works for the hall is zero rated.

5. The Conference Hall was substantially completed in 2013. On the lower ground floor there are 14 small dormitories or bedrooms containing in total some 63 beds. The beds are occupied by those attending the courses. On the upper ground floor is a large lecture hall, and on the top floor there are a few smaller rooms.

6. Capernwray sought a ruling from HMRC that the provision of the building was in whole or part zero rated under Group 5 Schedule 8 VAT Act 1994 as a building intended for use solely for a relevant residential or charitable purpose. HMRC refused to give such a ruling and, after a review, Capernwray appeal to this tribunal.

The relevant legal principles.

7. Item 2 Group 5 Schedule 8 VAT Act 1994 specifies for zero rating:

2. The supply in the course of construction of - (a) a building ... intended for use solely for a relevant residential or a relevant charitable purpose.

8. Note (4) defines "relevant residential purpose":

"(4) use for a relevant residential purpose means use as -

(a) ...

(d) residential accommodation for students or school pupils;

except use as a hospital, prison or similar institution or an hotel, in or similar establishment.

9. Note (6) defines "relevant charitable purpose": -

5 (6). Use for a relevant charitable purpose means used by a charity in either or both of the following ways -

(a) otherwise than in the course or furtherance of a business;

(b) as a village hall ...

10. Note (10) permits the zero rating of part of the supply were only part of the building is intended solely for a resident relevant residential or charitable purpose.

10 11. CX argued that:

(1) the Conference Hall was intended for use for a relevant charitable purpose because it was intended for use by a charity (itself) in a manner which was not "in the course or furtherance of a business"; and

15 (2) the lower ground floor of the Conference Hall was residential accommodation for students: namely those who attended its conferences and courses.

12. The arguments before us were limited to whether the activities in which Capernwray intended to use the Conference Hall amounted to a "business", and whether or not the attendees were "students".

20 *Relevant Charitable Use – otherwise than in a business*

13. It was common ground that "business" in Note (6) has the same meaning as "economic activity" in the European Directives' definition of taxable person.

14. The Second Directive did not use "economic activity" in this definition but provided that a taxable person was any person:

25 who independently and habitually engages in transactions pertaining to the activities of traders or persons providing services whether or not for gain.

15. We note in this formulation the final words "whether or not for gain" which appear in modified form in subsequent formulations.

16. Article 4 of the Sixth Directive provided:

30 1. "Taxable person shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

35 2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders or persons in supplying services, including mining and agricultural services and activities of professions. The exploitation of tangible or

intangible property for the purposes of obtaining income therefrom on a continuing basis shall also be regarded as an economic activity

17. Article 9 of the Principal Directive (which is substantially the same as article 4(1) and (2) of the Sixth Directive) now makes the following provision. In the quote
5 which follows we have added subparagraph numbers and sub subparagraph letters to assist in the later discussion:

1 (1) "Taxable person" shall mean any person who independently carries out any in any place any economic activity, whatever the purpose or results of that activity.

10 **(2) (a)** Any activity of producers, traders or persons in supplying services, including mining and agricultural services and activities of professions, shall be regarded as "economic activity". **(b)** The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

15 18. In this definition "purpose" appears twice: first in paragraph 1(1) which requires the purpose or results of an activity to be ignored; and second in paragraph 1(2)(b) which expressly requires cognizance to be taken of one particular purpose.

19. Despite the suggestion to the contrary inherent in "in particular" (rather than the former "also"), our initial impression is that the specificity in paragraph 1(2)(b)
20 indicates that it is *only* when considering whether exploitation of property is an economic activity that purpose is to be taken into account. That construction appears reinforced by the preservation of the original "whether or not for gain" in the wider words of the Principal Directive and the Sixth Directive: "whatever the purpose or results of that activity".

25 20. Before us Mr Hill put at the front of his submissions the recent (2009) CJEU judgement in *Commission v Finland* Case C-246/08. Mr Hill says that:

(1) the principles set out by the CJEU in *Finland* take precedence over domestic precedent;

30 (2) in that case the Court said that the scope of the term "economic activities" is wide and has to be considered without regard to its purpose or results, and that an economic activity as a general rule was an activity which was "permanent and carried out in return for remuneration received by the person carrying on the activity";

35 (3) 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 understood in the case law of the CJEU as part of a legal relationship including reciprocal performance ([43 to 45]) – that was sufficient to make it part of an economic activity;

40 (4) in *Finland* the court took no account of whether the supplies made were similar to other supplies made by businesses. The tribunal should not add to the tests laid down by *Finland*; and

(5) the tribunal was not permitted to have regard to Capernwray's purpose in determining whether it conducted a business. Since it received consideration, it was carrying on a business.

21. Mr Sykes argued that in *Finland*: the Court did not distinguish between remuneration and consideration; that it held that the receipt of consideration was not sufficient to make an activity economic; and that prior decisions of the UK Courts in particular *Lord Fisher*, *ICAEW*, *Yarburgh* and *St Pauls* (all cited later in this decision) expounded principles which were not inconsistent with *Finland*. In particular he said:

(1) that in determining whether activities are economic one must have regard to what they are and the way they are carried out;

(2) the disregard of purpose does not allow "the tribunal to disregard the observable terms and features of the transaction in question and the wider context in which it came to be carried out ... it will need to ascertain the nature of the activities carried on ... the terms upon which and the manner in which those activities ... were carried out and the nature of the relationship between the parties." (Quoting Patten J in *Yarburgh* at [23]);

(3) the question of why activities are carried on will shed some light on what they are;

(4) the fact that a person may have sound financial management does not necessarily mean that its activity was economic activity;

(5) an intention to break even is likely to be a strong pointer that a business is not carried on; and

(6) "the closer connectivity goes to the charitable heart of the charity, the less likely it is to be an economic activity". The charitable heart of Capernwray was evangelism and the conferences were at its heart

22. In *Finland* the State employed lawyers provided legal services to those entitled to legal aid. The beneficiaries of the services made contributions to the State which varied (between nil and 75% of the cost) on the basis of their income. Contributions fell well short of the costs involved. The question was whether the provision of the legal aid services by the State was an economic activity.

23. The Finnish government argued ([29]) that the legal aid services could not be regarded as an economic activity. They were not supplied in such a way as to cover the costs and were mostly financed from public funds: thus their pursuit was not accompanied by the economic risk characteristic of normal commercial activity.

24. In its judgement *Finland* the CJEU relied in particular on three previous decisions of the court.

25. The first was *University of Huddersfield* [2006] STC 980 in which the UK had argued that a university whose transactions formed part of a VAT avoidance scheme was not "engaged in the exploitation of immovable property for the purposes of obtaining income therefrom on a continuing basis when its purpose" was to avoid VAT. In other words that the activity did not fall within paragraph 1(2)(b).

26. The court held at [50] that it was an economic activity. It said that Article 4(2) (new Article 1(2)) was wide comprising "all" activities and that "an analysis of those definitions shows that the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that every activity is considered per se and without regard to its purpose or results". This statement was not directed solely to the paragraph 1(2) (b) argument made by the UK.

27. By contrast in *Hutchinson 3G v UK* [2008] STC 2181 the question referred to the court was whether the granting in return for payment of the 3G frequency licences by the UK was an economic activity for the purposes of Article 4 the Sixth Directive (new Article 9). The Advocate General had opined that the UK government's objective of regulating the market did not preclude the granting of licences from being an economic activity. He concluded that the government's actions were the exploitation of property within what is now paragraph 1(2)(b) ([60 to 73]).

28. The court disagreed. Having referred to the limitation of the otherwise wide terms of what is now Article 9 to activities of an economic nature, it then, at [31], confined its attention to paragraph 1(2)(b). It held that the UK government was not exploiting property: the exploitation was done by the licence holders. Further "the fact that the issuing of licences ... gives rise to a payment cannot affect the legal status of that activity [39]." It was not an economic activity.

29. Third, in *Landesanstalt für Landwirtschaft v Franz Gotz* C-408/76 (2007) a government agency dealt with the sale of surplus milk quota. The CJEU dealt with a preliminary issue as to whether the activities of the agency were "economic activities". It said, at [18]:

"Economic activity" is defined in Article 4(2) of the Sixth Directive as including all activities of producers, traders and persons supplying services, inter alia the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis ... The latter criteria, relating to the permanent nature of the activity and the income which is obtained from it, have been treated by the case law as applying not only to the exploitation of property but to all of the activities referred to Article 4(2) of the Sixth Directive. An activity is thus, generally categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity ...". We have highlighted "generally".

30. In the following paragraph the CJEU finds that the matching of offers to buy and sell milk quota was, unlike the granting of 3G licenses an economic activity.

31. These cases are the basis for [37 to 39] of the Court's judgement in *Finland*:

"[37] An analysis of these definitions shows that the scope of the term economic activities is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results ... An activity is thus, *as a general rule*, characterised as an as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity ...[our italics]

[38] However, it follows from that case law that the receipt of a payment does not, per se, mean that an that a given activity is economic in nature (see *Hutchison 3G ...* and *Gotz...*).

5 [39] ... it is therefore appropriate to consider, in the first place, whether the legal aid services provided by the public offices in legal proceedings in return for a part payment constitute economic activities ...

32. But there is also a line of cases which were referred to by the Advocate General. These cases include *Polysar Investments Netherlands BV v Inspector* [1993] STC 2 to 2 and *Floridienne SA v Belgian State* [2000] STC 1044.

10 33. In *Polysar* the Court had held that "the mere acquisition of financial holdings ... does not amount to exploitation [within paragraph 1(2)(b)] because any dividend yielded by that holding is merely the result of ownership of the property" ([13]), but that it was otherwise where there was direct involvement with the management of the companies whose shares were held.

15 34. In *Floridienne* the question was whether the receipt of dividends from a subsidiary could be a consideration for an economic activity. The court at [21] said that "the receipt of dividends is not consideration for any economic activity", and at [22] explained the features of dividends which accounted for that conclusion: they were dependent upon the investee company's profits, the proportion of those profits
20 received by shareholders was dependent on the shares held not the identity of the investor, and they were merely the results of ownership.

35. The court *Floridienne* then went on to consider whether, if the activities could be characterised as more than the mere acquisition of property and instead as assets being made available or "exploited" (see Advocate General: [25]) a different result
25 would ensue. It said:

" [28]. Where a holding company makes capital available to its subsidiaries, that activity may itself be considered an economic activity, consisting in exploiting that capital with a view to obtaining income by way of interest therefrom on a continuing basis, provided that it is not carried out merely on an occasional
30 basis and is not confined to managing an investment portfolio in the same way as a private investor (see, to that effect, *Wellcome...*) and provided that it is carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment."

36. To our minds, this passage, because it followed its finding that the mere receipt
35 of dividends was not an economic activity (and because it followed the Advocate General's discussion at [25]), addresses paragraph 1(2)(b) and does not embody any indication that purpose may be relevant in a broader context. This also appears to have been the opinion of the Advocate General in *Finland* at [39]:

40 "... In my view this passage seeks to specify the circumstances in which there is an economic activity of "exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis", but it cannot be extended to all other situations covered in Article 4 (2) of the Directive. Any

other interpretation would undermine the objective nature of the concept. The receipt of income is also essential in the other cases, not as a requirement of productivity, but of "reciprocity of services", as explained below."

37. In *Finland* the court reaches its first conclusion:

5 [40] ... in view of the objective character of the term "economic activities", the fact that the activity of the public offices consists in the performance of duties which are conferred and regulated by law, in the public interest and without any business or commercial objective, is in that regard irrelevant. ...

10 38. Mr Hill said that in [40] the court accepts the Advocate General's analysis at [39]. It refers to the activities of the public law office - something not connected to the exploitation of property - and says that business objective or purpose is irrelevant. It thus accepts the Advocate General's conclusion that outside the realm of paragraph (1)(2) (b), business or commercial purpose is irrelevant.

15 39. We agree. The limitation of [40] to the activities of a public office shows that the court is not considering paragraph 1(2)(b) It is finding that business or commercial purpose is irrelevant outside paragraph 1(2)(b).

20 40. In the extract from *Gotz* we highlighted the words "generally". That comment is also relevant in [37] of the court's judgement in *Finland*: "as a general rule". Mr Hill suggests that the only exception to the general rule is specified by the court in the following paragraphs, namely where the supply is not made for consideration.

25 41. In [41] the Court says that it is established that the services were provided on a permanent basis. It then says in [42] that it is appropriate to ascertain whether they were provided for "remuneration". At [43] it says that taxable transactions "presuppose the existence of a transaction between the parties in which consideration is stipulated" and, at [44], that "for consideration" requires reciprocal performance and a direct link between service and consideration. Between [46 and 50] the Court follows the Advocate General in concluding that the contributions made by the legal aid beneficiaries for the services received were "contaminated" by taking account of their income and so did not have the necessary direct and necessary link to the
30 services provided to qualify as consideration. At [51] the Court says:

[51]. Therefore... it does not appear that the link between the legal aid services ...and the payment...is sufficiently direct for that payment to be regarded as consideration...and accordingly, for those services to be regarded as economic activities ..

35 42. It seems to us that in these passages the Court does not draw a distinction between remuneration and consideration. It avoids the question of whether this was an exception by concluding that lack of consideration or remuneration is sufficient to prevent a supply being part of an economic activity. That is not the same as saying that lack of consideration is the only way in which an activity will fail, or that any
40 activity pursued for consideration is necessarily an economic activity.

43. We therefore do not think that the court's judgement is as prescriptive as Mr Hill suggests. The reasoning in *Hutchison 3G* (a case cited by the Court) was not that payment for the licenses was not consideration given for them, but that the activity of granting licences was not the exploitation of property by the UK government.

5 44. We draw the following conclusions:

(1) in a case outwith paragraph 1(2)(b) consideration of business purpose is irrelevant;

(2) there is a general rule: permanent activity for remuneration is economic activity;

10 (3) for these purposes “remuneration” has the same meaning as “for consideration”: it requires a direct link between supply and payment

(4) there are exceptions to the general rule like *Hutchison 3G* (and possibly *Polysar* and cases such as *Wellcome Trust Ltd v C&E Comms* [1996] STC 945 where the activity is analogous to that of the private investor dealing in shares or securities);

15 45. It is not wholly clear whether cases like *Polysar* are exceptions to the general rule or whether they are applications of that rule: it may be that in explaining that any dividend yielded by that holding is merely the result of ownership the Court was indicating that the dividend could not be remuneration for any activity of the investor. But in *Polysar* that statement was made in the context of paragraph 1(2)(b) exploitation and in *Floridiene* the Court applied the same reasoning to interest on loans – and in that situation the investor does make something available to the borrower.

25 46. How then does one recognise the exceptions to the general rule? We were referred to four cases in which the UK courts had found that despite the receipt of payment an activity was not economic. These cases predate the CJEU’s judgement in *Finland*.

(i) *Lord Fisher*

30 47. In 1981 in *Customs & Excise Commissioners v Lord Fisher* [1981] STC 238, Gibson J held that the management of a private shoot for which contributions were received from guests was not a “business principally because it was an activity carried out for private pleasure. In the course of his judgment six indicia of whether an activity was a “business” were advanced which have been considered in many subsequent cases. They were:

35 (1) whether it was a serious undertaking earnestly pursued;

(2) whether it was pursued with continuity;

(3) whether it has a certain measure of substance measured by the value of supplies made;

(4) whether it was conducted in a regular manner on sound and recognised business principles;

(5) whether the activity is predominantly concerned with the making of supplies to consumers for consideration; and

5 (6) whether the supplies are of a kind which, subject to differences in detail, are commonly made by those who seek to profit by them.

48. Mr Hill argued that the fourth of these indicia – the predominant concern criterion – was not relevant to whether or not an activity was economic.

49. This criterion was born in 1978 in *Morrison's Academy* when the Lord
10 President had found that if activities were "predominantly concerned with making supplies to consumers for consideration" that was a clear pointer to the activities being a business.

50. In 1996 in *Wellcome Trust* one of the four questions the ECJ had been asked
15 was whether, in deciding whether "economic activities" was capable of covering share sales by a person who was not a share dealer, it was relevant to consider "whether the sale of the [shares] is the predominant concern of the activity in which the sales take place". The ECJ at [40] held that that

20 "whether or not the sale of shares is the predominant concern of the activity in the course of which the sales in question took place cannot affect the classification.. of the.. activity".

51. The Advocate General had previously said this:

[39] The Commission, in contrast, points out that the notion of "predominant
25 concern" is not used in the directive. Under the directive, it is the inherent nature of the activity itself that is the vital consideration, not whether that activity is always not predominant. I also take the view that, in order to determine whether an activity is an economic activity for the purposes of art 4(2), it is not appropriate to consider whether the activity is not predominant concern. To illustrate this point, I would refer to the activities of the Wellcome
30 Trust in respect of which it is registered as a taxable person. These relate to the sale of books, photographs and so forth, none in any event an activity which is not predominant concern. That notwithstanding, these activities must be regarded as being economic activities for the purposes of the Sixth Directive, whereas the principal occupation of the trust, namely the management of assets, cannot be regarded as an economic activity within the meaning of the Six
35 Directive.

52. In 1999 in *Institute of Chartered Accountants of England and Wales v C & E
Comms* [1999] STC 398 ("*ICAEW*"), Lord Slynn, having referred to the quoted
40 passage from the Advocate General's opinion in *Wellcome* and having quoted the particular phrase "it is the inherent nature of the activity itself that is the vital consideration", turned to the tribunal's consideration in that case of the six indicia from *Lord Fisher*, and its finding that the predominant purpose indicium was not

satisfied. He did not disapprove the use of these tests or say that that indicium was irrelevant although he said the facts of *Lord Fisher* were far from those of the case in hand.

53. In 2004 in *C&E Comms v St Paul's Community Project Ltd* [2005] STC 95
5 Evans-Lombe J quoted [40] of the Court's judgement in *Wellcome* and paragraphs [38 & 39] of the Advocate General's opinion. It had been submitted that on that basis the tribunal in that case should not have considered the predominant concern test. He said at [38] that he agreed that:

10 "whereas the passage from the opinion of the Advocate General is not entirely clear in its meaning and may have suffered in translation such appears to be the effect of [40] of the judgement. However it must be borne in mind that, in the result of this was not the basis on which the court decided the case."

54. He then considered the passage quoted above from *Floridienne* at [28] and said that he considered that in that passage the CJEU had applied to the "predominant
15 *purpose*" test although the judgement did not describe it as such (our italics).

55. Mr Hill argues that given the plain words of the judgement in *Wellcome*, Evans-Lombe J was wrong to conclude that the "predominant concern" test was relevant. In particular he says that the role of the CJEU is to give guidance as to the law and the traditional difference between obitur and ratio is not relevant. Evan-Lombe J by
20 downgrading the CJEU's binding guidance on the basis that it was not the reason the CJEU decided the case was wrong because what the CJEU was deciding was the answer to the very question put to it on which it gave the answer in paragraph [40] of its judgement. Likewise he says Lord Slynn wrongly failed to disapprove the tribunal's reliance on the *Lord Fisher* list of tests in *ICAEW*. That was particularly so
25 given [40] of the judgement in *Finland* where the Court said:

"the fact that the activity consists in the performance of duties ... without any business or commercial objective, is in that regard irrelevant".

56. We agree with Mr Hill that *Finland* makes clear that commercial objective or purpose is irrelevant to the meaning of economic activity in the more general words of
30 article 9(1). But we do not agree that the predominant purpose test as described in *Lord Fisher* is proscribed. We prefer the views of Evans-Lombe J that something was lost in translation: for it seems that in the quoted passage [39] from the Advocate General's opinion he seems to regard the question as being whether the relevant activity was the predominant concern of the enterprise, rather than whether the
35 predominant concern of the activity was making supplies to customers for consideration. Indeed it seems to us that this question is properly understood as asking about the "inherent nature of the activity", and as reflecting the CJEU's "general rule" that a permanent activity carried out for remuneration is an economic activity. So applied and understood it does not conflict with the case law of the CJEU.

40 57. On that basis it seems to us that the *Lord Fisher* indicia may assist in determining whether an activity is of an economic nature.

(ii) *ICAEW*

58. *ICAEW* related to the activity of the ICAEW in licensing auditors and insolvency practitioners, an activity for which it charged a fee. In giving the only judgement in the house of Lords, Lord Slynn regarded the institute as carrying out on behalf of the state a regulatory function for the protection of traders and investors. In reliance on cases like *Eurocontrol* [1994] ECR I-43 (in which the ECJ had held that air navigation control for which a charge was made was not economic activity) , and recognising the question asked by the Advocate General in *Wellcome*: what is “inherent nature of the activity”, he did not consider that this was an economic activity. It does not seem to us that *Finland* indicates that this approach was wrong: the judgment in that case recognises the exception in *Hutchinson 3G*. Nor does it seem to us that this can be treated in the light of *Finland* as a case in which the lack of a direct link between payment and what was provided prevented the supply having been made for consideration.

(iii) *St Pauls*

59. In *St Paul's* Evans-Lombe J, on the basis of *EC v France* [1988] ECR 4797, found that the skewed admissions policy of the nursery towards disadvantaged families, the lower fees charges despite higher salaries for more highly trained staff and pitched only to cover costs indicated that the fees charges represented a concession which in turn indicated that it did not involve an economic activity. It seems to us that this may be viewed in the light of *Finland* either as a conclusion that the activities were not provided for consideration or did not have the inherent nature of an economic activity.

(iv) *Yarburgh*

60. In *C & E Comms v Yarburgh Trust* [2002] STC 207, Patten J emphasised the need for the tribunal to enquire into the wider picture, said that the need to disregard purpose did not require the tribunal to disregard the observable features of the transaction and its wider context, and held that a cooperative venture run by trained staff with help from parents struggling to maintain a balance between being affordable and meeting operating costs entitled a finding that the Trust was not conducting a business. Mr Hills says that to the extent this conclusion regarded the non profit purpose of the Trust as relevant the CJEU had found that to be wrong in *Finland*. We accept that, but the reliance on the nature of the organisation is not so proscribed in evaluating the intrinsic nature of the activity.

61. We conclude that these cases show: (1) the exceptions to the general rule arise where the inherent nature of the activity is not economic, and the circumstances and nature of an organisation may be relevant to this; (2) if the nature of what is received is that it is not consideration for the supply or adequately linked to the supply there will be no economic activity either because the general rule is not satisfied or because that affects the nature of what is done; and (3) the *Lord Fisher* indicia, as we understand them, remain a useful tool in deciding whether or not an activity is economic.

Students: residential accommodation for students or school pupils.

62. What is “residential accommodation for students or school pupils”?

63. The parties accepted that there must be some link between the accommodation and that which made its occupant a student or school pupil: the occupation must be because the occupier is in the capacity of a student or school pupil. Thus a teenager’s bedroom is not residential accommodation for students merely because he or she is still at school; and even if, when studying his barnacles in his study, Charles Darwin might (despite the lack of an institutional framework) be described as a student of natural history, neither his house nor his study would be relevant residential accommodation.

64. In relation to whether or not a person was a student we were referred to the Oxford English Dictionary and *Re Mason (deceased)* 1971 NZLR 714.

65. The Oxford English Dictionary (1989) gives three possibly relevant meanings of student:

1. A person who is engaged in or addicted to study;
- 2.a. A person undergoing a course of study or instruction at a university or other place of higher education or technical training.
- b. A scholar at an institute of primary or secondary education.

66. *Re Mason* concerned the proper construction of a limitation on the gifts which a trust might make to “students or graduates of law”, McMullin J said:

“I think that the word student must also mean a person who is engaged in study whether he be attached to an institute of learning or pursuing some degree or qualification or merely pursuing a reading of the law so long as it is with some close and continuous attention.”

67. Mr Sykes said:

- (1) “student” covers anybody engaged in a course of study or instruction at the institution which teaches. The course of the study does not have to lead to some sort of certification;
- (2) a child could be a student or be treated as incidental to its parents;
- (3) in *Re Mason* the need for close and continuous attention was directed in particular to a person not undergoing a recognised course or pursuing a qualification.

68. It seems to us that the following considerations are relevant to the meaning of paragraph (d).

69. The zero rating in group 5 of relevant residential accommodation is not the implementation of an exemption required by the Directive, but a derogation from the Directive permitted by Article 110 for measures adopted for clearly designed social

reasons and for the benefit of the final consumer. Thus the proper understanding of the meaning of that provision is not dependent upon an EU law understanding of "student". To this extent we reject Mr Sykes suggestion that in construing the provision one should adopt the "strict but not strained" approach normally pursued in
5 construing exemptions which reflect the language of the Directive, but we consider that the construction of the provision should recognise its design for social reasons.

70. . The full text of Note (4) is as follows:

"(4) use for a relevant residential purpose means use as -

- 10 (a) a home or other institution providing residential accommodation for children;
- (b) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder;
- 15 (c) a hospice;
- (d) residential accommodation for students or school pupils;
- (e) residential accommodation for members of any of the Armed Forces;
- (f) a monastery, nunnery or similar establishment; or
- 20 (g) an institution which is the sole or main residence of at least 90 per cent of its residents,

except use as a hospital, prison or similar institution or an hotel, in or similar establishment.

71. It will be seen that student accommodation appears amongst children's homes, hospices, old people's homes, ministers and arms forces accommodation. Each of these has, as the permission given by the Directive requires, a social reason. It seems to us that in the case of student accommodation that social reason is the support of the acquisition of knowledge in a serious and sustained manner, for such accommodation relieves the disadvantages under which persons engaged in such study away from
30 home might labour, and there is a social reason to support such endeavours.

72. We also note the tailpiece of Note (4), which excepts use as "an hotel, inn or similar establishment". Hotels are places to which people resort generally for a short time because of work or for a holiday.

73. In the same vein paragraph (d) applies to "residential" accommodation; the word "residential" indicates a period of occupation in which the accommodation becomes the residence of the occupier. These features of the statute indicate that the accommodation must be intended to be occupied with a degree of permanence.

74. The words of paragraph (d) also distinguish between "students" and "school pupils". Over the last 30 years or so pupils at secondary schools have begun to be

called students. This legislation was originally acted in the 1970s when such use was less customary, if growing. The OED quotes from the Times in 1976: "We have primary school students, presumably working for BAs in plasticine ... formerly people were schoolboys or school girls until they became undergraduates". It seems to us that in this context the presence of "school pupils" suggests that the kind of student the provision is concerned with is a person who, if they were of a lesser age is so circumstanced that he or she would be described as a school pupil: that is to say engaged in a long term period of sustained study or tuition (and occupying the accommodation as such).

75. We accept that to be a student a person need not be pursuing course at a recognised institution or which leads to some qualification or certification. But where that is not the case persuasive evidence is needed of the seriousness of the study or the close and continuous attention given to it.

76. One attribute of a student is that he or she is engaged in learning. That learning need not be purely mental: a drama or music student is nonetheless a student because part of what is learned is a physical response, but there must be some acquisition of knowledge.

77. Although "knowledge" may be used to span a continuum from 'the cumulative discovery by the processing of sensory data about the external world using reasoning power' through self-knowledge to belief; although a believer may say "I know God exists"; and although it might be said that scientific knowledge encompasses belief in the application of logic and the truth of observation, it seems to us that a person whose activity consists of the acquisition broadening of belief is not by virtue of that activity normally to be called a student.

78. It seems to us that whether or not a person is a student does not depend upon the nature of the purpose of the person who offers him or her teaching, but principally upon what the person actually learns or sets out to learn

79. In summary:
- (1) the social purpose of this provision indicates that the exemption should be limited to accommodation supplied to those who, while they occupied the accommodation are involved in a significant period of acquisition of knowledge;
 - (2) the use of "residential" and the exclusion of hotel accommodation indicate that there must be a degree of permanence in the occupation of the accommodation;
 - (3) the words " students or school pupils" suggests that in relation to those who are of an age to attend a junior or primary school, that they should be engaged in some form structured learning,
 - (4) to be students there must be a serious pursuit of knowledge,;
 - (5) there is no requirement that a person be engaged in a course of study prescribed by an institution; but the absence of such prescription or

accreditation there must be persuasive evidence of serious study or close and continuous attention.

(6) The student must be engaged in the acquisition of knowledge. Knowledge for these purposes does not include the acquiring or broadening of belief.

5 (7) The purpose of the person to be accommodated may be relevant to whether or not that person is a student, but the purpose of the person providing the accommodation is not.

The Evidence

80. We heard oral evidence from Philip Burt, Capernwray's bursar, Elliot Johnson
10 who, with his wife, had been living and working as unpaid volunteers at Capernwray since September 2013; David Ryan whose family members had attended residential courses and events at Capernwray annually since 1995; and Mark Thomas, a trustee of Capernwray, who was responsible for the oversight of the programmes of courses and activities at Capernwray. We found them all frank and truthful. We also had a
15 bundle of documents including brochures and course handbooks and leaflets. We find as follows.

Our findings of fact

81. We speak in what follows of how the Conference Hall is, and has recently been used. The test is of course what the intended use of the Hall was, but we were told,
20 and accept, that its intended use was the same as its actual use.

The Courses

82. For about 30 weeks in the year Capernwray runs a Bible School. Out of Bible School term time it runs a number of shorter courses and conferences lasting up to a week.

25 *(a) The Bible Schools*

83. These comprise a Winter School split into two 11 week terms and a Summer School of one eight-week term. About 160 participants attend the Winter Bible School and 130 the Summer School. Some participants will attend them both sequentially.

30 84. A typical week involves lectures for 5 1/2 hours a day (9 am to 12.45 and 7 pm to 8:50 pm) on Monday to Thursday, and on Friday 3 1/2 hours in alternate weeks of practical training or practical duties assisting in the maintenance of Capernwray. On Sunday there are services in the morning and evening. The lectures and services generally take place in the Conference Hall.

35 85. The lectures follow a set programme in which in the making different aspects of the Bible are addressed in sequence. The lectures include interactive sessions. Some idea of the content of the teaching may be gained from the description of Unit 1

(lasting we understood about a week) in the Course Handbook for the Winter School 2012 - 2013. The Expected Learning Outcome of that first unit is that:

"The learner will demonstrate an understanding of the whole Bible, how it was put together (including different translations) and how to apply it in their lives."

5 86. In each of the Units there is a significant element of factual material but also the encouragement of a personal response. This reflects what Mr Thomas said to us: that the aim of the Bible School "is not only for students to grasp the content and historical context [of the Bible] but to understand that the life of the Risen Christ is now available through the Holy Spirit to make the life the Bible teaches possible in our
10 own."

87. The practical training on Fridays includes lectures on topics such as: worship, marriage and the will of God, managing a devotional life, and how to run your finances.

15 88. The course requires the submission of written work which is marked and returned. At the end of the course the participant's portfolio of work is submitted to an external verifier. Each piece of work is assessed against set criteria and marked pass or resubmit.

20 89. In May 2012 of the Bible School was inspected by the Bridge Schools Inspectorate on behalf of the Secretary of State for Education. The inspectorate concluded that the school met BSI standards securely. Its report notes that "the courses require full-time attendance and considerable time and effort on the part of the students". It used "students" for the participants without qualifying that use.

25 90. At the end of the course participants may be awarded a certificate. About 95% are awarded the Bible School's own certificate, and 83% pass all the elements of an externally verified course (level III NVQ).

(b) Other Courses and Conferences

30 91. The other courses take place outside the Bible School terms. Generally they were marketed as events which, in Mr Thomas's words, provided a blend of sound teaching and a holiday. Much of the marketing material described them as "holidays" but even a cursory reading of that material would leave the reader in no doubt that the event had an evangelical core, centred on the Bible: "we provide great Bible teaching on every single holiday".

35 92. The courses include a range of activities other than teaching, worship and associated events. A significant amount of time is allocated to these other activities. Mr Thomas viewed these recreational elements as a means of attraction to what was unashamedly a teaching event: people were attracted by the whole package, but there was no hiding of the prime reason for the event which was to provide biblically-based Christian instruction and spiritual enrichment. The facilities he said were an incentive for people to apply - to stay in a beautiful location with the intention of developing
40 their faith.

93. A typical day at one of these courses will start at 8.30am with breakfast. The morning teaching session would take place from 9.30 to 10.30 (with an opportunity to talk to the speaker afterwards). The participants may then choose between a variety of trips, activities, or other leisure options: these could include walking, archery, swimming or simply sitting. There would be an evening meal followed by teaching session of about an hour. Then there would be further non-devotional activities.

94. Mr Burt said that the participants were strongly encouraged to attend all the teaching sessions. When applying participants agreed to attend. He said they would “round up” teenagers. We find that almost all participants would attend the teaching sessions on their courses.

95. Mr Thomas told us that the proportionate content of the teaching was the same as that for the Bible School classes: more than half consisted of the discussion of the biblical texts and the context to which they came.

96. A questionnaire is given to participants based upon the matters dealt with in the teaching sessions. Answers are discussed at the end of the week.

Individual courses.

(1) The Ladies' Conference.

97. There are two versions of this: the short weekend version which lasted from Friday to Saturday on which there is six hours of teaching, and a long weekend version which went from Friday to Tuesday on which there are eight hours of teaching. In the afternoon there are options including Archery, target practice, crafts, and the swimming pool, and also a Quiet Hour, also called Think it Through which is intended to enable guests to learn and mature in their faith,

98. The 2013 programme gave a short description of the subject of this conference:

"A Daughter's Walk. What does it mean to be the daughter of a Heavenly Father who "walks with us and talks with us along life's narrow ways"? What is it that defines us as His daughter? And what should our relationship with Him look like? We will look at different women in the Bible who show us the way forward in our desire to be the kind of daughters that reflect the likeness of their father."

(2) Choices.

99. This lasts from Monday to Friday. There is 15 minutes teaching at 8.30 in the morning, which is followed by “choices” of activity in the rest of the morning and the afternoon. In the evening there is 1 ½ hours teaching from 8.00 pm. Teachers on the course also make themselves available to discuss what they have been teaching.

100. The 2013 programme gave this description: “We have great choices for you! You choose an activity for the week, with other optional activities for everyone. Bible teaching from Mark Thomas, ...and Ian Ellershaw each evening for all guests. You

MUST bring your own equipment for some Choices.” It then detailed 11 choices including: motorbiking in the Lake District, digital photography, country skills, cycling, silver working, bushcraft, sketching, and hiking.

(3) Connect.

5 101. This lasts from Monday to Friday. It is from 11-13 year olds. Once the participants have arrived, there are teaching sessions of 1 ¼ hours in the morning at 9.30, and in the evening at 8.00pm. In the remainder of the mornings and afternoons there are recreational activities offered by Capernwray. There is also a Quiet Hour.

102. The 2013 brochure gave the following summary:

10 "If you have ever wondered what Christians believe and why, then we will look at the Bible and answer questions to help you understand more. A good foundation under a new building is vital. Young people need to be clear in what Christians believe - that is foundation building. Come and "Connect" with us, friends, the Bible and Jesus!"

15 (4) Refresh

103. This lasts from Saturday to the following Saturday. Each morning and evening there is 1¼ hours of teaching (16¼ hours in total). Activities are provided in the mornings and afternoons, together with the option of a seminar on a particular topic eg ‘An hour in Israel’.

20 104. The 2013 brochure said: "In Refresh 2013 we will enjoy Bible teaching and opportunities to worship God in a beautiful setting. Come and relax with us and we can provide a variety of options during your stay so that you can be as active or inactive as you like.

105. (5) Men's weekend

25 106. This extends over two days – Friday to Sunday. There are six hours of teaching: including all of the first morning. In the remainder of the time there are activities.

107. The 2013 brochure described the course thus:

30 "Join the guys who live and work at Capernwray along with others from around the country for a memorable couple of days. We will fill the days with activities, laughs, great worship and excellent, practical Bible teaching. Get a group together or book yourself!

(6) International Youth Week

35 108. This lasts three weeks. It encompasses 16 ¼ hours compulsory teaching per week together with optional and popular seminars on topics such as Faith Apps, the Dating Game, What is Worship? Music and Worship.

109. The 2013 brochure advertised the course thus:

5 "Our age group here is 14+ and at school - if that's where you're at then you will find the activities, teaching and approach to the week all geared for you! The atmosphere is great ... the Bible sessions include excellent speakers, music and input from folk who look forward to sharing what they discovered about God and how He affects their lives. Good times are planned for these weeks - in an amazing castle with great facilities! Free day trip included!"

(7) Family Week

10 110. This lasts from Saturday to Saturday. It is for families. There is teaching for 1 ¼ hours in the morning and evening (a total of 16 ¼ hours) together with an optional one day seminar. In the remainder of the mornings and afternoons there are activities organised by Capernwray. These included archery, kayaking, 'Family challenge', and a quiet hour.

15 111. There are separate teaching sessions for the children. This summer 4-11 year olds looked at the whole bible and characters such as Joseph and David. Teenagers considered the foundations of their faith focussing on people who had encountered Jesus.

20 112. Mr Burt told us that this year's courses had focussed on "foundations". Many sessions included the recounting of a foundational moment by a member of staff. This, he said, was usually a significant incident in their life, perhaps something that caused them to follow Christ and included reference to important bible verses that God uses to direct them in their lives.

113. The 2013 brochure said "A full programme of fun and Bible teaching is provided for everyone. There are great facilities on site, many tourist attractions to discover and some optional activities offered by Capernwray."

25 114. Family Weeks take place five times a year.

(8) One Parent Family Week

115. This is similar to the Family Week but for one parent families.

(9) Impact

30 116. This lasts from Saturday to the next Saturday. There is teaching for 1 ¼ hours morning and evening, activities such as Tennis, Wall climbing and Pottery in the rest of the morning and in the afternoon an option of seminars on topics such as Careers for Christians, What is Worship and Sharing your Faith, or activities such as Crafts, Waterslide, and Zip wires.

35 117. The 2013 brochure said: "A great holiday week for 18 to 25-year-olds, from friendship, teaching and relaxation, also in Impact: "Let's talk ..." finding a job, the dating game, money matters. Discussions to help you enjoy life and glorify God - a great goal!"

(10) Summer Studies

118. This lasts a week and includes 19 ¾ hours of teaching. There are optional bible seminars. In the remainder of the time there are recreational options.

5 119. The 2013 brochure gave the following summary: “A fantastic combination of lectures arranged to strengthen and equip you in your faith. Together we will search for answers, clarity and promises in a world where the loudest voice we often hear is not the voice of Truth”.

Financial Arrangements.

10 120. Over 80% of Capernwray's income derives from fees paid by those attending its courses. About 75% of that income derives from the Bible School fees and 25% from out of term time courses. The remainder of its income comes in the main from its farm, its shop and the swimming pool.

15 121. Capernwray charges set fees for each course. It sets the fees to recover its costs (which include historic cost depreciation but no more). The fees for the Bible School, which include board and accommodation, are some £7000 for a full three term course which compares very favourably with fees a boarding school might charge or the total cost of a year at a university. The fees for the out of term courses are also recognised as generally less than what broadly similar providers might charge.

20 122. Some relatively modest help is afforded to those who cannot afford the fees. The majority of this (about £17,000 per annum) is given to attendees at the Bible School, particularly those from the developing world; about £1000 per annum is provided in fee reductions to those attending out of term time courses.

25 123. Capernwray relies on three sources of help to maintain its operation and keep its fees low: the work of unpaid volunteers, the requirement that Bible School attendees assist with daily chores, and donations. In addition the level of remuneration of the 27 staff employed by Capernwray is in all cases below comparable market rates.

30 124. Volunteers come to Capernwray from a desire to serve and live within the Christian community and contribute to its objectives. They generally receive free board and lodging but are otherwise unpaid. They come from around the world for between a few weeks and a year. They work in housekeeping, catering, maintenance, administration, as lifeguards in the pool, and in the activities offered to holiday participants. Each normally works for about 40 hours per week. While the Bible School is in session, fewer volunteers are needed because of the work undertaken by the Bible School attendees. About 17 volunteers would be at work in term time. Out
35 of term time the number increases to about 60.

40 125. Mr Burt provided us with a calculation of the cost Capernwray would have incurred had it used paid employees rather than volunteers. We accept his estimate that the cost would have been some £470,000 (but note that no account is taken of accommodation in that estimate). That figure would increase Capernwray's expenses by some 25% from £1.7 million to £2.1 million per annum.

126. The Bible School attendees spend a couple of hours each week in daily duties, and 3 1/2 hours on Fridays in alternate weeks on larger tasks. Mr Burt's estimate for the cost of replacing their effort with paid labour was some £114,000 per annum.

5 127. Overall on this basis without volunteer support Capernwray would have had to increase its fees by some 25% if it were to continue to break even. Mr Burt said that this would reduce take up and that could make Capernwray's activities untenable. We accept that that could well be the case.

10 128. Capernwray also receives donations both of a general nature and for specific projects like building of the new Conference Hall. The donations of a general nature are of the order of £5,000 pa, and those for specific projects much more substantial.

Residential Accommodation for Students: The parties' arguments

129. Mr Sykes said that:

- 15 (1) although spiritual development was the aim, this was achieved through study of the Bible;
- (2) the only substantial difference between teaching at the Bible school and that on the other courses was the length. The greater part of all teaching was the explanation and contextualisation of the Bible; the application of what was learnt took up less than 50% of the time.
- 20 (3) the freedom for recreation and rest did not prevent the predominance of the focus of an attendee being on teaching;
- (4) spiritual growth and learning are not mutually exclusive.

25 130. Mr Hill likened attendance at the courses to extended sermons; he suggested that the teaching was at least in substantial part preaching, and that someone who went to hear preaching was not a student. He argued that the substantial and attractive organised leisure activity content meant that a participant was not a student.

Residential Accommodation for Students: Discussion

(a) The Bible schools

30 131. We had no doubts that the attendees on the Bible Schools were students. They engaged in serious pursuit of knowledge which required close and continuous effort. They worked towards externally validated qualifications. The accommodation which they used provided the social purpose of enabling them to live away from home while studying for an extended period. They occupied with a degree of permanence.

35 132. To the extent that the content of the course included elements which reinforced, developed or deepened belief, those elements were not so dominant as to call into question the conclusion that this course involved serious learning.

(b) The other Courses and conferences

133. We accept that the teaching in these courses is biblically based: that passages from the Bible are used as support for propositions of faith and conduct, and that these passages are considered in the context and in detail. But it seems to us that participants' principal acquisition will be, and their principal purpose will be to acquire tenets and understanding of faith and conduct (prayer, worship and rules of life) derived from those biblical passages and from the fruits of their reflection on their own belief and conduct. They will no doubt acquire some knowledge of the content and context of the biblical passages, but while being taught, their focus will be on faith and its practice. We reached this conclusion for the following reasons in particular:

(1) Capernwray's object is to proclaim the transforming presence of Jesus through biblical teaching. Its object is to convey faith: that faith is biblically based but the ultimate aim is faith, and that participants acquire, or acquire greater, faith. It is therefore likely that its teaching goes some considerable way to achieve this.

(2) Although more than half of the teaching time might be directed to the explanation of the meaning and context of parts of the Bible, it seemed to us from the programmes that that such teaching was directed towards the spiritual leaning which would follow.

(3) The teaching programmes for the conference exhibit this exploration of faith and conduct. The Bible underpins the content but what is likely principally to be absorbed are the answers to spiritual and religious questions.

(4) Guest speakers and receive an information pack which contains a section "Your teaching content". This says:

"Tell people about Jesus! Biblical teaching, Christ centred is what we strive for. Through your particular communication style, and with the messages you have been given, we look forward to you enjoying teaching, encouraging and challenging guests in their relationship with Christ."

134. For the following reasons we conclude that the accommodation occupied by those attending courses was not residential accommodation for students or school pupils:

(1) the period of occupation is akin to that of the period in which hotel accommodation might be occupied. The occupation does not have a sufficient degree of permanence;

(2) although there is no significant form of testing (such as publication, examination or other validation), we accept that the participants are likely to take the exploration of their faith seriously and devote close attention to it, but the nature of what the participants learn is not the type of knowledge which makes a person a student;

(3) it seemed to us that the participants came to Capernwray for both a holiday (and the activities and surroundings offered) and the teaching. Thus while they were there they were present in two capacities and not just as people acquiring knowledge. This was different from a university student who might

interrupt an afternoon's work for a game of netball: the time spent in activities was an allocated part of each day. Thus the accommodation was also used as accommodation for persons taking a holiday and not solely for persons who were studying. Such use did not appear to be de minimis;

5 (4) to the extent that children of primary (and possibly early secondary school age) were accommodated in the Conference Hall, it seemed to us that they could not be called students, and that they were not present as school pupils. Nor when they were there as part of a Family Week, could their occupation be regarded as merely incidental to their parents' occupation.

10 135. As a result we conclude that the sleeping accommodation in the Conference Hall was not intended for a relevant residential purpose.

Economic activity: The Parties' Arguments

136. Mr Sykes said:

15 (1) the fact that Capernwray was managed so as not to give rise to a profit pointed away from economic activity;

(2) a commercial organisation would not depend on donations to fund capital expenditure in whole or part;

20 (3) of the *Lord Fisher* indicia three were not met: Capernwray was not conducted on sound recognised with business principles in view of its reliance on volunteers and donations; the supplies it made were incidental to its predominant evangelistic concern; and the Bible School classes were unique, not the kind commonly made by others.

137. Mr Hill said that the conferences and Bible School courses were carried out for remuneration and carried out on a permanent basis. The only question remaining from 25 *Finland* was whether they were carried out for consideration. They were: there was a direct link between the payments and services: the fees varied according to the duration of the courses and did not depend on the means of the attendees. Donations and volunteers did not destroy that link.

Economic activity: Discussion

30 138. It does not seem to us that Capernwray can be regarded, by reason of the fact that it sets its fees to cover costs and relies on volunteers and some donations as operating a concession rather than receiving consideration and thus not engaged in economic activity. The fees to our minds are properly described as consideration for the supplies made. We accept that the fees are at a lower level than would have been 35 set had Capernwray been seeking to profit, but they were not so substantially lower than market rates as were the 1/15th of market rate rents in *EC v France*.

139. We have concluded that *Finland* does not require that any activity carried out for remuneration on a permanent basis must be an economic activity of 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 thus whether the intrinsic nature of what Capernwray does prevents it from carrying on an economic activity.

140. There are some parts of Capernwray's activities which do not seem to us to be of an economic nature. Generally the provision of religious worship even when supported by the contributions of those attending is not an economic activity. Nor is evangelism normally an economic activity. They are not predominantly concerned with making supplies for consideration: their intrinsic nature is not economic.

141. But Capernwray provides more than these things. It provides living and sleeping accommodation, food, activities, surroundings, and, in particular, in its Bible School traditional teaching. The provision of these services for payment is in our view *prima facie* an economic activity.

142. The differences between Capernwray and school or college in relation to the provision of these activities are (1) in the purpose for which it provides the services and (2) the way it is organised to provide them.

143. But so far the first of these is concerned Capernwray's purpose is not relevant to whether or not it is conducting an economic activity since we are not concerned here with paragraph 1(2) (b) - exploitation of assets, but with paragraph 1(1).

144. The second concerns Capernwray's reliance on volunteers and gifts to subsidise its fees. But not only is that reliance not such that participants are merely asked to make some contribution rather than being required to pay, but it seems to us that subsidy, whether in cash or kind does not affect the intrinsic nature of the supply.

145. Does the provision of worship and evangelism change what would therefore be an economic activity into one which is not? In our view in this case it does not: the other services provided are not so eclipsed by worship and evangelism is to make them part of something which is not an economic activity.

146. If one applies the *Lord Fisher* criteria they do not indicate that Capernwray is an exception to the general rule:

(a) this is a serious undertaking earnestly pursued;

(b) it is pursued with continuity;

(c) it has a measure of substance: 27 staff and a turnover of £1.7 million and;

(d) it is conducted on sound business principles in so far as it sets its fees to cover its costs. Its reliance on donations and volunteers to reduce its fees is an unusual practice, but where it can reasonably expect such assistance, setting fees to take account of it (as may a charity shop relying on volunteer services to make or enhance its profit) it is not in our view an unsound business practice;

(e) we accept that Capernwray's predominant concern was not the provision of services but this criterion, as we understand it, relates to the nature of what is done

viewed objectively. That was the supply of board and lodging, activities, surroundings and teaching for payment. That was intrinsically an economic activity.

5 (f) we agree with Mr Sykes that Capernwray is unique, but we regard this test as asking about the general nature of the what was supplied. In our view, the supplies made are, or at the least a substantial proportion of them are, of a kind commonly made by those who may seek to profit from them.

147. We find that the *Lord Fisher* indicia do not suggest that this was not an economic activity.

10 148. Nor was this a mutual or cooperative venture: it was run by a single directing body on a basis laid down by that body.

149. We conclude that Capernwray conducts business in the course or furtherance of which it intended to provide accommodation in the Conference Hall. As a result we conclude that the accommodation in the Conference Hall was not intended for use for a relevant charitable purpose.

15 *The Upper Ground Floor of the Hall*

150. It appeared that the Upper Ground part of the Hall was used to a large extent for religious preaching and for worship. Such use on its own would not normally be regarded as intrinsically of an economic nature.

20 151. If Capernwray's provision of accommodation and other facilities to participants were an economic activity, that would not prevent its use of Upper Ground floor of the Hall from being otherwise than in the course or furtherance of the business - in the same way that the business of a charity shop does not make the charity's other activities necessarily a business.

25 152. To the extent that the Hall was intended for use for worship we do not consider that such use was of an intrinsically economic nature. And that in our view would be the case whether or not any part of the course fee could be attributed to attendance at such worship.

30 153. Capernwray's use of the Hall for evangelical teaching on the courses and conferences as part of the activity of proclaiming Jesus Christ might be regarded as not being an economic activity if attendance could be regarded as consideration moving from the attendees in return for the holiday facilities rather than the other way round: Capernwray gives remuneration to the attendees - a holiday - in return for the attendance of the services and teaching sessions.

35 154. However for the reasons stated above the provision of teaching in return for payment in the Bible School terms does seem to us to be an economic activity, and the Upper Ground floor was intended to be used in that activity.

155. As a result it does not seem to us that the Upper ground floor of the Conference Hall falls within Note (6).

156. We conclude that the Conference Hall as a whole was not intended for use for a relevant charitable purpose.

Conclusion

157. We dismiss the appeal.

5 **Rights of Appeal**

158. 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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**CHARLES HELLIER
TRIBUNAL JUDGE**

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RELEASE DATE: 25 June 2014