[2020] UKUT 0020 (TCC)

Appeal number: UT/2019/0025

VAT Penalty for issuing incorrect zero-rating certificate – appellant had sought advice from accountants and counsel - whether FTT erred in law in concluding appellant did not have reasonable excuse – yes – decision set aside and remade- appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MARLOW ROWING CLUB

Appellant

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JUDGE KEVIN POOLE

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 19 November 2019

Philip Ridgway, counsel for the Appellant

Joanna Vicary, counsel, instructed by the General Counsel and Solicitor to Her Majesty's Revenue & Customs for the Respondents

DECISION

Introduction

1. This is an appeal by Marlow Rowing Club ("Marlow") against a decision of the First-tier Tribunal ("FTT") issued on 7 November 2018 ("the FTT Decision"). The decision was in relation to an appeal by Marlow against a decision of HMRC that Marlow was liable to a penalty of £279,866 under s62 of the Value Added Tax Act 1994 ("VATA") because it did not have a reasonable excuse for issuing a certificate (the "Certificate") to a supplier of construction services for a new clubhouse building that incorrectly specified that the supply fell within Group 5 of Schedule 8 (and that the supply was therefore zero-rated). As regards the question of whether Marlow had a reasonable excuse, the parties' arguments before the FTT centred around the significance of various pieces of advice Marlow had sought from its accountants and counsel in advance of the issue of the Certificate. The particular element of Group 5 which was of concern was the condition relating to whether the relevant parts of the building were intended to be used "otherwise than in the course or furtherance of a business". The interpretation of that provision has since been clarified by the Court of Appeal in *Longridge*[1] in favour of HMRC. However, at the time the Certificate was issued, the litigation had only got as far as the FTT and the FTT had decided the issue in favour of the appellant charity, Longridge.

2. Marlow submits that, for a number of reasons, the FTT erred in law in not accepting, despite the advice that was sought and given, that Marlow had a reasonable excuse. With the permission of the Upper Tribunal ("UT"), it now appeals to the UT against the FTT Decision.

The Law

3. Section 30 of VATA provides a supply is zero-rated if it is specified in Schedule 8. Item 2 to Group 5 of Schedule 8 specifies:

> "1. The supply in the course of the construction of—
>
> (a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or
>
> (b) any civil engineering work necessary for the development of a permanent park for residential caravans,
>
> 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."

4. Note 12 to Group 5 Schedule 8 to VATA 1994 provides:

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[1] *Longridge on Thames v Commrs for Revenue and Customs* [2016] EWCA Civ 930

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

5. Section 62 VATA (Incorrect certificates as to zero-rating etc.) sets out the circumstances where a person who gives an incorrect zero-rating certificate is liable to a penalty. It provides as relevant:

> "(1) Subject to subsections (3) and (4) below, where—
>
> (*a*) a person to whom one or more supplies are, or are to be, made—
>
> (i) gives to the supplier a certificate that the supply or supplies fall, or will fall, wholly or partly within any of the Groups of Schedule 7A, Group 5 or 6 of Schedule 8 or Group 1 of Schedule 9, or
>
> (ii) gives to the supplier a certificate for the purposes of section 18B(2)(*d*) or 18C(1)(*c*),
>
> and
>
> (*b*) the certificate is incorrect,
>
> the person giving the certificate shall be liable to a penalty.
>
> …
>
> (2) The amount of the penalty shall be equal to—
>
> (*a*) in a case where the penalty is imposed by virtue of subsection (1) above, the difference between—
>
> (i) the amount of the VAT which would have been chargeable on the supply or supplies if the certificate had been correct; and 5
>
> (ii) the amount of VAT actually chargeable;
>
> …
>
> (3) The giving or preparing of a certificate shall not give rise to a penalty under this section if the person who gave or prepared it satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for his having given or prepared it."

Test on reasonable excuse

6. In the appeal before us there was no dispute that the applicable test was that set out in *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234.

> "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered."

7. As we discuss later, the FTT's approach to questions of reasonable excuse was considered extensively by the UT in *Christine Perrin v The Commissioners for Her Revenue and Customs* [2018] UKUT 0156 (TCC). The UT stated an approach that was expressed to be in accordance with that in *Clean Car* (at [71] of *Perrin*).

The Facts and background

8. While the FTT made brief findings of fact in the course of its discussion section, which referred at high level to the two pieces of advice the appellant received from its accountants, Baker Tilly, and from the counsel it instructed, in order to deal with parties' arguments in this appeal, it is necessary to extract in more detail the correspondence and advice that were given in the run up to the issue of the Certificate. What follows below is taken from the documents which were before the FTT which included a witness statement of Mr Wood who was Marlow's Treasurer from August 2011 to July 2016.

9. Marlow is a company limited by guarantee and also a registered charity. It was incorporated on 17 February 2012 to take over the activities of the unincorporated association of the same name (which had been registered as a Community Amateur Sports Club), and as part of that process its constitution was altered on 23 June 2012 to incorporate charitable objects. Following a devastating fire to the clubhouse in August 2011, the members of the old club decided to construct a new facility, to be owned by a limited company. As recorded by the FTT (at [2][2]), Marlow undertook the construction of a "Water Sports Hub" building to be used by itself and other sports clubs in the local area and also to provide a gym facility for which it offered membership to non-club members. It issued the Certificate on the basis that the building was intended to be used "for a relevant charitable purpose otherwise than in the course or furtherance of a business".

10. Although Mr Wood had practised in tax, latterly as a partner with Baker Tilly, he did not have specialist VAT knowledge; his main focus had been corporate tax. On his recommendation the club engaged Baker Tilly to provide advice on the VAT liability in respect of the income streams currently received by Marlow, the issue of VAT registration, and also on VAT matters regarding the intended clubhouse construction.

Baker Tilly's First Advice

11. Although this advice did not give specific advice on whether a zero-rating certificate could be issued – it did, as will be seen, make it clear zero rating would not be available – we need to set out some of the detail covered as the advice provided the

[2] References to paragraph numbers are, unless the context requires otherwise, to paragraph numbers in the FTT Decision

context to the advice that was then sought from counsel and subsequently again from Baker Tilly.

12. Mr Wood had provided a briefing note to Baker Tilly dated 29 February 2012. Baker Tilly's advice was set out in a 20-page report dated 19 April 2012. The report covered the VAT liability position on various income streams including membership subscriptions, sponsorship and donations, coaching/courses, bar/catering and venue hire, fundraising events and regattas and miscellaneous income and noted the club received a substantial amount of exempt income. Regarding VAT registration, it concluded the club was not required to register for VAT but that it could choose to do so.

13. As for the clubhouse construction, Baker Tilly had been asked to consider whether there would be VAT benefits for the club in becoming a charity. Mr Wood had also included a memo on a proposed trading subsidiary company. Having set out the requirement that, for there to be a relevant charitable purpose, the building had to be used otherwise that in the course or furtherance of business (mentioned in the relevant Note to Schedule 5), the advice noted that the clubhouse would not meet this condition because charging members a fee was a business activity and one of the benefits was the use of the clubhouse building. Nor would it meet the "village hall or similar.." condition as usage was restricted to members. Charitable status would not, the advice concluded, therefore be beneficial from a VAT perspective.

14. Noting that the grant of an exclusive right over land was usually exempt from VAT subject to the option to tax rules, and based on the assumption the land for the clubhouse was retained by the club, the advice then considered two options: Option A, where the club would carry out the building work itself and then grant a lease of the bar and catering areas to an associated trading company incorporated for the purpose ("the Company"); or Option B, where the club would grant a lease of the whole site to the Company, which would then have the entire clubhouse built before granting a lease back to the club of the rowing-related areas. For both options there would be two entities using the building and one would be renting space from the other. Under Option A the club could register for VAT, opt to tax the clubhouse and charge VAT on the rent to the Company thereby enabling it to recover a proportion of the VAT on construction costs. Option B was said to be more difficult as the Company would be making supplies of facilities to the club which mainly made exempt supplies, giving rise to complications under certain anti-avoidance legislation and under the Capital Goods Scheme. The report concluded that it would be highly unlikely that the full input VAT on the costs of construction would be recovered but that the greatest recovery was likely if the Company or both entities registered for VAT and Option B was followed with the Company undertaking the build.

15. As mentioned above, Marlow was incorporated shortly before the initial advice was sought from Baker Tilly and it became a charity shortly after that time. The assets and undertakings of the old unincorporated club were eventually transferred to Marlow on 31 March 2013. All over this period (and indeed subsequently), fundraising activity was taking place in order to finance the purchase of the land on which the clubhouse stood and the rebuilding of the clubhouse itself.

16. On 28 February 2013 the FTT (Judge Edward Sadler and Nigel Collard) issued its decision in *Longridge on the Thames v Revenue & Customs* [2013] UKFTT 158 (TC) which found in favour of the taxpayer. (The appellant in that case happened to be a neighbouring organisation offering water-based and other recreational activities on the banks of the Thames). Mr Wood was alerted to the decision by a fellow committee member. (*Longridge* was later upheld by the Upper Tribunal but then overturned in the Court of Appeal).

17. On 24 July 2013 Marlow's Chairman read a statement entitled "Marlow Rowing Club as a charity – a very different financial landscape" to Marlow's AGM on the topic of club finances. This set out Marlow's charitable objectives – summarised as increasing participation - and examples of the measures Marlow intended to introduce. It also highlighted a change in financial model: whereas previously subscriptions and rowing events were set at a rate to meet the total cost of activities, there would need to be more reliance on fundraising and grants. Participation would be encouraged by reducing or waiving charges where cost was a barrier.

18. On 2 September 2013 Marlow's Committee met to discuss, amongst other matters, the Treasurer's report Mr Wood had prepared and the responses to the invitation to tender which Marlow had put out for the build of the new clubhouse. It was noted that the precise VAT position was yet to be resolved, that further advice was being taken and Marlow should be prepared to indemnify the builder regarding VAT if HMRC disputed the exemption certificate. The preferred contractor (Beard) was selected. The committee noted a letter of intent had to be issued within the week to maintain the planned on-site date of 23 September for commencement of construction.

Marlow's instructions to counsel

19. On 1 August 2013 Mr Wood followed up an informal conversation he had had with the counsel who had appeared on behalf of the appellant in *Longridge,* Roger Thomas, with a request to his clerk for advice. Mr Wood explained the matter was reasonably urgent as the result of a tender to a number of building contractors was expected shortly. After giving some brief factual background as to Marlow and its intentions, and mentioning that following *Longridge* it would "obviously be of significant benefit to the club if it could argue that the supplies to be made by [Marlow's] building contractor should be zero-rated under Items 2 and 4 of Group 5 of Schedule 8 to VATA 1994 on the grounds that all or at least certain areas of the building are not intended to be used otherwise in the course or furtherance of a business.", the e-mail went on:

> "What we are seeking at this stage is an opinion as to whether or not [Marlow] could proceed on the basis that it could stand behind the principles established by Longridge to try and make arrangements for the works to be zero-rated, which as I understand it, principally involves issuing a certificate to the builder.
>
> In the worst case scenario, we recognise that HMRC might ultimately win the Longridge case and in that event, we accept that HMRC may well succeed in recovering the VAT on the building costs. In that case the key issue would be penalties, but our hope would be that if you were

> able to give us a favourable opinion, that would serve to show that the Club had taken "reasonable care" in this matter such that no penalty would be charged."

20. Mr Wood asked whether the advice could be given in two stages: Stage 1 would be whether, on balance, counsel felt that "this strategy 'had legs'". Mr Wood observed here that the main concern was that unlike Longridge, Marlow was a members' club. Stage 2 would be to obtain a formal written opinion, which Marlow accepted might be favourable or adverse.

21. The e-mail attached the most recent accounts and management accounts, the policy statement "Marlow Rowing Club as a charity – a very different financial landscape" (see [17] above) and a letter to HMRC asking for clearance on whether the club might be able to fund its wholly owned subsidiary to build and operate the new facility. In relation to this Mr Wood commented that the letter gave some useful background but that whether the route was pursued would depend on the response which had not been received. No copy of this letter was included in the documents before the FTT or us.

22. On 20 August 2013 a telephone call took place between Mr Wood and counsel, which Ian Carpenter of Baker Tilly, who had given advice previously on VAT, attended on as well. Further factual information was given and there were further e-mail exchanges between Mr Wood and counsel on 19 August, 6 September and 12 September 2013.

23. It can be inferred that the proposed strategy was considered by counsel to "have legs", as he gave his six-page opinion on 20 September 2013.

24. The opinion recorded that advice had been sought on whether Marlow could obtain the benefit of zero-rating in respect of the construction of a replacement clubhouse. It expressly did not consider either the wider VAT aspects of the matter or the direct tax or charity law aspects of granting a lease to a trading company. It set out Marlow's objects and counsel's understanding on what uses it was intended the building was to be put to. After outlining and expressing broad agreement with Baker Tilly's analysis on options A and B (though with some caveats), counsel moved on to consider whether a zero-rating certificate could be issued. In relation to the success of *Longridge* before the FTT (which it was stated HMRC were appealing – the Upper Tribunal hearing was set for October 2014), counsel noted that Longridge, unlike Marlow, was not a members club but a charity which provided water based sports activities primarily to children and young people, and that it did not charge a membership fee or subscription but did charge for the activities provided.

25. Counsel did not set out the core of the FTT's decision in *Longridge* but highlighted where it could be found in the judgment. He went on:

> "5.…Since I am not in possession of a detailed knowledge of the manner in which [Marlow] operates it would be wrong of me to seek to apply the principles in that case and its predecessors to the limited facts known to me and to come to any absolute decision as to whether or not it can

> rightly be said that [Marlow] intends to use the new building, or part of it for charitable purposes only – that is to say use by a charity otherwise that in the course or furtherance of a business: see Note 6 to Group 5.
>
> 6. Nevertheless I would make the following observations…"

26. The observations were: a) any certificate issued could only relate to the floors which Marlow intended to retain (not those let to the trading company); b) it was critical that any charge made by Marlow was only made in the course of carrying out the charitable objectives of the charity i.e. that the supply was made in order to fulfil a charitable object and not to generate funds for the charity; c) for this reason it was very important the trading activities should be hived off to the Company. The membership fee ought only to enable the members to access the water sport activities (not also allow them to drink at the bar); d) the fact that Longridge had set its charges so as to cover operational costs after taking account of other contributions and donations, and that charges could be waived in particular cases, had clearly been significant in *Longridge*; e) the arguments relating to charitable accounting in *Longridge* should be considered; and f) that a distinction should be made between expenditure on capital projects and operational costs – the judge in *Longridge* had been impressed by the fact that capital projects were all financed by donations and grants and not out of the charges imposed to take part in the charitable water sports activities.

27. Counsel then confirmed he was able to say the Chairman's statement of 24 July 2013 "demonstrates an intent on the part of the Club" to meet the above "objectives".

28. Regarding the committee minutes before him relating to membership rates, and which drew a distinction between full membership and "social" membership, he noted that he had not seen any rules of the club and had not seen anything which prescribed what a person obtained for his or her membership. However, although the provision of social entertainment was not part of the charitable objectives the payment for social activities might not be "disastrous" so long as the social activities were not carried out in the part of the new building reserved to Marlow. To meet a concern that some part of the full membership fee was attributable to non-charitable social activities, he went on to suggest members might pay two entirely separate subscriptions: one to Marlow for the charitable rowing activities and one to the trading company for social activities with care being taken to ensure part of the building retained by the club was only used for charitable non-business activities. Counsel continued:

> "If this is done, and provided that [Marlow] does indeed operate in accordance with the statement made at the AGM, and assuming that *Longridge* survives on appeal, there would seem to be good grounds for concluding that the club could issue a zero rate certificate in relation to the lower floors of the new building."

29. Following counsel's opinion, Baker Tilly (Ian Carpenter and Colin Laidlaw) were asked to advise further on VAT on the assumption that a certificate could be issued. Mr Wood described in his witness statement how the Committee decided to obtain "further comfort" by asking Baker Tilly for the view on 1) whether the objective of taking reasonable care and avoiding a penalty from HMRC had been achieved and 2) what, given counsel's opinion, was the best way forward.

30. Baker Tilly accordingly provided a further letter of advice dated 4 October 2013, in which it discussed the VAT implications of the Options A and B it had given previously on the assumption zero rating certificates could be given, rebranding the options as Options 1 and 2.

31. Under Option 1, Marlow would construct the building and lease one floor to a trading subsidiary. Marlow would issue a zero-rating certificate for the part it intended to use for charitable (non-business) purposes. Construction of the remaining part would be subject to standard rate VAT. The advice mentioned it was likely that the builder would contractually seek to charge VAT in addition to the contract sum if required to charge VAT by HMRC and also dealt with the alternative options HMRC might pursue if they decided the building did not qualify as a "relevant charitable purpose" building (HMRC could assess the contractor for VAT not charged, or penalise Marlow for incorrect issue of the Certificate, but, following its own extra statutory concession in Notice 48 would not do both). Baker Tilly suggested that as Marlow had a counsel's opinion it was unlikely HMRC would penalise Marlow but were more likely to challenge the builder.

32. The letter pointed out that Option 1 relied on the cooperation of the building company and that it might be some time before certainty was obtained as the issue might not be reviewed by HMRC for some time (if ever) as there was a window of four years from the last supply by the contractor for HMRC to review and challenge the position.

33. Under Option 2 Marlow would lease the land to a trading subsidiary which would construct the building and lease the relevant part of it back to Marlow using the remainder for its non-charitable purposes. If the leases were structured correctly and the trading subsidiary registered for VAT, it would be possible to grant a lease in excess of 21 years in the part of the building to be used by Marlow which would be zero rated. Baker Tilly recommended seeking advice on Stamp Duty Land Tax charges and also considering whether grant of a lease to the subsidiary of greater than 21 years could lead to Marlow losing its charitable status.

34. Amongst the various features of Option 2, it was noted that as the trading subsidiary would be recovering VAT on the construction costs on the assumption that it would be making taxable supplies, HMRC would be likely to carry out a VAT inspection early on in the process, ensuring that the issue was addressed at an early stage.

35. Baker Tilly's conclusion was expressed as follows:

> "Both options have the ability to provide the same overall VAT position and potentially remove VAT as a cost. Option 1 is the simplest option if [Marlow] is prepared to incur some VAT but, on balance, although Option 1 is potentially simpler, we would recommend Option 2 for the following reasons:
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> - It secures the most VAT recovery with only 1 VAT registration
> - It does not require the cooperation of the contractor; and

- It will highlight the issue to HMRC at a relatively early stage so that certainty will be obtained at the earliest opportunity."

36. Mr Wood's undisputed evidence was that the Committee of Marlow considered all the advice given at length and in considerable detail. They were concerned that Option 2 appeared rather contrived with property interests being granted by the club to the trading company and then back again. Simplicity was the most important factor, and this outweighed any concerns over uncertainty. The contractor had already been appointed at this stage and there was no reason to think they would not accept a validly issued certificate. The Committee therefore decided to go with Option 1.

37. On 4 November 2013 Marlow issued the Certificate. Next to the section of the Certificate which referred to the fact Marlow would use "part of the building" Marlow noted "79%" in manuscript.

38. On 13 November 2014 the Upper Tribunal issued its decision in *Revenue & Customs v Longridge On The Thames* [2014] UKUT 504 (TCC) which found in favour of the taxpayer. On 18 November 2014 HMRC issued a routine compliance check into the issuing by Marlow of the Certificate. On 27 July 2015 a Notice of penalty assessment was issued. On 13 October 2015 HMRC issued its final decision and on 10 November 2015 Marlow requested a review claiming it had a reasonable excuse to which HMRC responded on 23 December 2015. Marlow appealed to the FTT on 21 June 2016. On 1 September 2016 the Court of Appeal issued its decision in *Longridge on the Thames v Revenue and Customs* [2016] EWCA Civ 930 which found in favour of HMRC. Marlow's hearing before the FTT took place on 13 June 2018. In the light of the Court of Appeal's decision Marlow did not seek to argue the Certificate was correctly issued but appealed against the s62 VATA penalty on the basis it had a reasonable excuse.

The FTT Decision

39. After setting out the parties' factual and legal submissions in detail, summarising the oral evidence which Mr Wood (who was Marlow's Treasurer) had given, and stating the test it was applying as set out in *Clean Car* (above), the FTT detailed its findings and reasoning in the following discussion section. As this is relatively short it is convenient to set this out in full.

> 20. In this case, the appellant is a volunteer-run charity. It took professional advice from accountants and counsel as to whether it could issue a zero-rating certificate in relation to construction of a building which was at least partially to be used for charitable activities. The accountants' advice was first sought before the *Longridge* decision was issued and indicated that the certificate could not be issued.
>
> 21. Counsel's advice was sought at a time when the relevant law was in some question, as the First Tier Tribunal had issued a decision in *Longridge* which appeared to support the view that the appellant could issue the certificate, but that decision was under appeal to the Upper Tribunal. Counsel's opinion that the certificate could be issued was, accordingly, stated to be subject to *Longridge* succeeding on appeal. I

do not consider that the fact that the appellant took advice from a member of the Bar with recent relevant experience in the particular area of law in this case necessarily means that the appellant could not have a reasonable excuse for issuing the certificate.

22. A second accountants' report was sought and I find that this report, dated 4 October 2013, clearly states that its comments are made on the assumption that a certificate can be issued and does not consider again the question of whether that assumption is correct.

23. That second accountants' report also clearly concludes that there would be an advantage to undertaking a particular structure on the basis that it would highlight the issue to HMRC at a relatively early stage so that certainty could be obtained at the earliest opportunity. I note that the appellant chose not to undertake that structure but, instead, followed the alternative suggestion which noted that it may be some time before certainty is obtained.

24. The appellant was clearly aware that the *Longridge* decision was not final at the time that it made its decision to issue the zero-rating certificate and was clearly aware that its actions in issuing the certificate would not be agreed by HMRC. I note the appellants' concerns as to the responsibilities of trustees of charities and the limited time in which it could issue the relevant certificate, and I note that they sought advice in order to minimise the risk to them of incorrectly issuing the certificate and because this was considered to be a complex and unclear area of law.

25. Taking all the circumstances into account and applying the test in *Clean Car*, I find that a trader in the circumstances of the appellant would have considered in particular the fundamental uncertainty in counsel's opinion, being the need for *Longridge* to succeed on appeal, and the accountants' clear recommendation that HMRC be advised of the position at the earliest opportunity and taken further steps to determine whether HMRC would in fact disagree with their actions by ensuring that HMRC was aware of the position rather than wait to see whether HMRC checked the position. I consider that the trustees' responsibilities could have been met by appealing any disagreement by HMRC and requesting that it be stayed pending the conclusion of the *Longridge* litigation. I note that the appellants were not directly informed by their advisers that this course of action was available, but neither was there any evidence that they had requested such advice.

Decision

26. Accordingly, as the appellant did not take such further steps, I consider that it does not have a reasonable excuse for issuing the zero-rating certificate.

UT's jurisdiction on appeals from FTT

40. Under s11 of the Tribunal Courts and Enforcement Act 2007, appeals to the UT are limited to points of law and thus to the question of whether the FTT made an error of law in its decision which needs to be corrected. As regards situations where what is at issue is the FTT's evaluation of whether a taxpayer has a reasonable excuse for a failure

or default, we drew the parties' attention to this tribunal's earlier consideration of its jurisdiction in *Christine Perrin v Commrs for HMRC* [2018] UKUT 0156 (TCC). While the tribunal in that case was concerned with whether the taxpayer had a reasonable excuse for a failure to file an income tax return (under the provisions of Schedule 55 to the Finance Act 2009) there is no reason to suggest the UT's analysis of its jurisdiction in *Perrin* is not just as applicable to the question of its jurisdiction regarding the treatment of reasonable excuse in this case.

41. The UT in *Perrin* described by reference to relevant case-law (at [34] to [44]) how errors of law could take a number of forms which can be summarised as follows:

> (1) the tribunal simply misinterprets the law and therefore reaches a wrong conclusion even though there is no dispute about the facts upon which it based its decision.
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> (2) the tribunal has made a direct finding of fact for which there is no evidence or which is inconsistent with the evidence or contradictory of it (per Lord Normand in Commissioners for *Inland Revenue v Fraser* [1942] 24 T.C. 498, 501, approved by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14).
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> (3) the tribunal has made inferential findings of fact which are susceptible to challenge on the same basis.
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> (4) where, in relation to the tribunal's decision on whether the facts found answer to some particular description or some particular test (such as a determination of whether a taxpayer has a "reasonable excuse"), the tribunal was wrong in law in its interpretation of the statutory phrase (this is an error falling into (1) above), or the tribunal plainly misapplied the correct law to the facts which it found.
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> (5) Where a statutory test involves a multi-factorial assessment based on a number of primary facts – commonly called a value judgement – an appeal court should be slow to interfere with that overall assessment (see *Perrin* at [41] which sets out the extracts of Jacob LJ's judgment in *Proctor and Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407 which in turn gathers together the relevant authorities for this proposition). In other words, as explained at [70] of *Perrin:*
>
> > "..In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with."

42. In relation to category (2) above, HMRC maintain that certain of the errors alleged by Marlow amount to challenges to findings of fact and thus face a high hurdle. As to the requirements for challenging a finding of fact, HMRC referred to Evans LJ's judgment in *Georgiou (t/a Mario's Chippery) v C&E Comrs* [1996] STC 463 (which was also mentioned in *Perrin* in regard to challenges to findings of fact):

> "…the appellant must first identify the finding which is challenged; secondly show that it is significant in relation to the conclusion; thirdly identify the evidence, if any, which was relevant to the finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make."

Marlow's grounds of appeal

43. In the UT, Judge Richards granted Marlow permission on the ground that it was arguable the FTT erred in concluding that Marlow had no reasonable excuse falling within s62 VATA.

44. Marlow's overall case, that the FTT erred, as no reasonable tribunal could have found there was not a reasonable excuse for giving or preparing the incorrect certificate, was developed by reference to the following points:

> (1) the FTT was wrong to characterise the second Baker Tilly report as making a clear recommendation to advise HMRC of the position at the earliest opportunity (failure to comply with which recommendation necessarily rendered Marlow's actions unreasonable);
>
> (2) whether (1) is correct or not, the FTT was wrong to regard Marlow's failure to approach HMRC as necessarily depriving Marlow of any reasonable excuse, because any such approach before issuing the certificate could not have resulted in an appealable decision, and any approach to HMRC after issuing the certificate could not affect the reasonableness or otherwise of issuing the certificate in the first place.

Did the FTT err in assuming Marlow could have obtained an appealable decision?

45. It is convenient to deal with (2) first. In our view, the question of whether Marlow could obtain an appealable decision, as was assumed by the FTT, was primarily a question of law turning on whether a negative advance ruling from HMRC on the question of whether the Certificate could be issued would give rise to a decision in relation to which the FTT's jurisdiction would then be engaged. While it is correct that this legal assumption sits among other factors that were considered by the FTT in reaching its conclusion and that accordingly some deference should be accorded to the FTT's overall conclusion, that does not detract from the point being a point of law. Similarly while this kind of point is not listed amongst those described by *Perrin* at [70], (it is not about a fact unsupported by evidence, the correct legal test, or about the application of that legal test to the facts as whole) it is clearly a point of law which may therefore give rise to an error in the FTT's decision and which may need to be corrected.

46. On behalf of Marlow, Mr Ridgway argued that if Marlow, as an unregistered entity, had asked HMRC whether it could issue a certificate and then been met with a refusal by HMRC, this would not have been an appealable decision.

47. Ms Vicary for HMRC explained that, to assist traders, the HMRC Charities Division offers a tailored service which can provide a definite 'yes' or 'no' answer to a

customer asking if they are in a position to issue a certificate for zero-rated construction services. Where a build has commenced these decisions can be produced in writing thereby creating an appealable decision for the customer. (As footnoted in HMRC's skeleton, the requirement for the build to have commenced stems from the unwillingness of the courts to decide theoretical questions – HMRC referred in this regard to *Odhams Leisure Group Ltd v CCE* [1992] BVC 11 and *Allied Windows (South Wales) Ltd.* 1973 (unreported))

48. By way of support, HMRC put forward two redacted example decision letters which set out a discussion of the particular applicant's factual circumstances, HMRC's view of the relevant law, and then HMRC's conclusion (which was in each case adverse to that which the applicant was seeking). This is then followed by a section entitled "Your Statutory Rights" followed by three familiar options that could be followed if the applicant disagreed with HMRC's decision (reconsideration, statutory review, or tribunal).

49. Mr Ridgway rightly highlighted the immediate difficulty with HMRC's proposed route was that for the decision to be one which was appealable, the supply must have been made. In other words, the building work must have started already. This point was not in dispute. By way of background the *Odhams Leisure Group Case* mentioned in HMRC's skeleton argument concerned the question of whether predecessor provision to s83(1)(b) (s40 Value Added Tax Act 1983) allowed the tribunal to hear an appeal concerned with a supply to be made in the future. McCullough J concluded the tribunal did not have jurisdiction under the provision to consider future supplies. He noted the restrictions on the tribunal entertaining an appeal without the "amount which the commissioners have determined to be payable as tax" being paid or deposited (i.e. the provisions which remain in place in the current law commonly known as those relating to "hardship"). He agreed with Customs' argument that not dealing with future supplies fitted with the general tenor of the 1983 Act and went on to say that it would also accord with the general practice of the courts not to decide theoretical questions. He also considered there was nothing to distinguish the case before him from the Court of Appeal's rejection of an appeal from a tribunal concerning supplies which had not yet taken place *Allied Windows (South Wales) Ltd.* 1973 (unreported)).

50. We note this limitation, on giving appealable decisions only in relation to supplies which have taken place is reflected in the terms of the redacted decision letters HMRC showed us; in each the "Your Statutory Rights" section is prefaced with the condition that the supplies to which the decision refers have taken place. The ensuing discussion of the Statutory Review and Tribunal options emphasises in underlined text that the statutory review or tribunal appeal options are only possible if the supply involved has taken place.

51. Regarding the particular situation in this case we note the terms of the legislation in Note 12(b) clearly require that the certificate as to intention must be given before the construction supply is made (see [4] above): "a …supply relating to the building … shall not be taken as relating to a building intended for such use **unless before it is made** the person to whom it is made has given … a certificate…" (emphasis added).

52. It struck us that this presents somewhat of a dilemma for a taxpayer in Marlow's situation. If Marlow thought, knowing its view of the law was different from HMRC, that it ought to be able to issue a certificate, it would not be able to get an appealable decision before the supply commenced. However, if Marlow had decided, despite its view that the supply was zero-rated, not to issue a certificate and to then pay standard rate VAT it was not at all clear how Marlow could then go about recouping that VAT given, as noted above, it is a pre-condition for zero-rating that the zero-rating certificate was issued before the supply was made.

53. In responding to our invitation to outline what options were available to Marlow, HMRC explained that it was possible for a supplier to treat a supply as zero-rated even if a certificate was issued subsequently, provided certain conditions as outlined in HMRC's guidance below were complied with. The following extract from their internal manual was cited.

> **"VCONST18200**
>
> **Certificates for qualifying buildings: what a certificate does**
>
> A certificate simply informs how a building is intended to be used. To be valid it must be issued to the supplier by the recipient of the supply before the supply is made. If a certificate is not issued, or is issued belatedly, a supply in connection with a qualifying use cannot be zero-rated. However, as noted in Section 16 of Notice 708 Buildings and construction, HMRC will allow suppliers to adjust their VAT on receipt of a belated certificate provided that:
>
> - it can be demonstrated that, at the time of the supply, the building was intended to be used solely for the qualifying purposes
>
> and
>
> - all other conditions for zero-rating or reduced-rating are met."

54. It was confirmed that the above arrangement operates by concession because, as we have already said above, under the letter of the law, in order for the supply to be zero-rated under the relevant provision a certificate must be issued before the supply is made.

55. Returning to the question of whether the FTT was correct to assume an appealable decision could be sought by Marlow, the first point to note is that it was incorrect as a matter of law in so far as it assumed such a decision could be sought before the supply was made. Under the law, for the certificate to be legally relevant for VAT purposes, it needed to have been given before the supply was made. Regarding the consideration of whether the person preparing the certificate has a reasonable excuse, we agree with Mr Ridgway's proposition, the reasonable excuse must emerge from the circumstances which existed up to the time the certificate was issued (that is not to say however that anything actually done after the certificate is wholly irrelevant; subsequent conduct may of course throw light on a person's intentions at an earlier time).

56. The question of whether Marlow could have obtained an appealable decision can accordingly only be relevant to the issue of reasonable excuse if that decision could be

obtained in advance of the issue of the Certificate and therefore in advance of the supply. In other words, to the extent it was possible to obtain an appealable decision *after* the supply had been made that could not be relevant to whether Marlow had a reasonable excuse for issuing the Certificate.

57. In any case, as regards HMRC's concessionary practice in relation to *belated* certificates, one immediate complication is that it would rely on the *supplier* adjusting their VAT on receipt of the certificate – whether or not that might be negotiated would not necessarily be within the supply recipient's gift. Furthermore, as the dispute before the tribunal would be as to the taxable status of the supply (and not as to the regularity of the issue of the certificate, as to which there is no right of appeal) it is not clear how, when the matter came before a tribunal, given HMRC's treatment was concessionary, and the provision of a certificate prior to the supply is under the law a pre-condition to zero-rating, a tribunal could reach any conclusion other than that the supply was not zero-rated. We note in passing, although it is not of course conclusive of the point, that while HMRC provided examples of its letters said to give rise to appealable decisions, we were not referred to any examples where similar letters had resulted in an appeal by the supply recipient before the FTT where it was accepted the tribunal could consider the issue of liability of supplies despite the certificate having been provided after the supply in contravention of the statutory requirement. Ms Vicary suggested that even if it were the case a belated certificate did not give rise to an appealable decision, then if HMRC went against its stated practice then this could give rise to an action in judicial review proceedings. However, by referring to an "appealable" decision the FTT clearly had in mind proceedings appealable to the tribunal and cannot be taken to be referring to judicial review proceedings. The fact a taxpayer has not selected a route which relies on negotiation with its supplier and the potential issue of judicial review proceedings (on the basis the late certificate could not succeed before a tribunal) could not in our view count against the taxpayer in evaluating whether the taxpayer had a reasonable excuse.

58. Returning to the question of whether the FTT erred in law in its assumption that an appealable decision could be obtained before the issue of the certificate, we consider that it did. Within the relevant constraints – that is, the need to get such a decision before the time of issue of the certificate passed – it was not possible as a matter of law, (or for that matter under HMRC's practice) to obtain such a decision. Even if the scope of what a taxpayer, in Marlow's circumstances, might reasonably be expected to do were enlarged to encompass actions that could have been undertaken after the supply was made (and after the time the certificate had to be issued under the law), it could not necessarily be assumed the supplier would cooperate so as to facilitate a situation where the recipient could recoup the VAT it had paid, if it turned out the recipient's view of the zero-rating was correct.

59. Even if we were wrong in our view that the FTT's conclusion regarding the availability of an appealable decision is a point of law rather than fact (as HMRC argued in their oral submissions before us), this would not help HMRC. Ms Vicary, for HMRC, suggested the FTT's conclusion was a finding of fact which was supportable because as a matter of fact HMRC's practice is to make these sorts of decision and issue appeal letters off the back of them. We reject this submission. It is clear the FTT's finding

contemplated the issue of a decision which would ultimately be legally capable of an appeal to the tribunal. Arguing that the conclusion is a finding of fact also does not help HMRC in any case because there is no indication that evidence of HMRC's practice was put before the FTT. Marlow's case before us was that it was not aware of the HMRC Charities Division's practice and that no mention was made in publicly available information about this possibility (we were not referred to any – the lack of signposting to see HMRC's views was also noted in the UT's decision in *Greenisland* – see [94] below). If the finding was one of fact, it was therefore clearly one upon which there was no evidence before the FTT and which would therefore be capable of amounting to an error of law. For the reasons we set out below (at [62]) the conclusion regarding the availability of an appealable decision was also, in our view, and despite HMRC's submission to the contrary, a finding which was "significant in relation to the conclusion" (as described by Evans LJ in the legal discussion at [42] above).

60. The other component of the FTT's conclusion was that once an appealable decision was obtained, a stay behind *Longridge* could have been requested. In relation to this point, Mr Ridgway took us to later correspondence showing that, when such a stay had subsequently been sought by Marlow, HMRC had maintained they could only comment on the matter once an appeal had been lodged and the content of the actual application had been considered by its legal team. Mr Ridgway's point was that it could not be assumed such a stay would be agreed to by HMRC. This does not detract however in our view from the FTT's point that, assuming there had been an appealable decision, a stay could nevertheless have been requested after the appeal had been commenced before the FTT (and we note that even if for some reason HMRC objected to the stay, that issue would then in the normal course likely be resolved one way or the other by the FTT in a case management hearing). However, as we consider no appealable decision could in fact have been obtained, this conclusion does not assist HMRC.

UT's jurisdiction when error of law identified

61. It follows from what we have said above, that the FTT Decision contains an error of law. Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides that in these circumstances: (1) the UT may (but need not) set aside the FTT Decision; (2) If the UT does set aside the FTT Decision, it may either (i) remit the case back to the FTT with directions for its reconsideration, or (ii) re-make the FTT Decision.

62. HMRC argue that even if there was an error made regarding the availability of an appealable decision, the point was simply an observation and was not material to the decision. Ms Vicary submitted the FTT's decision was explained by the other reasons referred to: the uncertainty in counsel's opinion, and Baker Tilly's recommendation that HMRC be advised at the earliest opportunity. As we indicated at the hearing, we reject that interpretation of the FTT's reasoning. In our view, all of the points mentioned in [25] of the FTT's decision contributed to the its ultimate decision that Marlow did not have a reasonable excuse. This is clear from the paragraph which follows on immediately afterwards, headed "Decision", which starts "Accordingly, as the appellant did not take such further steps…it did not have a reasonable excuse". The FTT's consideration of how Marlow's responsibilities, as a conscientious taxpayer,

could have been fulfilled, and in particular the assumption that an appealable decision could have been obtained before the Certificate was issued, was a material part of its evaluation of "all the circumstances" which it took into account. As we cannot be sure the outcome would be the same if the point is disregarded, we consider the FTT Decision must be set aside.

63. As to whether the case should then be remitted to the FTT, or whether we should re-make the FTT's decision, we consider we can, and should, re-make the FTT's decision: we reach this view because we have had the opportunity to review the correspondence and documents related to the advice Marlow sought and obtained, and which we have already set out above, and we have, in the course of the appeal before us, heard the parties' competing arguments on how the actions taken in relation to advice taken in the run-up to issue of the certificate should be viewed. There is also no suggestion that the evidence, so far as it related to matters of fact, which the FTT received from Mr Wood, was challenged.

Remaking decision

64. As we have said above, there was no real dispute on the appropriate legal test regarding reasonable excuse, namely that which was set out in *Clean Car*.

65. However, we consider we should approach the re-making of the decision taking account of the framework for considering issues of reasonable excuse articulated by this Tribunal in *Perrin*, which in turn had taken account of the test proposed in *Clean Car* amongst other decisions. The UT suggested the following approach (at [81]) which we set out so far as applicable to the reasonable excuse provisions in this case:

> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default…. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?..."

66. Marlow's skeleton referred to a number of decisions of the former VAT tribunal for the proposition that a taxpayer can have a reasonable excuse for making an error where the relevant law is confusing[3] and another in support of the view that the law should be

[3] *Weldon-Hollingsworth* ([1995] VAT Decision 13248), *Standing Conference of Voluntary Organisations* ([2002] VAT Decision 17827) and *Saint Benedict's School* ([1992] VAT Decision 7235)

regarded as complex if it is not reasonably obvious why the law was as it was[4]. Ms Vicary took us through some of these to demonstrate how those decisions turned on their particular facts.

67. As is clear from the approach to the question of reasonable excuse in *Clean Car* and indeed in *Perrin*, the judgment of whether a taxpayer has a reasonable excuse will depend on the evaluation of the particular facts relevant to the taxpayer's circumstances. There is no benefit in focussing on a selection from the multitude of FTT decisions on reasonable excuse, each of which will turn on their facts, to extract more specific points of principle. This is illustrated by the way in which the UT in *Perrin* dealt with the situation where a taxpayer's reasonable excuse argument was based on ignorance of the law, an issue which arose in a number of tribunal decisions, and concluded that ignorance of the law did not necessarily mean the taxpayer's argument failed. The UT explained (at [82]) that it will be a matter of judgment for the tribunal in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question. We make the same observation in relation to questions regarding what actions should be taken in the face of law which is said to be unclear; the objective reasonableness of what the taxpayer did or did not do in the light of that legal backdrop will depend on the particular case, and the relevant legal provisions.

68. In this case, as regards the facts which are asserted by Marlow to give rise to a reasonable excuse, there does not appear to be any real dispute as to the underlying facts. Those facts concern 1) the contents of the correspondence which was sought and received from Marlow's accountants and from counsel, 2) the timing of these, and 3) the background of Marlow's governing committee (that it was formed of members with volunteers some of whom were professionals but who were acting in the role of charity trustees). Rather the disagreement is as to how the various documents are to be interpreted, and whether in the light of that, together with all of the circumstances, a reasonable excuse is made out.

69. In particular two main points remain in contention: 1) the significance of the advice given taking account of the context in which it was sought and 2) whether Marlow should have taken the option suggested by Baker Tilly which it was said would have elicited certainty in HMRC's view sooner and/or sought advice from HMRC.

Advice

70. HMRC argue, contrary to Marlow's position, that Marlow did not at any time receive advice from a professional with knowledge of the manner in which Marlow operated which concluded that they would be correct to issue the Certificate. There was therefore no advice given to issue the Certificate and as such there was no advice upon which Marlow would reasonably claim to have been entitled to rely.

71. Regarding Baker Tilly's first advice, HMRC maintain this was advice that Marlow should not issue the Certificate. While Marlow emphasised that the advice did not, in

[4] *Malin* ([1992] VAT Decision 10085)

terms, advise a zero-rating certificate could not be issued and say the FTT were wrong at [20] to say it did, this is not a point of significance. There is no doubt that Baker Tilly's advice –as set out in our factual summary above – concluded that the contemplated construction supplies, whichever option was followed, would not be zero-rated. Marlow could not have thought it could issue the Certificate on the basis of that advice. Marlow explain however that following the FTT's decision in *Longridge,* Baker Tilly's initial advice was called into question, whereas HMRC maintain *Longridge* was irrelevant to Marlow's situation as Marlow, in contrast to the appellant in *Longridge,* charged membership fees. We consider that point of distinction further below when dealing with the advice received from counsel.

Counsel's advice

72. This advice is crucial to Marlow's case, given it is accepted that Baker Tilly's first advice clearly implied a zero-rating certificate could not be issued and Baker Tilly's second advice did not revisit the question of whether the supplies could be zero-rated.

73. HMRC base their conclusion that the advice was not advice that Marlow could reasonably rely upon on the following:

> (1) Counsel had insufficient information about how Marlow operated and considered that it would be wrong of him to come to any absolute decision as to whether the Certificate could properly be issued (HMRC refer in particular to paragraph 5 of his opinion extracted at [25] above).
>
> (2) The "observations" that Marlow had good grounds to issue a certificate was premised on a number of hypothetical events:
>
> (a) various actions being implemented by Marlow
>
> (b) the FTT's decision in *Longridge* surviving on appeal
>
> (3) Unlike Longridge, Marlow was a member's club.

74. Marlow say that when the opinion is read in full, it is clear it was giving advice on the basis of the facts that were known. The fact Marlow was a members' club was not a point of distinction as far as the reasoning in *Longbridge* was concerned. Although the opinion assumed various actions would be implemented by Marlow, the club intended to carry those points out and subsequently did. Regarding whether the FTT's decision in *Longridge* would survive on appeal Marlow's action should only be judged on what was known at the time – there was no reason to assume the FTT's favourable decision would not survive.

Motivation for getting advice and its relevance.

75. HMRC submit it is relevant to consider Marlow's objective in seeking the advice; the test in *Clean Car* mentions "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer". Marlow's objective, HMRC suggest, was to mitigate a penalty rather than a genuine attempt to determine the proper liability of supplies. Marlow strongly refute this. In taking us through the correspondence Mr

Wood had written, both before the issue of the Certificate, and in relation to Marlow's communications, Mr Ridgway argued that Mr Wood, whose background was in corporation tax, was unaware of the structure of the s62 VAT penalty until it was raised in correspondence by HMRC on 27 July 2015 which was well after the Certificate was issued. As could be seen from the correspondence Mr Wood's concern with a penalty arose from his mistaken view that a penalty might be charged in addition to repayment of VAT and that it would hinge on whether "reasonable care" had been taken (Mr Wood had thought the penalty would be similar to those he was familiar with in the context of corporation tax). HMRC say this misapprehension is irrelevant to the objective not being a genuine attempt to ascertain the liability of the supplies.

Baker Tilly's Second Advice – Marlow's choice of option and failure to seek advice from HMRC

76. HMRC highlight this advice was written on the assumption that a zero-rating certificate could be issued. Having set out the two options, the report recommended Option 2. The reasons for recommending Option 2 included that the particular structure would "highlight the issue to HMRC at a relatively early stage so that certainty will be obtained at the earliest opportunity", however Marlow ignored that recommendation. HMRC submit that while there is no absolute obligation to seek the advice of HMRC this would be a reasonable thing for the conscientious trader to do when faced with a situation in which they were unsure of the correct path to follow. As HMRC noted above HMRC Charities Division offered a tailored service which can provide a definite "yes" or "no" answer to a customer asking if they are in a position to offer a certificate for zero-rated construction services.

77. Marlow dispute the suggestion the report made a clear recommendation for option 2, emphasising the fact that it made the recommendation "on balance…" and that Marlow's committee had various valid reasons for not pursuing option 2 given its greater complexity, and the need to get further advice on SDLT and charity law issues. Regarding the suggestion that Marlow should have approached HMRC, HMRC Charities Division's written ruling service was a "well-kept secret" – Marlow were unaware of it or any publicly available information regarding it; Notice 708 made no encouragement to seek guidance. In any case Marlow knew from the fact HMRC were appealing *Longridge* that Marlow's rationale for zero-rating – based on the FTT's decision in *Longridge* - was contrary to HMRC's view so there would have been no point seeking HMRC's advice because it would undoubtedly have been negative.

Discussion

78. Before discussing our conclusions on the above issues, it is useful to set the scene with some more general points.

Relevance of professional background of Marlow's committee members

79. The UT in *Perrin* suggested the tribunal should take into account the experience and other relevant attributes of the taxpayer. Marlow is a company limited by guarantee which is a registered charity. The key decisions are made by a majority vote by the

directors who are also "charity trustees" as defined in the Charities Act 2011. Monthly meetings are held of a committee, which as well as including the directors, include other deputy office holders. Mr Ridgway gave further details in his submission about the particular backgrounds of the various committee members. It is not necessary to list these (and we did not in any case receive evidence on the matter) as it was not in dispute that a number of Marlow's committee members have professional backgrounds and they were not paid for their role, but nevertheless undertook the serious role of a charity trustee. Further, there is no suggestion from HMRC that the internal expertise was such that an approach to external advisers was not necessary.

80. On the evidence we do have, we note Mr Wood, the Treasurer from August 2011 to July 2016, as mentioned above, has expertise in corporation tax but not VAT. Mr Wood's statement mentions that in period 2011-2014 the Club was assisted also by the input of the Captain and former treasurer who was a CIPFA qualified finance director of a housing association and whose responsibilities including dealing with VAT matters. HMRC emphasise that although Mr Wood was not a VAT expert, he did have tax expertise and submitted that we should, accordingly, hold Marlow to a higher standard. We agree his background is relevant and accordingly take account of it together with the directors' role as charity trustees in evaluating the terms in which advice was sought and acted upon.

81. *Legal advice always gives person reasonable excuse?* HMRC argue that, in any event, the mere fact of seeking legal advice does not, and should not, afford a "reasonable excuse". We agree. But this is not because, as HMRC argue, that were it otherwise, this would be contrary to public policy as those who were financially able to receive eminent legal advice would be advantaged over those who could not afford to do so. Rather, it is, as HMRC rightly point out, because each case must be examined on its merits. As set out in the *Clean Car* test the hypothetical appellant will be taken to share such attributes of the particular appellant as the tribunal considered relevant to the situation – whether and what advice it is considered appropriate to seek and from whom will depend on the particular facts pertaining to the particular appellant.

82. *Motivation to avoid penalty?* Moving on to evaluating the advice Marlow actually sought and obtained, we agree the question of the objective of seeking that advice will be a relevant factor. However, we disagree with HMRC that, on the facts of this case, the reason for seeking counsel's advice was simply to mitigate a penalty that it was feared might be imposed. It is clear from the terms of the instructions sought that the appellant was genuinely seeking advice on the question of liability. Both the terms of the instructions and the proposal that counsel should advise in stages (giving a written opinion, only if counsel thought the strategy of standing behind the principles in *Longridge* "had legs") is consistent with Marlow appreciating that there was a risk that counsel might not advise in the way they were hoping for. It is correct that there was also an objective on the part of Marlow to mitigate the risk of a penalty – we agree with HMRC that it does not matter whether this was erroneously thought to be a penalty in the vein of Corporation Tax rather than a s62 VAT penalty – but that does not detract from the main objective in seeking advice being to ascertain whether the supplies would be zero-rated taking account of the FTT's reasoning in *Longridge*. Furthermore, we do not consider that the additional objective of seeking to mitigate a penalty which might

be imposed is necessarily objectionable. Part of the intention of a penalty is to incentivise certain behaviour – and in this case the concern over a penalty played a part in incentivising Marlow to seek specialist professional advice (which could have gone either way in terms of the conclusion on liability). We see no reason why that should be held against Marlow; if it were, that might in turn encourage taxpayers to be less transparent about their reasons for seeking advice. What is relevant is that the taxpayer is seeking advice which is appropriate to their circumstances with the genuine aim of clarifying their tax position and acting accordingly.

83. *Significance of counsel's advice?* Although HMRC highlight certain sentences in counsel's opinion in support of their submission that the advice was so caveated, and based on incomplete facts so as not actually amount to advice, in our judgment when the opinion is read as a whole, it is clear to us that counsel did ultimately give advice on the zero-rating of the contemplated supplies which it was reasonable for Marlow to rely on.

84. Counsel's disclaimer at [5] that it would be wrong of him to apply the principles of *Longridge* to the limited facts known to him and come to any "absolute decision" was subsequently qualified with a number of points in summary:

> (1) A certificate could only be issued in respect of the floors Marlow retained
>
> (2) It was important, taking account of what was referred to in *Longridge*, that:
>
> > (a) the membership fee must only enable the member to access water sports activities
> >
> > (b) charges were set with a view to covering operational expenses after taking account of donated income and volunteer contributions and that discretion was given to reducing or waiving charges in particular cases, and
> >
> > (c) capital projects were financed from donations and grants and not from charges imposed to participate in the charitable water sports activities.

85. In relation to (1), Longridge's certificate sought to reflect the percentage attributable to the floors it used (79%). In relation to (2) (a) to (c), counsel confirmed at [7] of his opinion that he was able to say the statement read out by the Chairman at the AGM on 24th July 2013 demonstrated an intent on the part of the Club to meet the objectives.

86. The opinion raised the further concern as to whether any social activities in respect of which membership fees were charged were carried out on the floors used by Marlow (as opposed to the trading company), given the provision of social entertainment was not part of the charitable objects of the club. Counsel's suggestion was that two entirely separate subscriptions be charged, one from Marlow for rowing related activities, and the other from the trading company for social activities. If this was done (and Marlow did operate in accordance with the Chairman's statement, and assuming *Longridge*

survived on appeal) there would, counsel advised, seem to be good grounds for issuing the Certificate. Mr Wood's evidence set out that Marlow subsequently did i) create two separate subscriptions ii) take great care the Marlow floors (the ground and first floors) were used only for charitable non-business rowing related activities and iii) operate in accordance with Chairman's AGM statement.

87. Regarding the concern that Marlow, unlike Longridge, was a members' club, this fact is specifically mentioned in Counsel's introductory summary of the factual background. While its significance was not specifically discussed it is clear from the contents of the rest of the opinion as detailed above that it was not a factor which counsel thought distinguished the applicability of the relevant reasoning he had extracted from the FTT's decision in *Longridge.*

88. So, while although he expressed initial reservations about giving an "absolute" decision, counsel then dealt with the key issues of concern regarding whether a zero-rating certificate could be issued and proceeded to give advice that it could. (As an aside we note that given that there was an opportunity for counsel to request and obtain further information from Marlow prior to giving advice (Mr Wood's statement refers to exchanges on 19 August, 6 September and 12 September) and Marlow was charged a not insignificant sum for the advice, it might be expected that Marlow might understandably feel short-changed if, as a client, it turned out that what it received was not advice on the point it had sought).

89. While certain assumptions as to how Marlow should operate were made, they were all ones that could plausibly be carried out and, it turns out, were carried out. (We also bear in mind, as Mr Ridgway highlighted, the Certificate is necessarily based on a person's intentions as to the use of the building. The building cannot by definition actually be used until it is built, but if the construction supply is to be zero-rated the certificate must be issued before the building is built. What was important therefore was Marlow's intentions at the time the Certificate was issued - the relevance of Mr Wood's evidence as to what Marlow actually did afterwards therefore is that it throws light on what their intention was before.)

90. A crucial assumption, which was one that was out of Marlow's hands as it was not to do with their intention, was whether the FTT's decision in *Longridge* would survive on appeal. There is nothing to suggest that it was, at the relevant point in time, irrationally optimistic to think that the FTT's decision would survive. Pending the appeal, the state of the law at the time the Certificate was issued was that there was a supportive FTT decision, of persuasive legal value. The fact it went against established HMRC policy which reflected HMRC's view of the law was neither here nor there – HMRC's policy can and does get challenged and adjudged to be wrong as a matter of law in the tribunals and courts. (As it turns out the FTT's decision was in fact upheld in the Upper Tribunal and so pending the Court of Appeal's determination represented a binding precedent contrary to HMRC's policy).

Baker Tilly Second Advice – relevance of going with Option 1 rather than 2 and should HMRC advice have been sought?

91. Although this advice did not revisit the question of whether a zero-rating Certificate could be issued, the advice was given before the Certificate was issued and Marlow's reaction to it does form part of the factual background which falls to be taken into account. However, whether the advice is interpreted as giving a clear recommendation for Option 2 or not does not matter in the sense that whatever reading is taken of the advice, the option which was ultimately taken, Option 1, was one that the advice contemplated Marlow might take, if it so chose. We accept from Mr Wood's evidence that Option 1 was done for reasons of simplicity, not to evade or delay detection by HMRC. That reason is consistent with what was said in the advice about the need to check out charity law and SDLT issues if Option 2 was followed. (As to the other difficulties Mr Ridgway highlighted of funding the trading subsidiary, as we think he accepted, there was no evidence before us on those matters).

92. Underlying HMRC's criticism of the fact Marlow selected option 1 is the idea that a reasonable taxpayer in Marlow's situation would have wanted to bring its concern to HMRC's attention sooner. In fact, HMRC's case is that, while advice need not necessarily always be sought from HMRC, on the facts of this case Marlow ought to have done so. We have already discussed above the difficulties of obtaining an appealable decision, but should Marlow have nevertheless sought advice from HMRC?

93. We agree with Marlow's argument that this course was not necessary: in circumstances where it was known that HMRC were appealing the decision in *Longridge,* which was adverse to HMRC's policy, there would have been little point in approaching HMRC. More crucially there would be little point, in these circumstances, in approaching HMRC because what they would receive from HMRC would, in any case amount only to HMRC's view of the law – and HMRC would be in no better position to advise on what the correct position was as to the interpretation of the law than a professional adviser. As an aside we note the relevance of whether or not advice is sought or not from HMRC will depend on the facts. There may well be cases where seeking advice from HMRC might be a necessary component of a "reasonable excuse" defence – but it will very much depend on the taxpayer's situation and the relevant legal issue. We are satisfied, on the facts of this case, that there was nothing to be gained in approaching HMRC for a view and that the fact this was not done should not count against Marlow.

94. Mr Ridgway referred us to the Upper Tribunal's decision in *Commissioners for Revenue and Customs v Greenisland Football Club* [2018] UKUT 440 (TCC). In that case HMRC were appealing against the decision of the FTT that the football club was not liable for a s62 VAT penalty in respect of a zero-rating certificate given in relation to a new clubhouse. The FTT held the supply was zero-rated and even if it was not, that the football club had a reasonable excuse as it accepted the club's evidence that it had sought professional third-party advice. As explained by Horner J (at [65] onwards) HMRC disputed the FTT's acceptance of the club's oral evidence to that effect. In their skeleton for the UT appeal they argued the appellant ought to have taken professional advice **and/or** advice from HMRC. Horner J noted HMRC's position changed to arguing that the club should have sought advice from HMRC **in any event**. That

change in position received short shrift and the judge went on to note there was no mention on HMRC's VAT Notice 708 which advised a taxpayer to seek advice direct from HMRC. The UT saw no reason to interfere with the FTT's conclusion that the club had a reasonable excuse. Accordingly, we reject HMRC's depiction of this case as one where the argument regarding the need to approach HMRC failed simply because of HMRC's late change in its pleadings. There would have been no need for the judge to mention the absence in Notice 708 of contacting HMRC for advice and the judge did not appear impressed with HMRC's argument. However, while the appellant argues that the advice Marlow sought went beyond that sought by the football club in *Greenisland* the point is of limited help as each case, as we have said, will turn on its particular facts.

Decision

95. Following the suggested approach in *Perrin* we ask ourselves the question "was what Marlow did (or omitted to do) objectively reasonable for this taxpayer in the circumstances?..."

96. In our view, taking into account that even though Marlow had tax and other professional expertise on its committee, it acted reasonably in seeking advice from VAT specialist accountants and counsel with specific expertise in relation to charity VAT in the light of the proposed construction and the state of the law following the FTT's decision in *Longridge.* It also acted reasonably in relying on that advice in the way it did, in omitting to seek advice from HMRC and in accordingly issuing the zero-rating certificate. We therefore find Marlow had a reasonable excuse for issuing the incorrect zero-rating certificate.

97. Although HMRC highlight that allowing Marlow's appeal represents a "windfall" for Marlow, this feature, as pointed out by Mr Ridgway, is inherent in a scheme which, while it charges a penalty of the amount of tax that ought to have been charged, allows the taxpayer to escape the penalty charge where it has a reasonable excuse.

Disposition

98. For the reasons set out above, Marlow's appeal before us is allowed. The FTT's decision is set aside. Our re-made decision allows Marlow's appeal.

Swami Raghavan
Judge of the Upper Tribunal

Kevin Poole
Judge of the Upper Tribunal

Release date: 22 January 2020