

## Construction of a building solely for a relevant charitable purpose

### [French Education Property Trust Ltd TC04762](#)

#### Background

This case concerned construction of a building by a charity to be leased to and used by a fee-paying school (a second charity). The appellants argued that it should qualify for zero rating as used for a solely relevant charitable purpose.

The case examined whether either the lease or the use by a fee paying school amounted to an economic activity – whether receipt of remuneration gives rise to a presumption of economic activity – whether profit motive and/or intention to maximise returns required – *Floridienne*, *Banque Bruxelles Lambert* and *Yarburgh* discussed – whether the “predominant concern” factor in *Lord Fisher* is inconsistent with CJEU case law – whether the rent was intended to be “concessionary” – *Commission v France* considered – The Tribunal found in favour of HMRC and the appeal was dismissed.

#### Held

The lack of a profit motive and the deliberate setting of fees below the market rate can indicate that there is no economic activity. But, it is not determinative.

The Tribunal took into account CFBL’s charitable status and the fact that it is carrying out its charitable objects by running the College. These too were pointers away from there being an economic activity. But again they were not conclusive.

The Tribunal distinguished the decision in *Yarburgh*

*“there is no real parallel with the parental involvement seen in St Pauls and Yarburgh. In the former “parents were involved in the day to day activities of the day nursery to a significant extent” see [1(6)] of that decision. Here, all the teaching and administrative staff are professionals. Patten J described the position in Yarburgh at [30] of his judgment:*

*“The overwhelming impression which one gets from considering the evidence before the Tribunal is that this is a co-operative venture run by trained staff with the benefit of help provided by parents under the control of a committee on which parents predominate”.*

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The Tribunal found that from the evidence before it, that the College is a professionally run business, managed by the Headmaster and the bursar and controlled by the trustees. That finding is not displaced simply because parents elect half of CFBL's trustees, or because they raise small sums of money for the College (£24k in the 2011-12 academic year and £48k the following year). Those are minor factors.

Although the lack of a profit motive, the setting of the fees below the market and the charitable status of both FEPT and CFBL were all pointers away from there being an economic activity, they were insufficient in its judgment to offset the many indicators in the other direction: namely that the College is a substantial, professionally-run, well-managed school with fee income of over £4m paid in exchange for the provision of education.

The Tribunal therefore found that the activity of running the College does not fall outside the "very wide" meaning to be given to the term "economic activity," and as such the construction could not qualify for zero rate relief.

### **Comment**

Zero rating this type of building will provide significant capital savings. It is essential however that the relevant tests are met. Businesses are advised to take appropriate VAT advice for any construction project as early as scheme appraisal stage.

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