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INLAND REVENUE DEPARTMENT

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Mr Anthony CHU
Clerk to Public Accounts Committee
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong
By Fax : 2543 9197

4 May 2017

Dear Mr CHU,

Public Accounts Committee
Consideration of Chapter 1 of the Director of Audit's Report No. 68
Government's support and monitoring of charities

As requested in your letter of 28 April 2017, I append below the information required –

- (a) **Information pamphlet entitled “A tax guide for charitable institutions and trusts of a public character” mentioned in paragraph 2.3 of the Audit Report**

A copy of the information pamphlet in English and Chinese are at **Annex A** and **Annex B** respectively.

- (b) **Staff Handbook setting out the practices and procedures in processing new applications for tax exemption and carrying out reviews of tax-exempt charities mentioned in paragraph 2.4 of the Audit Report**

An extract (paragraphs 6.2 and 6.8) of the Charitable Donation Section Staff Handbook is at **Annex C**. The Chinese translation of the extract is at **Annex D**.

****Note by Clerk, PAC: Annex B and Annex D not attached.***

(c) **The case law ruling and legal advice obtained by the Inland Revenue Department (“IRD”) in 2003 mentioned in paragraph 2.16 of the Audit Report**

Please refer to **Annex E** for the case *Oldham Training and Enterprise Council v Inland Revenue Commissioner* [1995] STC (SCD) 273. The Chinese translation of the relevant paragraph of the decision (i.e. paragraph 7.1(vi)) is at **Annex F**.

We have, in consultation with the Department of Justice, set out below a gist of the legal advice obtained in 2003 for the reference of the Public Accounts Committee –

Paragraph	Issue	Advice
2.16(a)	Whether it is legally proper for IRD to deny or withdraw a charity’s tax exemption status when the charity or its trustees or directors have been convicted of any offence involving deception, fraudulent acts or misappropriation of donations received or any offences punishable under the Theft Ordinance	It would depend on the merits of each particular case. IRD may deny or withdraw the exemption status of an institution if it is in fact not a charity but, e.g., is a vehicle used in the commission of fraud. However, an isolated incident may not be necessarily conclusive as to the true nature of the business of an institution. Further, an offence committed by an official of an institution may not necessarily be attributable to the institution.
2.16(b)	Whether it is legally proper for IRD to overturn a charity’s tax exemption status solely because the charity has not complied with any obligations or guidelines, whether statutory or not, which are not provided in the Inland Revenue Ordinance	No.

Yours sincerely,



(YIP Wai-fun, Judy)
for Commissioner of Inland Revenue

c.c. Secretary for Financial Services and the Treasury (fax no. 2537 3210)

***Note by Clerk, PAC: Annex F not attached.**

A Tax Guide for Charitable Institutions and Trusts of a Public Character

This pamphlet is issued as a guide only. It has no binding force and does not affect a person's right of objection or appeal to the Commissioner, the Board of Review or the Courts

WHAT IS THE ROLE OF THE DEPARTMENT?

1. The Department is not responsible for the registration of charities. However, subject to certain limitations, charitable institutions or trusts of a public character are exempt from tax under section 88 of the Inland Revenue Ordinance. Charities wishing to enjoy the tax exemption may apply to the Department.

WHAT IS A CHARITY?

2. ***Charity is not equivalent to "voluntary" or "non-profit-making" organisation***

Not all "Voluntary" or so-called "non-profit-making" organisations are charities, however worthy their causes may be. In fact, there is no provision in the Inland Revenue Ordinance which exempts a "voluntary" or "non-profit-making" organisation from tax.

3. ***Charity must be established exclusively for charitable purposes***

Generally speaking, for an institution or a trust to be a charity, it must be established for purposes which are exclusively charitable according to law. The law defining the legal attributes of a charity is based upon case law developed through court decisions.

4. ***Charitable purposes are classified into four heads***

For practical purposes, the judgement of Lord MacNaghten in the case of *I T Special Commissioners v Pemsel* (3 TC 53) is regarded as an authoritative summary of the purposes that may be accepted as charitable. These are: -

- a. relief of poverty;
- b. advancement of education;
- c. advancement of religion; and
- d. other purposes of a charitable nature beneficial to the community not falling under any of the preceding heads.

While the purposes under the first three heads may be in relation to activities carried on in any part of the world, those under head (d) will only be regarded as charitable if they are of benefit to the Hong Kong community.

5. ***Charity must be established for public benefit***

A purpose is not charitable unless it is directed to the public or a sufficient section of it. An institution cannot generally be charitable if it is in principle established for the benefit of specific individuals. It is, however, not possible to lay down any

precise definition of what constitutes a sufficient section of the public. Each case must be considered on its own merit.

6. ***Examples of purposes held by the court to be charitable and non-charitable purposes are given in the lists shown at [Appendix A](#).***

HOW IS A CHARITY SET UP?

7. ***Charity should have a governing instrument***

It is essential that a charity is established by a written governing instrument. The type of instrument adopted will depend on the particular circumstances pertaining to the charity proposed and the preference of the promoters or founders. Persons who are considering starting a charity are advised to seek legal advice about the format, content and legal sufficiency of the charity's governing instrument. Before seeking advice, persons founding a charity must be clear in their own minds as to the purposes of the charity and the manner in which they wish the charity to be administered. Briefly the most common types of structures are:-

- a. a trust;
- b. a society established under the Societies Ordinance (Cap 151);
- c. a company incorporated under the Companies Ordinance (Cap 32);
- and
- d. a statutory body established by the Hong Kong legislature.

In exceptional circumstances, granting tax exemption to some ad hoc committees established for charitable purposes may be possible. Though preparation of governing instrument is strictly not required for a committee of this nature, minutes of the meeting establishing such committee must be ready for inspection.

8. ***Only charities under the jurisdiction of Hong Kong courts qualify for exemption***

Following the principle applied in *Camille and Henry Dreyfus Foundation Inc v CIR* (36 TC 126), tax exemption will only be given to charities subject to the jurisdiction of the courts in Hong Kong, that is to say, charities established in Hong Kong or Hong Kong establishment of overseas charities such as those deemed to be established in Hong Kong under section 4 of the Societies Ordinance or registered under Part XI of the Companies Ordinance.

9. ***Clauses that the governing instrument of a charity should generally contain include:-***

- a. clauses stating precisely and clearly its objects (This also applies to companies incorporated under the Companies Ordinance on and after 10 February 1997 and not required to state their objects in their Memoranda of Association);
- b. clause limiting the application of its funds towards the attainment of its stated objects;
- c. clause prohibiting distribution of its incomes and properties amongst its members;
- d. clause prohibiting members of its governing body (e.g. directors, trustees, etc) from receiving remuneration;
- e.

- clause specifying how the assets should be dealt with upon its dissolution (The remaining assets should normally be donated to other charities);
- f. clause requiring the keeping of sufficient records of income and expenditure (including donation receipts), proper accounting books and compilation of annual financial statements; and
- g. clause excluding the powers set forth in the Seventh Schedule to the Companies Ordinance (in case the charity is a company incorporated under such Ordinance).

WHAT ARE THE TAX ADVANTAGES AVAILABLE TO CHARITIES?

10. A summary of the tax advantages accorded to charities, in so far as ordinances administered by the Commissioner of Inland Revenue are involved, is as follows:-

a. **Inland Revenue Ordinance**

- i. Section 88 provides that charitable institutions or trusts of a public character are exempt from tax under the Inland Revenue Ordinance.
- ii. Proviso to section 88 states that for the purpose of Profits Tax, if a charitable institution or trust of a public character carries on a trade or business, the profits from such trade or business are exempted only if:-
1. the profits are applied solely for charitable purposes, and
 2. the profits are not expended substantially outside Hong Kong, and
 3. either
 - (A) the trade or business is exercised in the course of the actual carrying out of the expressed objects of the institution or trust (for example, a religious body might sell religious tracts);
 - or
 - (B) the work in connection with the trade or business is mainly carried on by persons for whose benefit such institution or trust is established (for example, a society for the protection of the blind might arrange for the sale of handicraft work made by the blind).
- iii. For the purposes of Personal Assessment, Salaries Tax and Profits Tax and subject to certain limitations, a deduction is granted for donations of money to charitable institutions or trusts of a public character which are exempt from tax under section 88 or to the Government for charitable purposes.

b. **Stamp Duty Ordinance**

Stamp duty under Head 1(1) or Head 2(3) shall not be chargeable on any conveyance of immovable property or any transfer of Hong Kong

stock operating as a voluntary disposition inter vivos where the beneficial interest therein passes by way of gift from the person entitled to that interest, or from the registered owner, to or on trust for a charitable institution or trust of a public character. However, the instrument in question must still be submitted to the Collector for adjudication. It is not treated as duly stamped unless it has been stamped with a particular stamp denoting either that it is not chargeable with stamp duty or that it is duly stamped.

c. *Estate Duty Ordinance*

- i. Gifts for the benefit in Hong Kong to any charitable institution or trust of a public character, or to Government for charitable purposes will not be deemed to be part of the dutiable estate.
- ii. Property bequeathed for the benefit in Hong Kong to any charitable institution or trust of a public character, or to Government for charitable purposes is allowed as a deduction.

The exclusion from the dutiable estate is applicable in respect of gifts and bequests received from donors dying before 11 February 2006.

d. *Business Registration Ordinance*

Charitable, ecclesiastical or educational institutions of a public character are normally exempt from the obligation of business registration unless a trade or business is carried on. Where such an institution carries on a trade or business, the exemption will only be granted if the conditions set out in section 16(1)(a) of the Business Registration Ordinance are satisfied. These conditions are similar to the conditions set out in the proviso to section 88 of the Inland Revenue Ordinance as explained in [the sub-paragraph \(a\)ii. above](#).

WHAT IS A DONATION?

11. The word "donation", in its ordinary sense, means a gift. To constitute a gift, the property transferred must be transferred voluntarily and not as a result of a contractual obligation to transfer it and no advantage of a material character is received by the transferor by way of return [see *Sanford Yung - Tao Yung v Commissioner of Inland Revenue (HKTC 1081)*].
12. Persons administering charities should note that donors may be asked to produce receipts for donations in support of any claims they make for an allowance under the Inland Revenue Ordinance. It is therefore important to distinguish donations from other payments when issuing such receipts. Payments other than those which are strictly gifts, e.g. payments made for a grave space, services such as saying prayers, reservation of a space for ancestral worship, admission tickets for film shows, etc., should not be termed as donations. In borderline cases, it is suggested that the exact nature of the payment should be clearly stated on the receipt so that such transaction can be separately considered by the Department.
13. Though a tax-exempted charity may state on its receipts that donations to it may

be tax deductible, such statement must be crossed out when receipts other than donations in the true sense are acknowledged.

HOW TO CHECK WHETHER AN ORGANISATION IS A CHARITY?

14. A list of charitable institutions and trusts of a public character which are exempt from tax under section 88 of the Inland Revenue Ordinance is available on the Internet from:-

www.ird.gov.hk/eng/pdf/e_s88list_emb.pdf

HOW MAY A CHARITY OBTAIN TAX EXEMPTION STATUS?

15. Any organisation wishing to seek exemption from tax as a charitable institution or trust of a public character should submit the following documents to the Department:-

- a. an application letter;
- b. if the organisation has been established:
 - i. a copy of the relevant certificate of registration;
 - ii. a certified true copy of the instrument and rules governing its activities, i.e. the Memorandum and Articles of Association in the case of a corporation, the Ordinance where the body has been established by statute, the Trust Deed in the case of a trust, or the Constitution in the case of a society;
 - iii. a list of any activities which have been carried out in the past 12 months (or less, if appropriate), and a list of activities planned for the next 12 months;
 - iv. a copy of its accounts for the last financial year (if the organisation has been established for 18 months or more).
- c. if the organisation has not yet been established:
 - i. a draft of the instrument and rules governing its activities;
 - ii. a list of the activities planned for the next 12 months from the date of establishment or date of application, where appropriate.

16. The application should be sent to the Commissioner of Inland Revenue, G.P.O. Box 132, Hong Kong.

IS THE TAX EXEMPTION STATUS OF A CHARITY SUBJECT TO REVIEW?

17. The Department will, from time to time, call for accounts, annual reports or other documents to review whether the institution's objects are still charitable and its activities are compatible with its objects. It is essential that a charity should maintain good management and good accounting practice. A practical guide on good governance is available on the Internet from:-

www.icac.org.hk/filemanager/en/Content_1031/fund_raising.pdf

18. Charities are required to advise the Department of any:-
- a. establishment or cessation of subsidiary organisation;
 - b. alteration of its governing instrument; or
 - c. change of name or correspondence address.

HOW TO OBTAIN FURTHER INFORMATION?

19. Further enquiries should be directed to the Assessor (Donations) on 2594 5300.

CHU Yam-yuen
Commissioner of Inland Revenue,
Collector of Stamp Revenue,
Estate Duty Commissioner.

September 2010
 Our WEB page on the Internet: www.ird.gov.hk
 Our E-mail address: taxinfo@ird.gov.hk

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Appendix A

EXAMPLES OF PURPOSES WHICH THE COURT HAD HELD TO BE CHARITABLE PURPOSES

- a. Relief of poor people;
- b. Relief of victims of a particular disaster;
- c. Relief of sickness;
- d. Relief of physically and mentally disabled;
- e. Establishment or maintenance of non-profit-making schools;
- f. Provision of scholarships;
- g. Diffusion of knowledge of particular academic subjects;
- h. Establishment or maintenance of a church;
- i. Establishment of religious institutions of a public character;
- j. Prevention of cruelty to animals;
- k. Protection and safeguarding of the environment or countryside.

EXAMPLES OF PURPOSES WHICH THE COURTS HAD HELD TO BE NON-CHARITABLE PURPOSES

- a. Attainment of a political object;
- b. Promotion of the benefits of the founders or subscribers;
- c. Provision of a playing field, recreation ground or scholarship fund for employees of a particular company or industry;
- d. Encouragement of a particular sport such as angling or cricket.

6.2 Approval of Tax Exemption Claims from Charitable Institution or Trust of a Public Character

6.2.1 Approval of claims for tax exemption under section 88 of the IRO

6.2.1.1 Upon receipt of tax exemption claims, Assr / AA will consider the claims and make recommendations to CA(SD) on whether tax exemptions can be given. The procedures in considering new claims are set out below:

6.2.1.1.1 The case officer will check whether the information and documents provided by the claimant are sufficient for his/her consideration of the claim.

6.2.1.1.2 In considering the claims, the case officer will make reference to the tax guide, viz. “A Tax Guide for Charitable Institutions and Trusts of a Public Character” which is published on the Department’s homepage. In general, the followings are considered:

- (a) whether the claimant is established for exclusively charitable purposes;
- (b) whether the claimant is established for public benefit;
- (c) whether the claimant is under the jurisdiction of Hong Kong courts (if not, the claimant cannot be recognised as tax-exempt under section 88 of the IRO);
- (d) whether the following crucial clauses that the governing instrument of a charity should generally contain are specified in the governing instrument of the claimant:
 - (i) clause stating precisely and clearly its objects;
 - (ii) clause limiting the application of its

- funds towards the attainment of its stated objects;
- (iii) clause prohibiting distribution of its incomes and properties amongst its members;
 - (iv) clause prohibiting members of its governing body (e.g. directors, trustees, etc.) from receiving remuneration;
 - (v) clause specifying how the assets should be dealt with upon its dissolution (the remaining assets should normally be donated to other charities);
 - (vi) clause requiring the keeping of sufficient records of income and expenditure (including donation receipts), proper accounting books and compilation of annual financial statements; and
 - (vii) clauses about avoidance of conflict of interests of the members of the governing body;
- (e) whether the claimant's activities for the past twelve months and/or activities planned for the coming twelve months are compatible with its stated charitable objects; and
 - (f) for claimants established for more than eighteen months, whether its accounts for the last financial year has any irregularity.

6.2.1.1.3 The case officer may raise enquiries to obtain further information and documents in considering the tax exemption claim until he/she is satisfied that the issues in [Chapter 6.2.1.1.2](#) are fulfilled.

6.2.1.1.4 If the case officer considers that the claimant can be recognised as tax-exempt under section 88 of the IRO, he/she should make recommendation for CA(SD)'s approval by stating briefly in the submissions the reasons therefor.

6.2.1.2 Approval to the main body – When it is satisfied that tax exemption under section 88 of the IRO can be given to a charitable institution or trust of a public character, actions in the following paragraphs will be taken:

6.2.1.2.1 CA will type the Exemption Certificate (I.R. 302) (in duplicate) and Approval Letter (in triplicate) for Assr's signature for issue to the claimant.

6.2.1.2.2 CA will also prepare a Circular Letter drawing the claimant's attention to the meaning of approved charitable donations for issue to the claimant (signature not required).

6.2.1.2.3 One copy of the Approval Letter will be passed to the Business Registration Office for their necessary action and record.

6.2.1.2.4 ACO / ATO will issue Approval Letter, Exemption Certificate (I.R. 302) (both signed by Assr), as well as Circular Letter to the claimant.

6.2.1.2.5 ACO / ATO will enter all necessary details in the following records:-

- EUC Program (including the indicator whether the charity consents to disclose its name on the List of Tax-Exempt Charities uploaded to the Department's homepage or not)
- BCFMS
- Work Book

6.2.1.3 Approval to the subsidiary body or sub-subsidiary body – When it is satisfied that a subsidiary body is part and parcel of the tax-exempt charity (i.e. under the sole ownership and control of the tax-exempt main body and does not have a separate written governing document), the tax exemption under section 88 of the IRO will be extended to the subsidiary body.

6.2.1.3.1 Assr/AA will state briefly in the file the reasons for extending exemption to the subsidiary body. Upon the charity's request, a letter recognizing the extension of its tax exemption status to the subsidiary body is to be issued.

6.2.1.3.2 ACO / ATO will update the relevant details in the EUC Program.

6.2.1.4 For those tax-exempt charities (main body and subsidiary bodies) consenting to have their names published in the List of Tax-Exempt Charities uploaded to the Department's homepage, their names will be included in the preparation of the List of Tax-Exempt Charities (see [Chapter 6.7](#)).

6.8 Review of Tax-Exempt Charities

- 6.8.1 To protect revenue, review on the tax exemption status of charities are conducted from time to time having regard to their circumstances. Such reviews are conducted at least once every four years. In December every year, a control list comprising all the files that are due for review for the next year is prepared by AA by using a specially designed function in the EUC Program.
- 6.8.2 The review exercise is conducted in three to four batches depending on the number of cases scheduled for review for each year, the workload of and resources available to the Section.
- 6.8.2.1 After preparation of the control list, Form C.D.1s and Form C.D.1As (the review questionnaires) will be prepared for issue to the tax-exempt charities (signature not required). The Form C.D.1s and C.D.1As are sent to those tax-exempt charities selected for review for completion and review within one month. The charities are also required to file their financial statements and reports on activities they have conducted.
- 6.8.2.2 The following information and documents are sought for review purposes (stated in Form C.D.1A):
- (a) The charity's current corresponding address;
 - (b) Whether the charity's governing instrument has had any changes since the last review/recognised as tax-exempt;
 - (c) Annual report or list of activities for the last financial year;
 - (d) Whether the charity carries on any trade or business;
 - (e) A copy of the charity's accounts for the last financial year;
 - (f) Whether the charity has any subsidiary body to carry out charitable work; and
 - (g) A copy or specimen of donation receipt currently issued by the charity to a donor.

- 6.8.2.3 Reminder (Forms C.D.2) will be issued in around eight weeks' time if the review questionnaire is not received by then.
- 6.8.2.4 Final reminder (Forms F.R.2) will be issued in around sixteen weeks' time if the review questionnaire is still not received by then.
- 6.8.3 Upon receipt of the review questionnaire from the tax-exempt charity (Form C.D. 1A):
 - 6.8.3.1 ACO / ATO will enter record in the Review Exercise Control List.
 - 6.8.3.2 TO will conduct preliminary check on the followings:
 - 6.8.3.2.1 Whether an annual report or a list/details of activities of the last financial year are provided;
 - 6.8.3.2.2 Whether a copy of the accounts duly signed by the responsible person/officer of the charity is provided. If the charity is a body corporate or whose governing instrument requires the preparation of audited accounts, such accounts should be audited and contain a duly signed directors' and auditor's report; and
 - 6.8.3.2.3 Whether a copy or specimen of donation receipt currently issued by the charity to a donor is provided, and if so, whether the charity's full official name is imprinted thereon.
 - 6.8.3.3 If any of the information/document in [Chapter 6.8.3.2](#) is outstanding or insufficient/incorrect, TO will instruct CA to type the appropriate enquiry letters (signed by Assr) for issue to the charity seeking the outstanding/correct information/document.

6.8.3.4 ACO / ATO will pass those C.D.1A containing the sufficient information/document sought with their respective files to the case officer to take necessary review action.

6.8.4 During the review:

6.8.4.1 The case officer will examine the charity's replies to the C.D.1A and its financial statements to ensure that the objects of the charity are still charitable and that its activities are compatible with its charitable objects, and ultimately consider whether the recognition of its tax exemption status could be continued. He/she will state briefly in the file the reasons therefor. If warranted, the case officer may raise enquiries on the charities. Failure to furnish information required by the C.D.1A may lead to the withdrawal of the tax exemption status.

6.8.4.2 If the case officer is finally satisfied that the charity's tax exemption status can be continued, he/she will summarize the findings by preparing a Form C.D.4 and inserting therein all updated information of the tax-exempt charity as well as the year for the next review, and will, depending on the circumstances of the case, prepare usual or modified C.D.5 (signed by the case officer) if continued tax exemption is warranted.

6.8.4.2.1 For cases that the charity cannot provide an annual report or a list of activities held for the last financial year for examination, if the case officer considers that the continued recognition of tax exemption is warranted based on other available information (e.g. the charity's accounts where there may reflect that expenses were incurred for activities held, the provision of a future activity plan, etc.), he/she should state so briefly in the C.D.4 and with the reasons therefor.

6.8.4.2.2 For charities that have prepared audited accounts and whose auditor expressed an adverse opinion

on their accounts and the issues involved may affect their charitable status and hence their tax exemption status, the case officer may raise enquiries on the pertinent issues/concern and seek for the remedial actions. If he/she is satisfied with the remedial action proposed by the charity and is of the view that the tax exemption status can be continued, he/she should state briefly in C.D.4 the issues involved, the remedial actions proposed by the charity, and the justification of giving continued tax exemption.

6.8.4.2.3 For the copy or specimen of donation receipt provided by the charity which is issued to a donor, the case officer has to ensure that the name of the charity imprinted is the correct official name of the charity.

6.8.4.2.4 For charities that paid remuneration to members of the governing body, the case officer should check whether this is permitted in the governing instrument (i.e. the presence of the relevant overriding provisions). If so, he/she has to ascertain if such overriding provisions are duly followed. If not, he/she has to draw the charity's attention for violating the rules prohibiting the payment of remuneration to members of the governing body in the governing instrument and seek the charity's remedial actions in that regard.

6.8.4.3 Under normal circumstances, the next review will be conducted four years after the current review is closed. However, the case officer may suggest advancing the next review and state the reasons therefor in C.D.4.

- 6.8.4.4 In appropriate cases, the case officer may recommend issuing modified C.D.5 to draw the charities' attention to any irregularity identified and the remedial actions taken (if any) during the review.
 - 6.8.4.5 Cases that do not warrant the issue of C.D.5 are submitted to CA(SD) for approval.
 - 6.8.4.6 If withdrawal from exemption is considered warranted, the case officer will prepare and issue the Withdrawal Letter (C.D.3) (signed by case officer). The procedures in [Chapter 6.3.2](#) will also be followed.
 - 6.8.4.7 For those cases that require approval by senior officers according to the approval limits, if the approving officer holds a view contrary to the recommendation of the case officer, he / she should state briefly in C.D.4 the reasons for the decision and may give instructions to the case officer for follow-up.
 - 6.8.4.8 ACO / ATO will enter the details of all actions taken in the Review Exercise Control List and input the next review year in the EUC Program following the instruction of Assr/AA.
- 6.8.5 Whenever enquiries are raised, the case officer has to handle each reply received. The review action on a tax-exempt charity is not regarded as to be completed unless a decision to continue or withdraw the tax exemption status is made by the case officer with endorsement sought with appropriate senior officer(s) (depending on approval limits).
- 6.8.6 The Review Exercise Control List is to be kept as permanent record.

Oldham Training and Enterprise Council v Inland Revenue Commissioners

a

SPECIAL COMMISSIONERS: MR P M F HORSFIELD AND MR T H K EVERETT

24, 25 JULY, 24 AUGUST 1995

b

Exemption – Charities – Body of persons or trust established for charitable purposes only – Private law body set up to promote and provide vocational education to the public, to improve the skills of the workforce and to promote the development of industry, commerce and enterprise of all forms for the benefit of the community – Whether body established for charitable purposes only – Income and Corporation Taxes Act 1988, s 506(1).

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The council was a private law body set up to attain the objectives proposed by a White Paper entitled *Employment for the 1990s* (Cm 540) aimed at reducing unemployment. Its activities included (as envisaged by the White Paper) enterprise services (including the supply of information and advice to businesses), business start-up services and vocational training for young people and retraining for the unemployed. The council was incorporated on 3 May 1989 and according to its memorandum of association, it was established (i) to promote and provide vocational education and training and retraining of the public, (ii) to improve the skills of the workforce, and (iii) to promote the development of industry, commerce and enterprise of all forms for the benefit of the community in and around Oldham. The council sought exemption from income tax under Case III of Sch D on yearly interest in respect of the periods 1 July 1989 to 31 March 1990 and 1 April 1991 to 31 March 1992 pursuant to the exemption from tax available to charities under s 505^a of the Income and Corporation Taxes Act 1988. By a notice dated 20 June 1994 the Revenue determined that the council was not entitled to the exemption under s 505 on the ground that it was not a 'charity' as defined in s 506(1)^b because it had not been established for charitable purposes only. The Revenue took the view that the inclusion of the third of the objects defined in the council's memorandum, namely the promotion of 'the development of industry, commerce and enterprise' prevented the council's objects as a whole being charitable. The council appealed contending that the promotion or advancement of industry or commerce was a charitable object, provided that the purpose was the advancement of the benefit of the public at large and not merely the promotion of the interests of those engaged in the manufacture and sale of their particular products. The Revenue contended, that the council, by its constitution and in practice, was concerned not only with public benefit but also with private advantage, in particular as regards the advice and diagnostic services given to individual businesses and to the cash allowance made to unemployed people to set up a business.

Held – While all of the objects of the council as set out in the memorandum were expressed in such terms as rendered them capable of being charitable, the absence of any express reference to 'charity' in the memorandum made it proper and necessary to look at the circumstances surrounding the foundation of the council to ascertain whether its expressed purposes were not only capable of being charitable, but were in fact charitable. The whole tenor of the White Paper, in so

^a Section 505, so far as material, provides—'... the following exemptions shall be granted ... (c) exemption from tax under Schedule D in respect of any yearly interest where the income forms part of the income of a charity and so far as it is applied to charitable purposes only.'

^b Section 506, so far as material, provides—'... "charity" means any body of persons or trust established for charitable purposes only...'

far as it dealt with the formation of training and enterprise councils and their proposed functions, was the promotion of national and local benefit by the reduction of unemployment, particularly among disadvantaged sections of the population and in depressed areas. That was an object which was not only beneficial to the community but was vital to its welfare. Moreover, the undoubted benefits to individual traders (in the form of advice etc) which were involved in the council's activities and contemplated by the White Paper were not inconsistent with charitable status and could fairly be described as being conferred for the purpose of carrying out the main object of developing industry, commerce and enterprise for the benefit of the community. Accordingly, the council was a charity within s 505 and as such was entitled to relief on its deposit interest. The assessments would therefore be discharged.

Notes

For charities established for other purposes beneficial to the community, see Simon's Direct Tax Service C4.512.

For exemption from corporation tax available to charities, see *ibid*, C4.525, 523.

For the Income and Corporation Taxes Act 1988, ss 505, 506(1), see *ibid*, Part G1.

Cases referred to in decision

Ashton, Re [1938] Ch 482.

A-G v Ross [1986] 1 WLR 252, [1985] 3 All ER 334.

Bray v Ford [1896] AC 44, HL.

Construction Industry Training Board v A-G [1971] 1 WLR 1303, [1971] 3 All ER 449; *affd* [1973] Ch 173, [1974] 2 All ER 1339, CA.

Crystal Palace Trustees v Minister of Town and Country Planning [1951] Ch 132, [1950] 2 All ER 857.

French Protestant Hospital, Re [1951] Ch 567, [1951] 1 All ER 938.

Incorporated Council of Law Reporting for England and Wales v A-G [1972] Ch 73, [1971] 3 All ER 1029, 47 TC 321, CA.

IRC v White (1980) 55 TC 651.

IRC v Yorkshire Agricultural Society [1928] 1 KB 611, 13 TC 58, CA.

Norfolk's (Duke of) Settlement Trusts, Re [1982] 1 Ch 61, [1981] 3 All ER 220, CA.

Sanders' Will Trusts, Re [1954] 1 Ch 667, [1954] 1 All ER 667.

Special Comrs of Income Tax v Pemsel [1891] AC 531, 3 TC 53, HL.

Richard Bramwell QC (instructed by Binder Hamlyn, chartered accountants) for the council.

Mark Merrington, of the Inland Revenue Solicitor's Office, for the Crown.

DECISION

Introduction

1.1 The appellant, Oldham Training and Enterprise Council (the council), is a company limited by guarantee. It was incorporated, under another name, on 3 May 1989. Its present name and constitution derive from special resolutions passed on 13 March 1990. Save as regards an amendment to the remuneration provisions mentioned below, the appeal proceeded on the footing that we were not concerned with the constitution of the council prior to these resolutions taking effect, that is to say that the appeal should be decided on the basis that there was no difference which was material to the appeal between the pre-1990 and the post-1990 constitutions.

1.2 Assessments to corporation tax have been raised against the council under Case III of Sch D in respect of deposit interest. These assessments are dated 5

September 1991, 23 September 1991 and 21 October 1992 and are in respect of the periods 1 July 1989 to 31 March 1990 (the first two assessments), and 1 April 1991 to 31 March 1992. There is a further assessment before us also dated 23 September 1991 under Cases I and II of Sch D. The net tax payable under this assessment is £37,992.96. However, the Crown concedes that this assessment was raised in error and should be discharged and we discharge it. Accordingly the appeal relates only to the three remaining assessments under Case III of Sch D. All of these assessments are in respect of yearly interest of the council. The Crown did not seek to argue that the council is taxable as a trader. It is only the council's deposit interest which it has sought to tax.

1.3 The council appeals against the assessments on the grounds that it is entitled to exemption under s 505 of the Income and Corporation Taxes Act 1988 (the 1988 Act) as a charity within the definition in s 506(1) of the 1988 Act (s 505 is made applicable to corporation tax by s 9(4) of the 1988 Act). The definition of charity in s 506(1) provides that charity means any body of persons or trust established for charitable purposes only. The Crown contests the appeal on the grounds that, as the Crown contends, the council is not established for charitable purposes only.

1.4 We should mention at this point that, in order to obtain exemption under s 505 of the 1988 Act in respect of any yearly interest, it is not sufficient for the relevant body or trust simply to satisfy the condition of being established exclusively for charitable purposes. It is also necessary for the interest in question to be applied to charitable purposes only. However, in the present case, the sole issue before the tribunal is whether or not the first condition of s 505 is satisfied. It is not contended by the Crown that, if the council is a s 505 charity, the relevant interest is still taxable on the basis of non-charitable application.

e 2. *The facts*

2.1 The relevant facts are set out in an agreed statement supported by an agreed bundle of documents. The facts in the agreed statement, so far as material to our decision, are as follows:

(1) In December 1988 the government issued a White Paper called *Employment for the 1990s* (Cm 540), a copy of which is in the agreed bundle. One of the proposals in the White Paper was the creation of Training and Enterprise Councils (TECs) such as the appellant.

(2) The Employment Act 1989 enacted some of the proposals in the White Paper, but did not place TECs on a statutory footing. They were to be private law bodies which contracted with the government, through the training agency to attain the objectives envisaged by the White Paper.

(3) As already mentioned, the council was incorporated on 3 May 1989 and reconstituted on 13 March 1990.

(4) At all material times the members of the council have also been directors.

(5) The council's activities fall under three main headings as follows:

(a) *Enterprise Services*, which include information and advice to businesses, diagnostic services (assessment of a business's strengths and weaknesses and opportunities for development) and business skills training (planning, financial management, identification of new markets etc).

(b) *Business start-up services*, which include a free enterprise training scheme for anyone thinking of setting up a new business (in such subjects as marketing and bookkeeping) and a cash allowance of up to £60 per week for people setting up new businesses (such allowance not to exceed £2,800 in total in the case of any one individual). To qualify for such an allowance (which is in lieu of any unemployment or social security benefits) the recipient must (i) have been unemployed for at least six weeks, (ii) be starting a business judged by the council to have potential for the employment of more people, (iii) have attended a business

training scheme and be able to produce an acceptable business plan, and (iv) have access to sufficient capital.

(c) *Training*, which includes training young people for work and retraining unemployed people. a

(6) As foreshadowed in the White Paper the provision of the above services is generally made by sub-contractors—mainly private sector firms and universities and colleges. Where the services are not provided free, the cost is shared between the recipient business and the council

(7) The activities of the council are funded by government grants and are governed by operating agreements made with the relevant secretaries of state. b

(8) The determination which is the subject of this appeal is contained in a notice from the Deputy Controller FICO (Trust and Charities) dated 20 June 1994 to the effect that the council is not entitled to exemption from tax under s 505 of the 1988 Act for the period 1 August 1989 to 31 March 1992.

(9) The council has not sought registration as a charity and the Charity Commissioners have expressed the view (in a letter to Mr Syd Stagg of the Revenue office making the determination) that the council is 'not established for charitable purposes exclusively'. c

2.2 In addition to the documents in the agreed bundle, two further documents were produced at the hearing. One of them was a pro forma 'TEC Operating Agreement'. It was common ground that this was a mere specimen agreement and might or might not correspond with any agreement actually entered into by the council. Neither party relied on this document and the case proceeded on the footing that the activities of the council were at all material times as described in the agreed statement of facts. The second document was part of an 'Evaluation of DTI funded TEC services'. We have not derived any assistance from this second document, save to note the statement towards the end of p11 that within stated broad objectives 'each Training and Enterprise Council sets its own objectives and priorities'. d
e

3. *The council's memorandum and articles*

3.1 The objects of the council are set out in para 3(1) of the 1990 memorandum of association of the council. (The agreed bundle contains only a copy draft to this memorandum dated 25 July 1989, but it is common ground that the draft represents the terms of the memorandum as adopted in 1990.) Paragraphs 1 and 2 of the memorandum refer merely to the name of the company and the situation (in England) of its registered office. We set out para 3(1) in full: f

'3(1) The company is established to promote and provide vocational education and training and re-training of the public, to improve the skills of the workforce and to promote the development of industry, commerce and enterprise of all forms for the benefit of the community in and around Oldham and in furtherance of these objects and for these purposes (but without prejudice to the generality of the foregoing) to:—(a) examine the local labour market and assess key skill needs; prospects for increasing local employment and the adequacy of existing training opportunities; (b) devise, implement and monitor local training education and work experience programmes for young people, unemployed people and adults requiring new knowledge skills and technical training; (c) develop, secure and provide training, advisory, consultation and other support services and advice to and for local businesses; (d) promote the development of existing businesses and the establishment of new businesses. And it is hereby declared that the objects of the company as specified above shall be separate and distinct objects of the company and shall not be in any way limited by reference to any other paragraph of this clause or the order in which the same occur or the name of the company.' g
h
j

3.2 Before turning to the other provisions of the memorandum and articles it will be helpful if we indicate our general conclusions as to the proper construction of the objects in para 3(1) of the memorandum as follows:

a (1) The opening section of para 3(1) describes three main categories of objects, the first being the provision of 'vocational education and training and re-training of the public', the second being the improvement of the 'skills of the workforce' and the third being the development of 'industry, commerce and enterprise'.

b (2) It is conceded by the Crown that, if the first two of these three categories of objects stood alone, the objects of the council would be charitable as falling under the head of education. The issues between the parties arise out of the third of the three categories of object, namely the development of 'industry, commerce and enterprise'.

c (3) It was initially contended by the Crown that the term 'enterprise' in the third of the three categories of objects should be construed independently of the preceding expressions 'industry' and 'commerce'. Despite the existence of the final provision in para 3(1) that the objects are 'separate and distinct objects', we are doubtful whether this is correct. However, whether this be so or not, it seems to us that the term 'enterprise' adds little, if anything, to 'industry' and 'commerce'. It was argued by the Crown that the term 'enterprise' introduces suggestions of the 'initiation' of a business, of 'entrepreneurial activity' and of 'risk taking'. This may well be so, but if and so far as the expression 'enterprise' does carry these meanings *d* in the present context, it seems to us that its presence does no more than emphasise particular aspects of the concepts of 'industry' and 'commerce' without adding significantly to their scope. We derive support for this view from the fact that, as Mr Bramwell QC for the council pointed out, the expression appears to be used synonymously with 'industry and commerce' in passages of the White Paper, e g at para 4.8.

e (4) What were referred to as the secondary objects in sub-paras (a), (b), (c) and (d) of para 3(1) are expressed to be 'in furtherance of' the three main categories of objects and 'for these purposes'. That being so, we accept the council's arguments that these subsidiary objects cannot enlarge the three principal categories of objects once those principal categories have been construed (see for example *IRC v White* (1980) 55 TC 651 at 653). However it seems to us that they are relevant to the construction of the three main objects as indications of the purposes which the pursuit of these main objects are intended to serve (see *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] Ch 73 at 99, 47 TC 321 at 345-346). We return to this point below when considering the extent to which evidence of the surrounding circumstances is admissible to construe the council's objects.

f 3.3 Paragraph 3(2) of the memorandum contains wide powers of the kind commonly found in company memoranda. However, these powers are expressed to be exercised 'in the furtherance of the said objects but not further or otherwise' and again cannot be said to enlarge the objects. Nor does it seem to us that they assist in the construction of the objects.

g Paragraph 4 of the memorandum provides that the income and property of the company 'shall be applied solely towards the promotion of the objects of the company' as set forth in the memorandum, any distribution to the members being prohibited.

h 3.4 Paragraphs 5 and 6 of the memorandum limit the liability of the members to the sum of £1 per head.

j 3.5 Paragraph 7 provides what is to happen if there is a surplus of assets on a winding-up. This surplus is not to be distributed to the members, but 'is to be given or transferred to some other association, body or bodies (whether corporate or not) or trust having objects similar to the objects of the company, with a similar prohibition against distribution to members, 'such association body, or bodies

or trust to be determined by the Secretary of State for Employment at or before the time of winding-up or dissolution of the company'.

3.6 The articles of the council are in conventional form and nothing turns on them.

4. *The issue between the parties*

4.1 Against the background set out above, the question which we have to determine is a short one, namely whether the inclusion of the third of the three categories of objects defined in the council's memorandum, the promotion of 'the development of industry, commerce and enterprise' prevents the objects as a whole being charitable objects. If that is so, then it cannot be said that the council was 'established for charitable purposes only' within s 506(1) of the 1988 Act, so as to be entitled to relief under s 505. If on the other hand the third of the categories of objects in the memorandum is itself a 'charitable purpose', then it follows that the council was 'established for charitable purposes only', since the Crown accepts that the first two categories of objects, if standing alone, would be charitable.

4.2 There was some discussion at the hearing as to whether the provisions of para 7 of the memorandum, dealing with a surplus of assets on a winding-up, could authorise the secretary of state to apply such assets for non-charitable purposes, and, if so, what would be the effect of these provisions on the charitable status of the council. However, the Crown conceded that the possibility of a non-charitable application of the surplus assets on a winding-up would not prevent the council being 'established for charitable purposes only' within s 506(1).

4.3 As we have already mentioned, if the council is in truth 'established for charitable purposes only', then it follows that it is entitled to the relief it claims under s 505 as applied to corporation tax. The Crown does not contend that the council's funds have been applied inconsistently with its objects. In short, therefore, this appeal turns on the question whether the third of the categories of object in para 3(2) of the memorandum is or is not, on its true construction, charitable.

5. *The council's case*

5.1 Mr Bramwell QC for the council puts his case shortly, adopting the statement of the law of Fox J in *IRC v White* (at 659). At that reference the learned judge referred to three earlier cases and stated that these cases—

'... seem to me to establish that the promotion or advancement of industry (including a particular industry such as agriculture) or of commerce is a charitable object provided that the purpose is the advancement of the benefit of the public at large and not merely the promotion of the interests of those engaged in the manufacture and sale of their particular products.'

The three cases on which Fox J relied for this statement of the law were *IRC v Yorkshire Agricultural Society* [1928] 1 KB 611, 13 TC 58, *Crystal Palace Trustees v Minister of Town and Country Planning* [1951] Ch 132 and *Construction Industry Training Board v A-G* [1971] 1 WLR 1303.

5.2 In the *Yorkshire Agricultural Society* case, the objects of the society, as set out in the judgment of Lord Hanworth MR ([1928] 1 KB 611 at 620, 13 TC 58 at 69), were 'to hold an annual meeting for the exhibition of farming stock, implements, etc., and for the general promotion of agriculture'. Certain privileges attached to membership of the society, summarised by Lord Hanworth MR as 'free admission to the shows and to parts of the grand stands at the shows, the opportunity of going to a reading and writing room on the show ground, a right to have manures and foodstuffs analysed at reduced fees, special railway facilities, and similar benefits'.

Lord Hanworth MR summarised the objects of the society as follows ([1928] 1 KB 611 at 621, 13 TC 58 at 69):

- a 'As the objects of the Society now stand, I think it would be fair to describe them as being for the assistance and promotion of agriculture generally, and in particular certain objects are specified by which that general object, the improvement and promotion of agriculture, may be attained. [adding that, as regards the privileges accorded to members, the existence of these privileges] does not in any way alter the general nature and purpose of the
- b Society as a whole.'

On this basis Lord Hanworth MR concluded as follows that the society's objects were charitable under the fourth head in *Pemsel's* case (see *Special Comrs of Income Tax v Pemsel* [1891] AC 531 at 583, 3 TC 53 at 96) ('trusts for other purposes beneficial to the community, not falling under any of the preceding heads') as follows ([1928] 1 KB 611 at 623, 13 TC 58 at 71):

- c 'It seems to me that the right interpretation to be given to the object of this old Society is that the Society has been formed for the purpose of the improvement of agriculture as a whole, and not for any confined purpose of benefiting only the particular members of the Society or those resident in the locality to which its name attached it, and for a purpose which may bring
- d advancement and improvement to the benefit of the community at large. I think that that general purpose remains in spite of the matters to which I have already referred—namely, the benefits which are catalogued in the case '

Atkin LJ gave a concurring judgment, elaborating on the question of benefits to members as follows ([1928] 1 KB 611 at 631, 13 TC 58 at 77):

- e 'There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object maybe, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its
- f members, I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to its members is only given to them with a view to giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the Society being established for charitable purposes only.
- g That I imagine to be this case.'

Lawrence LJ also gave a concurring judgment, summarising the question in issue as follows ([1928] 1 KB 611 at 635–636, 13 TC 58 at 80):

- h 'In my judgment the crucial question in this appeal is whether the appellant Society was established for the promotion of agriculture generally or what has been conveniently called a members' society, established for the promotion of the interests of its members in their respective businesses. If the former be the case I am clearly of opinion that the Society was established for charitable purposes only within the legal acceptance of that expression. Agriculture is an industry not merely beneficial to the community but vital to its welfare.
- j The fact that the operations of this Society may be confined to Yorkshire is, in my opinion, immaterial, as it is well settled that the benefit in point of local area need not extend to the public at large and that the benefit of the inhabitants of a particular district will suffice '

5.3 The *Crystal Palace* case raised the question whether the Crystal Palace and its park and ground were land 'an interest in which is held on charitable trusts or for ecclesiastical or other charitable purposes of any description'. The relevant trusts were constituted by the Crystal Palace Act 1914 for purposes which included, inter alia, 'the promotion of industry commerce and art'. The charitable status of this object was one of the issues in the case. It was argued by Mr Buckley on behalf of the Minister of Town and Country Planning (at 141), inter alia, that 'the promotion of industry or commerce amounted to no more than the promotion of the interests of those engaged in the manufacture and sale of their particular products, was not in any way concerned with any benefit to the public at large, and so could not be charitable.' Danckwerts J dealt with this argument as follows (at 141-142):

'As regards the construction which Mr. Buckley sought to put on the words "the promotion of industry and commerce", in my view, such a construction is contrary to the whole purpose of the Act and the creation of the statutory corporation represented by the trustees. I am entitled, when the terms of the trusts are not clear, to have regard to the attendant circumstances, including the nature of the trustees: see *In re Ashton* [1938] Ch 482. I find, on reading the Crystal Palace Act, 1914, that the trustees constituted by the Act, are to a large extent, representative trustees, representing the public authorities who contributed to the moneys required for the acquisition of the property, which property was to be administered by the trustees as a concern which would not distribute any profits, and in the title and the preamble and throughout the Act, the note which is stressed is the provision of benefits to the public. In those circumstances, it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees. It appears to me that the promotion of industry or commerce in general in such circumstances is a public purpose of a charitable nature within the fourth class in the enumeration of charitable purposes contained in *Pemsel's* case.'

5.4 The last of the cases on which Fox J relied in his statement of the law in the *White* case, was the *Construction Training Board* case. However, as its name implies, this case concerned a body established for training purposes (held by Sir John Pennycuik VC to be charitable) and not for the wider purpose of promoting industry and commerce. It does not seem to us, therefore, to be much assistance.

5.5 On the basis of the authorities referred to above Mr Bramwell for the council argued: (i) that the promotion or development of 'industry and commerce' was capable of being a charitable object, if the overriding purpose was to benefit the community rather than individuals engaged in trade and commerce; (ii) that the addition of the words 'and enterprise' added nothing to 'industry and commerce' and did not therefore affect the position; (iii) that the wording of the council's memorandum made it clear that the overriding purpose of the development of 'industry, commerce and enterprise' was one of public benefit, ('the benefit of the community in and around Oldham'), not the benefit of individual traders; and (iv) that, if and so far as it was appropriate to look at the benefits which individuals received in the implementation of its objects by the council, those benefits were to be disregarded as incidental to the overriding purpose of public benefit.

6. *The Crown's case*

6.1 The Crown resisted the council's argument on a number of grounds. However, it would, we think, be fair to say that in substance all of these grounds were essentially directed to the same point, namely that the council was by its

constitution and in practice concerned not only with public benefit but also with private advantage.

a 6.2 The Crown starts from the uncontentious proposition that, if the third category of objects in the council's memorandum is to be charitable, it must be within, or at least within the spirit and intendment of, the preamble to the Elizabethan Statute 43 Eliz c.4, and be for the benefit of the community. The Crown then goes on to say that, although on the authorities the promotion of industry and commerce is capable of being charitable under these two tests, the promotion of 'industry, commerce and enterprise' is not, because of the particular b nuances carried by the expression 'enterprise'. We reject this argument for reasons already given, namely that, in the present context, the addition of the word 'enterprise' does not seem to us to enlarge in any significant way the terms 'industry' and 'commerce'. However, there remains the main plank of the Crown's argument, namely that on its true construction and in its context the council's third object is not for the benefit of the community. It was round this difficult issue that c the contest centred.

6.3 The Crown places reliance on the fact that the memorandum in general and the objects provision in particular contain no express reference to charity. We accept the council's contention that this fact cannot of itself prevent the objects from being charitable if, on their true construction, they fall within one or more of the recognised categories of charitable objects. However, the absence of any d reference to charity does, in our view, raise sufficient uncertainty as to the scope of the very wide third category of objects 'the development of industry, commerce and enterprise', to justify looking outside the precise wording of the objects themselves, in particular to the White Paper, for evidence of the circumstances surrounding the formation of the council (see the approach of Danckwerts J in the passages from the *Crystal Palace* case cited above and *A-G v Ross* [1986] 1 WLR 252 at 263). The e Crown further contends that it is permissible to look, not only at the circumstances surrounding the formation of the council, as in the *Crystal Palace* case, but also at the activities carried on by the council after its formation; on the grounds that 'in a case where the real purpose for which an organisation was formed is in doubt, it may be legitimate to take into account the nature of the activities which the organisation has since its formation carried on' (see the *Ross* case (at 263) per f Scott J). The council, while at least impliedly accepting that it is permissible to look at the White Paper (large passages of which were read to us by way of 'background'), resists the contention that it is permissible in this case to look at the actual activities of the council. At the end of the day the point seems to us to be academic. The activities of the council on which the Crown relies as indicating the furtherance of individual advantage rather than benefit to the community are g activities which are foreshadowed in the 'subsidiary objects' in sub-paras (a) to (d) of para 3(1) of its memorandum and in the White Paper (see in particular paras 5.7 to 5.19 of the White Paper). Accordingly, the nature of these activities falls, in our view, to be considered in any event. Further, the broad generalisations in which the description of the TECs and their intended activities are couched in the White h Paper make it difficult to grasp the real nature of those activities without reference to the manner in which they are carried out in practice. That being so we accept the Crown's contention that it is appropriate to consider those activities as set out in the agreed statement of facts.

6.4 On the footing that it is permissible to look at the council's activities, the Crown points to the 'enterprise services' and 'business start-up services' referred j to in the agreed statement of facts, in particular to the advice and diagnostic services given to individual businesses and to the cash allowance made to unemployed people setting up a new business. These activities in particular, the Crown contends, are essentially directed to the benefit of individual traders in the conduct or commencement of their businesses for their personal advantage and are

not directed to the public benefit. The council, on the other hand, contends that these elements of individual benefit are merely incidental to the implementation of the object of developing industry, commerce and enterprise generally' for the benefit of the public. a

6.5 In addition to its main point (the elements of benefit to individual traders) the Crown relies on a number of subsidiary points as follows: (i) It is argued that para 7 of the memorandum would, on construction, authorise the secretary of state to direct the application of surplus assets on a winding-up for a non-charitable purpose and that this points to a non-charitable construction of the objects of the company. (ii) Similarly the Crown refers to the fact that para 3(2)(p) of the memorandum was amended after the foundation of the council so as to authorise the payment of 'reasonable and proper remuneration to the officers, employees and professional advisors of the company and any other person or persons on the objects of the company or any of them'. Payments to directors were previously excluded. This change, the Crown contends, could not properly have been made by a charitable corporation (see *Bray v Ford* [1896] AC 44 and *Re French Protestant Hospital* [1951] Ch 567) and indicates that the council is not in truth charitable. (iii) Finally, the Crown points to the fact that the council has not sought registration as a charity. b

7. Conclusion c

7.1 We have found this an exceptionally difficult case. It is quite clear to us that the council's activities as outlined in the White Paper and implemented in practice are unlike those of most conventional charities, particularly in the extent to which they involve co-operative partnership with bodies which are not or may not be, charitable (see for example para 5.11 of the White Paper which states: 'Although TECs will be new organisations with a separate legal identity, existing business organisations like chambers of commerce and the CBI will often form the nucleus of a TEC. TECs will act as the focus for a range of public and private sector initiatives in the area. Local Employer Networks might also form the nucleus of a new Council. In other areas it might be sensible for TECs to absorb their functions or to link with them in a constructive way'). Further, although it seems to us indisputable that the amelioration of the scourge of unemployment and of all the social ills which flow from it is a purpose of the most profound public benefit, we are conscious that, as a matter of law, not every socially beneficial end is legally charitable (see *Re Sanders' Will Trusts* [1954] 1 Ch 667). However, at the end of the day and after considerable vacillation, we have come to the conclusion that the council is established 'for charitable purposes only' and is accordingly a charity within s 505 of the Act. In the light of the citations of authority set out earlier in this decision, the reasons for our conclusion can be shortly stated as follows: d

(i) All of the objects of the council as set out in para 3(1) of the memorandum are expressed in terms which render them capable of being charitable. In particular this is true of the third object 'to promote the development of industry, commerce and enterprise of all forms' (the word 'enterprise' adding nothing of significance to 'industry' and 'commerce') (see the *Yorkshire Agricultural Society*, *Crystal Palace* and *White* cases). e

(ii) The absence of any express reference to 'charity' renders it proper and necessary to look at the circumstances surrounding the foundation of the council to ascertain whether its expressed purposes are, not only capable of being charitable, but are in fact charitable (see the *Crystal Palace* and *Ross* cases). f

(iii) The whole tenor of the White Paper, in so far as it deals with the formation of TECs and their proposed functions, is the promotion of national and local benefit by the reduction of unemployment, particularly among disadvantaged sections of the population and in depressed areas. This, in the words of Lawrence LJ in the *Yorkshire Agricultural Society* case, is an object which, like agriculture, is g

'not only beneficial to the community but vital to its welfare' (see [1928] 1 KB 611 at 635, 13 TC 58 at 80).

- (iv) The undoubted benefits to individual traders (in the form of advice etc) which are involved in the council's activities and contemplated by the White Paper do not seem to us to be inconsistent with charitable status. As Mr Bramwell very fairly argued, it is difficult to envisage how 'industry, commerce and enterprise' in general could be developed without there being incidental benefits to individual businesses. As in the *Yorkshire Agricultural Society* case, the benefits conferred by the council on individual traders can, it seems to us, fairly be described as being conferred for the purpose of carrying out the main object of developing industry, commerce and enterprise for the benefit of the community. Nor does there seem to us to be any particular difficulty about the weekly payments to unemployed persons seeking to start up new businesses. The purpose of these payments is not to enrich the individuals concerned (since they take the payments in lieu of unemployment or social security benefits), but to promote employment. The new businesses in question must have 'potential for the employment of more people'. These payments do not seem to us to be different in principle from the provision of workshops at a reduced rent in the *White* case (at 657).

- (v) The position does not seem to us to be affected by the provision in para 7 of the memorandum for the application of surplus assets in a winding-up. On the footing that the objects in para 3(1) are charitable, it seems to us that the 'similar' objects in para 7 may well be likewise limited to charitable objects. Even if this is not so, it does not seem to us that a provision of this sort for the application of assets on a winding-up can prejudice the construction of the objects of the council prior to a winding-up, if, as we consider, those objects should otherwise be construed as charitable.

- (vi) As regards the amended provision for the payment of remuneration so as to include directors, even if the amendment was a breach of trust or fiduciary duty, as to which we feel some doubt (see *Re Duke of Norfolk's Settlement Trusts* [1982] 1 Ch 61), it does not seem to us that it can affect the construction of the council's objects. Nor, it seems to us, can the council's failure to apply for registration with the Charity Commission affect the construction of its objects.

- 7.2 In short we conclude that the council is a charity within s 505 of the Act entitled to relief on its deposit interest and we discharge the three assessments relating to such interest accordingly.

Susan J Murphy Barrister.