TC04312

Appeal number: TC/2014/01901 & TC/2014/03392

CAPITAL ALLOWANCES – Business Premises Renovation Allowance - whether a former Church was a Qualifying Building as last been used for the purposes of a trade, profession or vocation – yes - whether a Vestry used as an office [whether or not for the purposes of a trade, profession or vocation] – yes. Capital Allowances Act 2001 Section 360C – Appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SENEX INVESTMENTS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RUTHVEN GEMMELL,WS
MR IAN M P CONDIE, CA

Sitting in public at George House, 126 George Street, Edinburgh on 9 February 2015

Philip Simpson, QC for the Appellant

Stephen O'Rourke, Advocate instructed by the Office of the Advocate General for Scotland for the Respondents

DECISION

1. This is an appeal by Senex Investments Limited ("Senex"), a property leasing company, against the refusal by the Commissioners for HM Revenue & Customs ("HMRC") to grant a claim for Business Premises Renovation Allowance ("BPRA") under Section 36A of the Capital Allowances Act 2001 (CAA) for the periods ended 30 September 2011, 30 September 2012 and 31 December 2012. The relevant tax amounts to £36,703.

2. HMRC's decision to disallow the claim for BPRA was intimated to Senex on 9 January and 14 March 2014.

3. A written Statement of Case and Skeleton Argument was submitted by HMRC and a Skeleton Argument submitted by Senex.

4. The Tribunal had before them, in addition, a Bundle of Authorities and also a Witness Statement of Mr Colin McLean Beattie ("CB") a shareholder and director of Senex who gave evidence and was a credible and reliable witness.

5. The issue before the Tribunal was whether the premises purchased and partially redeveloped by Senex had last been used for the purposes of a trade, profession or vocation for the purposes of Section 360C of the CAA and, in the alternative, whether the claim should be allowed *pro rata* to the extent that part of the premises was used as an office.

Legislation

6. See Appendix 1.

Cases referred to

7. See Appendix 2.

The Facts

8. Senex is a limited company, investing in property, owning a number of bars/restaurants, residential property and offices.

9. CB, as a director of Senex, is involved in seeking investment opportunities and running the company's business.

10. Senex owns a number of public houses, one of which was situated next door to a former church at 1 Montrose Street, Clydebank. This church ("the Premises") had been derelict for a number of years, having been sold to a property company who were unsuccessful in obtaining planning permission to develop it. The public house had been owned since 2003 and let out so that CB was not often at the premises but he was aware of the potential of purchasing the adjacent church ("the Premises").

11. On or about 2010, Senex purchased the Premises and it was inspected by CB. CB referred to a plan and described the building as being derelict with pews and the pulpit still intact in the church area. The church hall contained sports equipment but, otherwise, was "a bare looking room full of rubbish"; there was a relatively small kitchen containing an oven and storage and a Vestry which contained a book shelf, a table and a chair. There were also WCs.

12. CB stated that in order to save on non domestic rates, Senex's refurbishment of the church property meant that the church hall was 'bricked up' and sealed off so that it remained empty and unused and it still is.

13. Senex carried out a refurbishment of the Premises and CB was the site manager over a period of two and a half years. The long period was as a result of difficulties with the licensing authority and their policies and the then strictures of the Licensing Act which were subsequently changed.

14. CB stated he was on site almost every day for some time at least during the two and a half year construction period.

15. The conversion of the Premises created a restaurant, Casa Italia, which was leased by Senex and included WCs for the restaurant's customers, WCs for the staff and changing/storage facilities.

16. CB had never seen the Premises operating as a church but, based on his experience of his own church and the layout of the Premises and his inspection of it, stated the church would have been used for church services and the church hall for all manner of events such as raising funds and jumble sales and that the Vestry would have been used as an office.

17. CB stated that he had not considered the possibility of obtaining BPRA when he purchased the property but subsequently made the claim on the advice of his accountants.

18. Reference was made to "the constitution of the Wesleyan Reform Union ("WRU") as approved by the conference in 2011. It was unclear whether this was the constitution in force prior to 2003 when the Premises were occupied by the WRU.

19. In addition to the Constitution, WRU had a Confession of Faith approved by their conference in 1970 and amended by a conference in 2008, rules on church Membership and Practice and a Ministerial Statement.

20. The aim of WRU was "to extend God's love and encourage closer fellowship among the churches of the union to promote unity of action in ways which best serve the Lord Jesus Christ…".

21. The WRU had an elected general committee. Members of the church were committed to worship, the Sacrament of the Lord's Supper, fellowship and service, prayer and bible study and responsible giving. WRU believed that biblical teaching was vital and received individuals into full membership at the age of 18 years and

those names were kept in a membership register and members were expected to regularly attend church services.

22. The Ministerial Statement said that whenever a church decided to engage a minister they should use a standard contract of service and they were expected to pay at least the recommended minimum salary but failing which they could approach the Management Committee for assistance.

23. The Confession of Faith stated "that the holy scriptures, both Old and New Testaments, as originally given, are of divine inspiration and infallible, supreme in authority in all matters of faith and conduct. It continued that "the Lord Jesus Christ is the Head of the Church".

Senex's Submissions

24. Senex say that the Premises were last used "for the purposes of a trade, profession or vocation" within the meaning of Section 360C(1)(c)(i) CAA and separately, that part of the premises had last been used as an office within the meaning of Section 360C(1)(c)(ii) CAA and that part was converted or renovated within the meaning of Section 360B(2A) CAA.

25. The Premises were used as a church for the purposes that one would normally expect to be carried on in a church including, primarily, church services and use by church based groups which was validated by CB's description of the premises when Senex bought them. The church would have had a minister in charge of the church activities. The church was a non-profit making body although it required to make income to exceed its expenditure but had no purpose of distributing any excess to its members.

26. Senex refer to the Statement of Faith and Practice, the Statement of Church Membership and Practice and the Ministerial Statement as evidencing the normal way a church operates, including the acceptance of non-members attending.

27. Senex say the Vestry was an office and that it is within judicial knowledge that the minister would have an office within a church where, as in this case, there was no other room for an office.

28. Senex say the church used the Premises "for the purpose of a trade, profession or vocation" within the meaning of Section 360C CAA, a term which appears in numerous places throughout the Tax Statutes but which in Section 360 has no specific qualifications such as the requirement to carry out a trade, profession or vocation with a view to realising a profit.

29. Senex say it is clear that an individual who carries on the self-employed activity as a minister of religion carries on a profession and refer to *Inland Revenue Commissioners v Maxse*; as authority for the proposition that profits, in this instance, by a writer, were profits arising from a "profession" whether the profits consisted of remuneration received from another person or whether they were derived from the sale of works by the writer himself, or from their publication and sales through

another person such as a publisher, who either pays the author a royalty or a proportion of the profits arising from the publication and sale.

30. Lord Justice Warrington stated "the remuneration of an editor of a magazine or a journal would also, in my opinion, be profits arising from a profession". Consequently, Senex say carrying on a profession, even under a contract of employment, does not mean that you are not carrying on a profession and say this applies to the position of a minister in the WRU.

31. In the same case, Lord Justice Scranton said "the word "profession" used to be confined to the three learned professions, the Church, Medicine and the Law. It has now a wider meaning. It appears to me clear that a journalist whose contributions have any literary form, as distinguished from a reporter, exercises a "profession"; and the editor of a periodical comes into the same category. It seems to me equally clear that the proprietor of a newspaper or periodical, controlling the printing, publishing and advertising, but not responsible for the selection of the literary or artistic contents, does not exercise a "profession" but a trade or business other than a "profession".

32. Senex say that a minister is clearly carrying on a profession. He provides religious services and pastoral services, albeit unusual to put them in commercial terms, and that the church was an association, an unincorporated association, which was non-profit making but one that has to aim to make a surplus even although this is not distributed to its members; and further that activities when carried on by an individual which constitute a profession when carried on by a body corporate or unincorporated are not removed from the charge to corporation tax and also carry on a trade.

33. Consequently, a company may carry on a solicitors practice and would have its profits within the charge to corporation tax.

34. Senex say that some ambiguity exists as to whether a non-natural person, corporate or unincorporated, can carry on a profession but refer to the *Commissioners of Inland Revenue v Peter McIntyre* and refer to Sections 164 to 167 of the Corporation Taxes Act 2009 ("CTA 2009") as evidence that it can.

"Section 164(2) - If the stock is sold to a person who -

> (a) carries on or intends to carry on a trade, profession or vocation in the United Kingdom, and
>
> (b) is entitled to deduct the cost of the stock as an expense in calculating the profits of that trade, profession or vocation for corporation or income tax purposes."

35. If an unincorporated body cannot carry on a profession, it must follow that they would be carrying on "a trade" and support for this is given in the explanatory notes of CTA 2009, Annex 1, as follows:-

"The question of whether or not a corporate body can carry on a profession for the purposes of corporation tax is one of interpretation of the corporation tax legislation. This is apparent from the general rules under which acts of individuals are attributable to corporate bodies.

The drafters of the Finance Act 1965 introducing corporation tax, proceeded on the basis that a corporate body could not carry on a profession but the Inland Revenue's/HMRC's view is that, instead, a corporate body carries on a business consisting of the provision of professional services and the practice is to treat it as carrying on a trade."

36. These explanatory notes also refer to the meaning of an "unincorporated association" and refer to an Opinion of Lord Justice Lawton in *Conservative and Unionist Central Office v Burrell* which sets out HMRC's view that "the union between members (of an unincorporated association) need not be legally enforceable and there is no reason why an unincorporated body should not have trading or business objectives or carry on significant commercial activities".

37. Senex draw the distinction between an unincorporated association with an aim of profit making such as an English partnership and a church which is not a profit making body in that sense. A church that operated for profit in, say, the form of a style of an American Evangelist Church would be charged corporation tax on the basis that the company was carrying on a trade, profession or vocation. The only difference between a church such as WRU and the American Evangelist Church is the intention to make a profit, not what they do.

38. Senex then say such a body does not have to have a profit making motive to be carrying on a trade, profession or vocation, the profits of which are liable to corporation tax. A profit making motive may be a relevant factor in determining whether an activity is a trade but it is not a decisive one and refer to the Income Tax cases, The *Incorporated Council of Law Reporting of England and Wales, Carnoustie Golf Course Committee v Commissioners of the Inland Revenue* and *the Commissioners of the Inland Revenue v Stonehaven Recreation Ground Trustees.*

39. In the *Incorporated Council of Law Reporting of England and Wales,* an 1888 Queen's Bench case, the Council who produced "the law reports" and who employed editors, reporters, printers and publishers, for payment to third parties, but where no part of the income could be paid as a dividend bonus or otherwise to any member, was held to be established for a trade or business within the meaning of the 1885 Inland Revenue Act and, as a consequence, entitled to an exemption from tax.

40. Chief Justice Coleridge stated "I should have thought it capable of strong argument that they (*Incorporated Council of Law Reporting of England and Wales*) carried on a trade because it is not essential to the carrying on of a trade that the person engaged in it should make, or desire to make, a profit by it. It may be true that in the great majority of cases the carrying on of a trade does, in fact, include the idea of profit, yet the definition of the mere word 'trade' does not necessarily mean something by which a profit is made".

41. In *Carnoustie Golf Course Committee v Inland Revenue*, a 1929 First Division case, it was held that the management of a golf course was a trade or business in relation to a surplus of income over the expenses of management, Lord President Clyde said "I cannot see any ground for regarding the annual balance of revenue over expenditure as anything but the balance of profits and gains arising from a concern carried on business lines. I do not forget that the object of the agreement was not to make divisible profits and it was not conceived in any purely commercial spirit".

42. Similarly in *Inland Revenue v Stonehaven Recreation Ground Trustees*, a 1930 First Division case, the revenue of the trustees of a recreation ground exceeded the expenses of management, the trustees were held to carry on a trade or business and not a mutual association for the benefit of a body of subscribers. Again, Lord President Clyde stated "Whether the trust carries on a 'concern in the nature of a trade', and is thus liable to income tax in respect of the balance of any profits and gains thence arising, is a question which is not simply dependent on what may have been the motives of those who promoted the recreation ground, nor even on the general objects of the trust. It depends rather on what the trust actually does, and on the practical effect of what it does".

43. Lord Blackburn in the same case stated "I concur with some reluctance, but I cannot avoid the conclusion that the respondents maintain the recreation ground out of money which they collect from the public who they admit to the grounds and that therefore any surplus income which they earn inevitably becomes subject to the assessment of tax".

44. Senex say these cases support the proposition that the intention to make profits is not a decisive factor in determining whether an activity is a trade; that even a prohibition on distributing profit does not negate it and in some organisations making enough to cover expenditure equates to a business line or a trade.

45. WRU, as a body, is not an individual and cannot carry on a profession but it can carry on a trade and, consequently, the Premises are a qualifying building in terms of Section 360C.

46. Senex say that HMRC's argument that the relevant "use" for the purposes of Section 360C1(c)(i) CAA was the "use" made by the congregation for worship, which HMRC describe as a "social" purpose, is incorrect in law. They say the congregation was, in effect, the "customers" of the church, the church being the body that occupied and used the premises.

47. Similarly, if the previous use had been a restaurant, the use would have been that made by the restaurant owner for the purposes of the trade, rather than that made by the diners for their private or social purposes.

48. Senex say the church engaged a minister and it is clear that the minister used the premises for the purposes of his professional vocation. The fact that he did so pursuant to a contract of employment does not mean that he was not carrying out his profession or vocation, as stated in *Maxse*. So far as the minister's income tax

position is concerned, the charge to employment tax takes precedence over the charge to tax and business profits, Section 4 Income Tax (Trading and Other Income) Act 2005. Even if the use made of the premises by the minister was not the main or principal use of them (on the basis that the main or principal use was that made by the church body), Section 360C(1)(c)(i) CAA does not require that the relevant use for the purposes of a trade, profession or vocation be the main or principal use and any degree of use beyond *de minimis* would be sufficient to meet the condition in that provision.

49. Senex say the Vestry was used as an office based on the evidence of CB and refer to judicial knowledge in relation to the use of offices by ministers in churches and their use of vestries.

50. Senex say there is no ambiguity in the legislation and refer to *Pepper v Hart* [1992] UKHL3 as authority that HMRC cannot look at the background to legislation for comparative purposes as they have not identified any ambiguity.

51. Senex say it is clear that profit is not relevant and that WRU were not making it and that the word "business" is used extensively in tax cases and legislation and is not the same as carrying out a trade profession or vocation which is relevant for the purposes of Section 360C CAA. Furthermore, Section 360c CAA has no cumulative conditions such as relate to Section 169S of the Taxation of Chargeable Gains Act 1992 which requires the trade, profession or vocation to also be conducted on a commercial basis and with a view to the realisation of profits.

52. Senex say that the broad purpose of the legislation was to provide for the regeneration of dilapidated buildings in disadvantaged areas and that Senex's claim supports that purpose but notwithstanding that the issue is about applying the definition of carrying on a trade profession or vocation and it should not be given a narrow interpretation.

Respondent's Submissions

53. HMRC requested that the Tribunal accept their stated case and say that Section 360C CAA is unambiguously clear; the term "trade, profession and vocation" has been extensively used and explained in tax legislation and cases and that Senex's claim goes against the intention of Parliament when introducing BPRA.

54. HRMC drew an analogy to a courthouse and questioned whether it would qualify for BPRA as being used for a trade, profession or vocation. Whereas it may be used by some who follow a vocation or the profession of lawyers, it is inimical to describe the whole building as being used for a trade, profession or vocation, as it is, in fact, used for the administration of justice in the same way as a church is used for worship, that is to say, a collective activity which includes the minister and the congregation in the overall use for worship.

55. HMRC question CB's evidence to the effect that the Vestry was used as an office and say it is insufficient. Instead, they say a vestry is a room traditionally where a minister would change and carry out ancillary activities and that an office is more

likely to be in a manse or elsewhere and, in any event, the burden of proof is on Senex to prove that it was used as an office.

56. HMRC say that the words "trade, profession or vocation" are well known in tax law and relate to business activities; that it is not a defined term and if there is any ambiguity then you have to look at the material behind the legislation to purposive construction to "address the mischief".

57. They refer to HM Treasury's pre-budget report entitled "Opportunity for All" which describes the BPRA as a relief which "would provide 100% capital allowances in enterprise areas for the cost of renovating business properties that have been vacant for at least a year". As this allowance was capable of being classified as state aid, a number of activities were excluded such as wholly or partly for the purposes of a relevant trade, including, for instance, the coal industry, the steel industry and shipbuilding, amongst others, as was previous use as a dwelling excluded.

58. HMRC's technical note of 18 July 2013 described "BPRA's policy purposes" as follows:-

"Boarded-up rows of derelict shops and empty business properties can be a common sight in the most deprived areas of the UK. The objective of BPRA is to bring such empty or longer term derelict business property back into productive use. The policy purpose of BPRA is, therefore, to foster the regeneration of deprived areas in the UK, by encouraging private investment in those areas, in order to increase local enterprise and employment. BPRA is also designed to support the redevelopment of brownfield sites so reducing pressure on greenfield sites."

59. HMRC say that the background to BPRA was to address the mischief of unused shops and say that it is clear that the allowance relates to business premises.

60. HMRC refer to Bennion and their paper on the "Purposive Approach to Interpretation" and to selections of tax law, including the Taxation of Chargeable Gains Act 1992 Section 19S(1) where "a business" means anything which –

(a) is a trade profession or vocation, and

(b) is conducted on a commercial basis and with a view to the realisation of profits and to the Finance Act 2013 Section17 "cash basis for smaller businesses.

and where Schedule 4 contains a provision enabling the profits of a trade, profession or vocation to be calculated on the cash basis; and to the National Insurance Contributions Act 2014 Section 2(9) which states "in subsections (5) to (7) business" includes –

(a) anything which is a trade, profession or vocation for the purposes of the Income Tax or the Corporation tax Acts…

(c) any charitable or not–for-profit undertaking or any similar undertaking

and point out the Act is clear to distinguish between Section 2(9)(a) and Section 2(9)(c).

61. HMRC refer to the case of *Partridge v Mallendaine,* a Queen's Bench 1886 case, which held that bookmakers are deemed to be carrying on "a vocation" with the consequence that profits on gains should be assessable to income tax and to *Humphrey v Peare,* an 1913 Irish King's Bench Division when it was held that money paid to a land agent as commission incidental to services performed in relation to the carrying out of a contract for sale was part of the annual gains and profits of the agent arising from his vocation.

62. Consequently HMRC say that a vocation can be taxable and, in defining the term, it needs to be read with regard to the actual occupation and whether it has a business interest with a view to profit.

63. In the case of *William Esplen, Son and Swainston Limited v Commissioners of the Inland Revenue,* a King's Bench Division case of 1919, the principal point was the interaction between the business character of an individual as it related to the organisation. The case involved a firm of naval architects in the manner of a company incorporated under the Companies Act, having previously been a partnership. The partnership carried on the profession of naval architects and consulting engineers and the work done by the company was identical in character. The three partners became the sole shareholders and directors of the company and the work carried on was also identical. It was held that they were carrying on a trade or a business.

64. Mr Justice Rowlatt stated "it may be said that the company as such is not carrying on a profession. A company never does anything of itself; it has to employ persons…. In this case it is quite clear that the concern which is carried on is carried on by the company and the question is whether the company is carrying on a profession…". In relation to the work carried out, he said "a company such as this can only do a naval architect's work by sending a naval architect to its customers to do what they want done. As I think the company is not carrying on a profession, the appeal must be dismissed".

65. HMRC say you cannot make "the leap" from base camp to summit and whilst accepting that where a group of individuals can form a body which represents the profession of the individual members, applying this to a church is to go too far.

66. A church is different from, say, a solicitors Limited Liability Partnership or a company and it is the link between the salaried employee and the church that acts to remove the use as a trade, profession or vocation from the church. It is the Church not the employed minster that carries on the use of the business premises and the church is composed of the ministers and the congregation. The character of the church and the use by the church is different from the activities of the individual minister and, even if the minster is carrying on a profession, rather than a vocation, that cannot extend to the church because the character of being a professional rests with the individual.

67. HMRC refer to *Graham v Green*, a 1925 King's Bench Division case, which involved a gambler whose sole means of livelihood was derived from backing horses. It was held that the aggregate of winnings was not derived from a vocation nor were the winnings "profits or gains" within the meaning of the Income Tax Act; and to *Brighton College v Marriot*, a House of Lords decision in 1925, which related to a school, limited by guarantee, whose memorandum of association provided that its whole income and property should be applied solely towards the promotion of the objects of the college, including the remuneration of its officers and other persons for services rendered. The college was treated as a trustee for charitable purposes but in the year in question the fees charged for attendance at school exceeded expenses creating surpluses. It was held that the surplus fees were profits or gains arising from the carrying on of a trade by the college in respect of which the college was assessable to income tax.

68. HMRC say it is the nature of an organisation that lends itself to being in the nature of a trade and say that the payments in terms of the WRU constitution, by members of the congregation or the collection, are not in the same manner as a charge for school fees. HMRC refer to Mr Justice Rowlatt who sought to differentiate between the surplus which the college might obtain from a comparison of the fees and expenses on the one hand and the income from fees which, in this case, was larger than the expenses.

69. Consequently, HMRC say that *Brighton College* carried on a trade because money changed hands, ie the school fees and the use to which the fees were put were beyond the needs of the school.

70. HRMC say that you only ever trade if a non-profit making organisation goes beyond what is normal and reasonable for it to do and that the WRU did not go beyond. It did not sell hymn books which might be outwith normal activities, it remained within WRU's rules or, as Mr Justice Rowlatt would have it, within the memorandum of association of the college.

71. HMRC cite the *British Legion, Peterhead Branch, Remembrance & Welcome Home Fund v Commissioners of the Inland Revenue*, a First Division Court of Session case in 1953, where it was held that public dances which were not conducted on commercial lines were held to be carrying on a trade and were not covered by the charitable exemption. Lord President Cooper stated: - "a person cannot be said to be engaged in carrying on a trade or concern in the nature of a trade within the meaning of the Income Tax Acts unless, in a reasonable sense, he is conducting business on commercial principles. If he is so conducting business it matters not from what motive he acts nor the purpose to which he devotes the profits, if any". And:- "it appears to me that the choice between trade or no trade must in every case involve a large element of fact. It may be a question of degree. While the point is narrow and difficult, I have come with regret to be of the opinion that there was evidence sufficient to justify the finding of the Special Commissioners and that they had not misdirected themselves in law although I doubt whether I should have independently reached the same conclusion".

72. HMRC *a fortiori* say there is no evidence of any organised activities; there is no evidence of any admission fees and it would be a leap over and above this test to say that the church was carrying on a trade.

73. HMRC distinguish the *Incorporated Council of Law Reporting of England and Wales* case as involving a peculiar type of body being an organisation to produce law reports and refer to Lord Chief Justice Coleridge "if Parliament had intended to treat a body like (ICLR) as being – which it is perhaps to some extent – liable to duty… that could have been done in equally clear terms".

74. HMRC say that there is something unique about the *Incorporated Council of Law Reporting of England and Wales* case and that churches are not unique and so the principle cannot be extended to churches. Similarly, in reference to the *Maxse* case, HMRC say those circumstances are unusual and is not relevant to WRU.

75. HMRC refer to the nature of the organisation and refer to explanatory notes to the CTA 2009 which refers to the section entitled "Meaning of Unincorporated Association". In *Conservative and Unionist Central Office v Burrell* (1981) where Lord Justice Lawton considered the meaning of unincorporated association for the purposes of the Income and Corporation Taxes Act as follows:-

> "It is sufficiently like a 'company' to be put in the charging section with the ambit of that word. The interpretation section makes it clear that the word 'company' has a meaning extending beyond a body corporate but not as far as a partnership or local authority. I infer that by 'unincorporated association' in this context Parliament meant two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will. The bond of union between the members of an unincorporated association has to be contractual."

76. HMRC say that WRU is a bond of union between members by contract which encompasses mutual obligations.

77. Section 164 of the Corporation Tax Act 12009 refers to the valuations of trading stock with the emphasis being on trading and, again, refer to the guidance where it stated "HMRC are not aware of any instant of an unincorporated association being assessed to Corporation Tax as carrying on a vocation".

78. HMRC say that the nature of the use of the church by WRU is in relation to the Statement of Faith and the Confession of Faith and, particularly, refer to Section 2 of the latter "WE BELIEVE… 2. That the Holy Scriptures, both Old and New Testaments, as originally given, are of divine inspiration and infallible, premium authority in all matters of faith and conduct;" and in the Constitution of the WRU in relation to church membership and practice "3 In the church members are committed to worship, the sacrament of the Lord's Supper, fellowship and service, prayer and bible study and responsible giving"; and at section 17, "the greatest care should be

taken to maintain church premises as a place for worship, prayer, fellowship, biblical teaching and outreach. All questionable practices should be avoided.

79. HMRC then refer to the New Testament, John 3, verses 14 to 16, -

> 14 And found in the temple those that sold oxen and sheep and doves, and the changers of money sitting:
>
> 15 And when he had made a scourge of small cords, he drove them all out of the temple, and the sheep, and the oxen; and poured out the changers' money, and overthrew the tables;
>
> 16 And said unto them that sold doves, Take those things hence; make not my Father's house a house of merchandise.

80. Matthew, chapter 21, verses 12 and 13, -

> 12 And Jesus went to the temple of God, and cast out all them that sold and bought in the temple, and overthrew the tables of the money changers, and the seats of them that sold doves;
>
> 13 And said unto them, It is written, My house shall be called the house of prayer; but ye have made it a den of thieves.

81. HMRC say that, given the evidence of the use of the church which is not persuasive in relation to claim a statutory created allowance when given a purposive interpretation, the case should be dismissed. BPRA can only apply to business premises used for commercial uses and cannot apply to a church because it is not a qualifying building for the use of a trade, profession or vocation but, instead, a place of worship and is not within the class that Parliament intended to benefit from the allowance.

Decision

82. In interpreting the terms of Section 360C(1) CAA, the following points were not in dispute, namely –

> (1) that the expenditure claimed in respect of the conversion was incurred;
> (2) that the building was within a disadvantaged area Section 1(a);
> (3) that the building was unused for the relevant period of one year (Section 1(b); and it had not been used as a dwelling.

83. The issue, therefore, was whether the Premises was a qualifying building meaning "a building or structure or part of a building or structure", which "had last been used –

> (i) for the purposes of a trade, profession or vocation, or
> (ii) as an office or offices (whether or not for the purposes of a trade, profession or vocation)".

84. The Tribunal held that WRU was an unincorporated association, a church, which whilst being a non-profit making organisation would aim to have met its costs or even make a surplus.

85. The Constitution of Church Membership and Practice and the Ministerial Statement are much more concerned with administration and purpose and theological considerations rather than monetary concerns but it is clear from considering these that the church was run on business lines.

86. To meet their aims they would require finance. The General Committee has a treasurer. The General Committee kept salary and benefits packages under regular and systematic review and, at Clause 14, it was stated "in order to maintain the administration and meet the financial costs of the Connection (the totality of the Church) an assessment will be agreed by the Annual Conference and reviewed as necessary". Annual church meetings were required to be held and amongst the matters to be included were – "presentation of the accounts for the year and discussions of church finances".

87. The Tribunal, as has been said, found CB to be a credible witness and his description of a former church which had been derelict for a number of years was as the Tribunal would expect. Added to this, CB had been a mechanical engineer and involved with construction for 18 years prior to 1986 and, in the Tribunal's view, recounted the description of the building when making reference to the plan and to its condition with additional weight. The description of the Vestry as an office was entirely credible and, whereas as suggested by HMRC, it might also be a place to change there was no mention of there being a wardrobe or any other cupboard in which clerical robes might be stored, to give strength to that submission, whilst acknowledging that the burden of proof rested with Senex.

88. It was clear that any ministers were employed by WRU under contracts of employment and the WRU Constitution, at paragraph 11, refers to contracts of employment and job descriptions and the carrying out of staff appraisals by the General Committee; the General Committee having 20 members plus a number of *ex-officio* members. In the event that a church was unable to pay at least the recommended minimum salary for ministers, they could approach the Management Committee of WRU for assistance.

89. The Tribunal were referred to a number of instances of the term trade, profession or vocation and noted, in relation to Section 360C CAA, the term had no specific qualification such as a requirement to do so with a view to realising a profit or conducting a trade, profession or vocation on a commercial basis as, for instance, is required under the Taxation of Chargeable Gains Act 1992 Section 169S(1).

90. The Tribunal considered that the Church had been in a similar position to the limited company of naval architects referred to in the *Esplen* case and the opinion of Mr Justice Rowlatt that although the company was not carrying on a profession they were carrying on a trade or a business.

91. The Tribunal accepted Senex's submission that WRU did not have to make a profit or have a profit motive to be carrying on a trade, profession or vocation as referred to in the *Incorporated Council of Law Reporting of England and Wales, Carnoustie Golf Course Committee* and the *Stonehaven Recreation Ground Trustees* cases.

92. The Tribunal considered that the relevant activity, as Lord President Clyde stated in *Stonehaven Recreation Ground Trustees*, depends on what (in that case) the Trust actually did and the practical effect of what it did, and not on the motivation or even the results of its activities. A comparison could be drawn with an English partnership of, say, solicitors. If that partnership had occupied a business premises meeting the same conditions as Senex in relation to being unoccupied for the requisite amount of time and in a disadvantaged area, in circumstances where the office was staffed by solicitors employed by the partnership, then a valid claim for BPRA would seem to be available. There would be an unincorporated association; there would be employees carrying on a trade, profession or vocation and there would presumably, at some time, have been clients making use of the services provided in return for payment.

93. Lord President Cooper in the *British Legion, Peterhead Branch, Remembrance & Welcome Home Fund* said there had to be business conducted on commercial principles and "the choice between trade and no trade must in every case involve a large element of fact. It may be a question of degree". He stated that the point is "narrow and difficult".

94. The Tribunal considered that taking the Constitution and other WRU documents and intentions together that the Church was conducted on commercial principles and constituted a trade.

95. The Tribunal did not consider that it was necessary for WRU to have gone beyond their usual purposes and consider the example given of selling hymn books as a necessary requirement in order to transform its activity into a trade.

96. The Tribunal considered the submission by HMRC in relation to the Incorporated *Council of Law Reporting of England and Wales* case that Parliament could have included churches in "equally clear terms" but reflected that a number of exceptions were made to BPRA and, conversely, Parliament could have expressly excluded churches in "equally clear terms".

97. In relation to HMRC's submission that a number of the cases referred to by Senex were unusual or unique or in their term *sui generis*, the Tribunal accepted Senex's submission that cases which proceed to Court are often unique and unusual which is why they have reached the Courts.

98. The Tribunal consider that HMRC's assessment of the intention behind Parliament was too narrow; the Premises were in a derelict state in a disadvantaged

area and, notwithstanding that, Senex did not set out to claim BPRA, they met what Parliament sought to achieve.

99. HMRC's technical note of 18 July 2013 refers to bringing empty or longer term derelict business property back into productive use. The Policy purpose of BPRA is, therefore, to foster the regeneration of deprived areas in the UK, by encouraging private investment in those areas in order to increase local enterprise and employment. BPRA is also designed to support the redevelopment of brownfield sites. It is clear from this that the "mischief" is derelict business property in deprived areas and/or the redevelopment of brownfield sites.

100. The Tribunal consider that the Premises are a qualifying building and had last been used for the purposes of a trade, profession or vocation and that the Vestry was used as an office. The Tribunal consider that is what a vestry would be used for and that the claim for this proportion of the building should, in any event, be allowed as it is not conditional on whether there was use for the purposes of a trade, profession or vocation in any event.

101. The Appeal is allowed.

102. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RUTHVEN GEMMELL
TRIBUNAL JUDGE

RELEASE DATE: 4 March 2015

Appendix 1

Legislation

Capital Allowances Act 2001 c.2

Chapter 3 QUALIFYING BUILDINGS AND QUALFYING BUSINESS PREMISES

[

360C Meaning of "qualifying building"

(1) In this Part "qualifying building", in relation of any conversion or renovation work, means any building or structure, or part of a building or structure, which -

(a) is situated in an area which, on the date on which the conversion or renovation work began, was a disadvantaged area,

(b) was unused throughout the period of one year ending immediately before that date,

(c) on that date, had last been used –

(i) for the purposes of a trade, profession or vocation, or

(ii) as an office or offices (whether or not for the purposes of a trade, profession or vocation),

(d) on that date, had not last been used as, or as part of, a dwelling, and

(e) in the case of part of a building or structure, on that date had not last been occupied and used in common with any other part of the building or structure other than a part –

(i) as respects which the condition in paragraph (b) is met, or
(ii) which had last been used as a dwelling.

(2) In this section "disadvantaged area" means-

(a) an area designated as a disadvantaged area for the purposes of this section by regulation made by the Treasury [.][2]

[…][2]

Appendix 2

Cases

Partridge v Mallandaine [1886] QBD 276 at 278

RE Duty on Estate of Incorporated Council of Law reporting for England and Wales (1888) 22 QBD 279

Humphrey v Peare [1913] 6 TC 201

William Esplen, Son and Swainston Limited v Commissioners of Inland Revenue (19919) 2 KB 731

Inland Revenue Commissioners v Maxse (1919) 1 KB 647

Graham v Green [1925] 2 KB 37

Brighton College v Marriot (1925) 10 TC 213

Commissioners of Inland Revenue v Peter McIntyre (1926) 12 TC 1006

Carnoustie Golf Course Committee v Commissioners of Inland Revenue 1929 SC 419

Commissioners of Inland Revenue v Stonehaven Recreation Ground Trustees 1930 SC 206

British Legion, Peterhead Branch, Remembrance & Welcome Home Fund v CIR [1953] 35 TC 509

Pepper v Hart [1992] UK HL 3