

PROMOTING SPORT AND CHARITY LAW

Francesca Quint and Gordon Nurse¹

The vexed question of the relationship between sport and charity has suddenly come under the spotlight through proposed changes in both tax law and the interpretation of charity law. The Chancellor of the Exchequer announced cryptically in the Budget speech in the spring of 2001 that amateur sports clubs would receive tax relief, and this was followed in November by a consultation document, 'Promoting Sport in the Community', published by H M Treasury. The Treasury's document itself was published after a consultation paper issued by the Charity Commission during the summer as part of the Commission's Review of the Register of Charities. This has been followed by guidelines entitled 'Charities Status and Sport', a copy of which is appended to the Treasury document.

Treasury Proposals

Briefly, the Treasury proposes to encourage donations to sports clubs in the same way that charitable gifts are encouraged, by a new income and corporation tax relief equivalent to Gift Aid, a new exemption from Inheritance Tax, a new relief from capital gains tax and a new corporation tax relief for businesses on gifts in kind. In addition, clubs would be exempt from capital gains tax on disposals and from income/corporation tax on trading activities intended to raise money (but only where the turnover of the trading operation does not exceed £15,000); on interest; and on income from property of up to £10,000 a year. Further, as a matter for separate legislation on local government finance, it is thought that many sports clubs would be among the small businesses eligible to benefit from proposed mandatory and

¹ Francesca Quint and Gordon Nurse are members of the Chambers of Grant Crawford & Jonathan Simpkins at 11 Old Square, Lincoln's Inn.
Tel: (020) 7430 0341; Fax: (020) 7831 2469.
email: clerks@11oldsquare.co.uk.

discretionary relief from non-domestic rates: apart from discretionary relief of up to 100%, there would be a 50% mandatory reduction where the rateable value of the property was less than £3,000 decreasing to a 20% reduction where the rateable value was £6,000 or more. There are no proposals to relieve sports clubs from VAT.

In order to be eligible for the proposed package of reliefs, a sports club would need to qualify as a Community Amateur Sports Club ('CASC'). The basic qualifications for a CASC would be as follows:

- The Club's main purpose must be to promote participation in an eligible sport or sports, eligibility being determined initially by reference to activities recognised by the four national Sports Councils.
- Membership must be open to all regardless of ability or other qualifications, and this must be enshrined in the constitution.
- Membership may be restricted to one sex only where this is necessary in practice through the physical constraints of the facilities available or the requirements of the sport.
- The club must be organised on a non-commercial basis.
- There must be strict limits on financial and similar benefits to members (except that if they are also employees of the club they may be remunerated for their work).
- There must be limits on the distribution of the club's assets on dissolution (i.e. only to other CASCs concerned with the same sport or in the same geographical area, the governing body of the relevant sport and/or a registered charity).

The proposed benefits are similar to, but not as extensive as, the benefits available to a charity. Similarly, the qualifications for eligibility are comparable with, but mostly less restrictive than, the requirements for charitable status, as freshly interpreted by the Charity Commission. The principal question posed in the Treasury's document is whether the separate tax relief package it proposes is necessary or desirable given the greater benefits available to CASCs which also qualify as charities. Would it just be a waste of time?

Charity Commission Guidance

After consistently denying that sports clubs could be charities, on the basis of dicta in the 19th century decision of the Court of Appeal in *Re Nottage* [1895] 2 Ch 649 to the effect that to promote sport is not a charitable purpose, the Commission have radically changed their approach. Whilst it stops short of the view that promoting sport is capable of being a charitable purpose, it has come round to the view that amateur sport is a healthy activity and a legitimate method of promoting healthy recreation for the benefit of the community and advancing the physical education of the young. The Commission do not overtly refer to the Canadian case of *Re Laidlaw Foundation* [1986] 48 OR 549, but it is interesting to note that among the reasons given by Judge Dymond Surr, whose decision was upheld by the Divisional Court of the High Court of Ontario, was the modern view of sports which promote health and fitness as 'a sort of preventive medicine'. She said:

'the promotion of amateur athletic sports under controlled conditions promotes health, and is akin to those cases which have decided that the promotion of health is a charitable purpose ...and...participation in organised competitive amateur sports is in itself educational, both in the sense of discipline and maintenance of a healthy body and further in respect to education resulting from the interchange of people from different cultures'

In that case it was held that an organisation whose main object was to promote an amateur athletic sport involving the pursuit of physical fitness is *prima facie* beneficial to the community and may be classified as charitable provided (i) that any other non-charitable object is merely incidental or ancillary to the promotion of that amateur sport and (ii) the benefits are available to the public. Interestingly, despite the very clear reasoning in the judgment, the Canadian authorities have not yet incorporated the principle into the day to day administration of charity law.

The Commission appear to have adopted a comparable reasoning process, namely that associations which promote healthy sport for amateurs are carrying out a charitable purpose. They claim to have recognised two 'new' charitable purposes: (1) 'The promotion of community participation in healthy recreation by the provision of facilities for playing particular sports' and (2) 'The advancement of the physical education of young people not undergoing formal education'. It can be argued that these are not new charitable purposes as such, but the belated recognition of another method of providing facilities for recreational activities for the benefit of the public (which is charitable under the Recreational Charities Act 1958) and of another method of advancing the education of the young, being a section of the community, which has always been charitable in law. Rather than treating the promotion of

healthy sport as a charitable purpose akin to the promotion of health and education (which would be a new charitable purpose) they have regarded it as charitable only in so far as it involves the provision of facilities for education or healthy recreation. Indeed they expressly deny that they have changed the law, and provide as examples of their approach the charitable work of Riding for the Disabled, which relieves disability by means of riding, or the charitable provision of physical training for elderly people as therapy for their infirmities.

It might be thought that the difference in objects does not matter, but there is a slight but significant difference between the object or purpose of a charity established to promote recreation (or education) by the provision of certain facilities and the purpose of a CASC as posited by the Treasury (to promote participation in an eligible sport or sports). The qualifying restrictions for charitable CASCs are also significantly stricter than the Treasury's proposed restrictions except that there is no requirement that membership of a charitable club should be open to elderly or disabled people.

The Commission recommend that the object of a charitable CASC should be expressed as:

‘the promotion of community participation in healthy recreation by the provision of facilities for playing particular sports’

(the first of the new purposes they say they recognise) with or without a reference to the inhabitants of a specified geographical location or, presumably, the relevant sport. This seems to be more or less the same as providing, in the interests of social welfare, facilities for healthy recreation for the benefit of the community in order to improve their conditions of life, a standard objects clause under the Recreational Charities Act. In elaborating the implications of the reference to the ‘community’, the Commission have made it clear that a not-for-profit sports club concerned with a sport which promotes health and fitness will not qualify as charitable if it -

- has a restricted membership, e.g. where members must be proposed and seconded by existing members, are confined to one sex (unless this is the result of physical limitations in the facilities or the nature of the sport) or must have reached a minimum standard of competence;
- gives priority in the use of its facilities to the more able players (although there will be nothing to prevent members from being organised into groups of similar ability); or
- regards its main aim as achieving success in competitions.

They also say that it will fail to achieve charitable status if –

- benefits in kind (or in cash) are given to individual players;
- social facilities, such as refreshments or a bar, or other benefits are provided for non-playing members;
- refreshments are made available to playing members, unless these are ancillary to healthy recreational activities;
- the cost of membership fees, or required clothing or equipment, is so high as to exclude potential members; or, it appears to,
- spectators are required to pay a fee.

It may be observed that these restrictions would be virtually the same for any charity for recreational purposes except for the Commission's acceptance of the possibility that a charitable CASC may lawfully confine membership to the male sex if women and girls are unable to take part in the relevant sport (i.e. at any level) or if the physical limitations in the changing and other ancillary facilities are such that satisfactory arrangements cannot be made for both sexes. The Commission do not mention that under the Recreational Charities Act 1958 it is already acceptable to provide recreational facilities which are limited to women and girls without there being any special reason for the limitation. Under the 1958 Act charitable facilities can also, of course, be provided specifically for, and thus confined to, persons with special need of them: the elderly, those suffering from a particular physical or mental disability or from disability generally, and those disadvantaged by their social and economic conditions. It might be argued that some men and boys who are not suffering from any physical disability have a physical or psychological need to engage in active sports which require a degree of strength or endurance which is outside the capability of the female sex. If that is so, the provision of facilities for men only could possibly be justified under the 1958 Act, although there would be ample scope for argument. If, however, the only reason given for excluding women and girls is that the changing facilities are inadequate (in other contexts, a dreadfully familiar excuse), the fact that females rather than males may be excluded (a policy which is not permitted under the 1958 Act) indicates that in effect priority can be given to the more able, which the Commission says is improper.

The Likely Effect on Sports Clubs

In practice, most amateur sports clubs are set up without very much conscious deliberation about the objects or the constitution, and tend to have certain characteristics:

- Membership is not always open to all, although lottery funding has greatly encouraged the trend towards openness and inclusivity. There are some clubs, e.g. old boys' clubs, which restrict membership to alumni of a particular institution, and some which remain open to one sex or to members of a particular religion. And many sports clubs still require prospective members to be proposed and seconded.
- Competing and helping to raise standards in the sport will often be as important to members, as it is to the sport's governing body and the Sports Councils, as health and fitness or education as such.
- The social side of the club's activities is important. Former players will spend time (and money) socialising on the club's premises and will also help in practical ways by providing coaching for younger members and undertaking the administration of the club.
- The sale of alcohol is essential. The bar will usually be the main source of income, and will normally have a much higher turnover than the absurdly low £15,000 envisaged by the Treasury paper.
- The members will not usually be interested in the extra paperwork and procedures necessarily involved in setting up and operating a separate trading company.
- The members will often have a strong commitment to the club and the sport which makes them feel justified in spending their money on it and engaging in fundraising activities for larger projects.
- Former players who have been successful in business will sometimes be prepared to make generous gifts
- The committee will be accustomed to answering to the membership and sports governing bodies, but not to being supervised by a regulator such as the Charity Commission.

- Most non-profit-distributing sports clubs operate on the margins of financial viability.

Whilst the Commission's requirements for recognition as a charity appear to represent their best efforts to interpret the law in a way that favours CASCs, and whilst the Gift Aid equivalent and other encouragements to giving in the Treasury's package would in themselves be a valuable reform, the price of the tax relief offered will probably be too high for many existing clubs which have achieved, or aspire to, sporting success.

It may be that the present proposals are not really intended to apply to many existing clubs so much as to persuade those setting up new clubs to choose a form which is tax-efficient. In other words, the proposals can be seen as a form of social engineering – designed to increase the physical activity of the population (and maybe slightly discourage the drinking which often accompanies it) rather than simply to assist existing clubs. It might be thought that if in future new sports clubs are usually set up in a way that achieves tax relief they will also have a commercial advantage over traditional clubs in that they will be able to offer lower membership fees. It will be interesting to know the outcome of the consultation.

It is submitted that neither the Commission's nor the Treasury's proposals confront the real difficulties faced by many sports clubs. Yet it remains important that steps should be taken to improve the health of the community and overcome the shortage of facilities which has been caused by the widespread disposal of playing fields previously attached to maintained schools. Unfortunately, whilst the Commission is obviously hampered by the existing law as they understand it, the Treasury's consultation can be viewed cynically as providing more the appearance than the reality of tangible support for the voluntary contribution of sports clubs. If the Government is serious about improving the situation it could (i) recognise the need for sports clubs to be able to raise money without excessive red tape by means of social activities and/or (ii) relieve clubs from the burden of VAT. This is particularly great where a club hires facilities and the hirer charges VAT but the club, even where registered for VAT, recovers insufficient output tax from (for example) the sale of refreshments. Alternatively, the Government could give serious consideration to amending charity law to recognise the promotion of athletic sports for the benefit of the public (or a section of the public) as a charitable purpose.