Neutral Citation Number: [2016] EWCA Civ 930

Case No: A3/2015/0462

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(Tax and Chancery Chamber)
Mrs Justice Rose
[2014] UKUT 0504 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/09/2016

Before:

LADY JUSTICE ARDEN
LORD JUSTICE TOMLINSON
and
MR JUSTICE MORGAN

- -

Between:

LONGRIDGE ON THE THAMES	**Respondent**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**

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Kieron Beal QC and Michael Jones (instructed by **HMRC Solicitor's Office**) for the **Appellants**
Roger Thomas QC (instructed by **Ashurst**) for the **Respondent**

Hearing dates: 20 -21 April 2016

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Approved Judgment

LADY JUSTICE ARDEN :

OVERVIEW: DO LONGRIDGE'S ACTIVITIES AMOUNT TO ECONOMIC ACTIVITY FOR VAT PURPOSES?

1. VAT is payable where a person carries on an economic activity, but the line may be difficult to draw between activity and economic activity where a person provides a service for a payment but that payment does not represent the full cost of the service. The case law of our courts shows that this is a problem that often arises with charities and the issue is which side of the line the respondent charity falls. In other words, by what test or process should genuinely non-economic activity be ascertained?

2. The primary activities of the respondent, Longridge on the Thames ("Longridge") are the provision of water-based and other outdoor activities (for both recreational and educational purposes) and the giving of instruction in how to undertake such activities. It provides these to people of different ages, although its focus is on youth. Longridge operates from a site on the banks of the Thames in Marlow. It makes a charge for these facilities but that charge may be adjusted to meet the ability of the end-user to pay insofar as donations or receipts from other activities permits this. It is not registered for VAT and therefore does not charge VAT on its supplies.

3. Longridge has recently built a new training centre. It had to pay VAT on the construction of the building amounting to some £135,000. It now wants to recover that sum. It contends that the supplies made on constructing the training centre should be zero-rated under Items 2 and 4 of Group 5 of schedule 8 to the Value Added Tax 1994 ("VATA 1994"), set out in the Appendix to this judgment, on the grounds that the building was intended for use solely for relevant charitable purposes within the meaning of Note (6) to Group 5. A zero-rated supply is a taxable supply chargeable at a zero rate and entitling the supplier to recover all of the input tax attributable to his zero-rated supplies.

4. The appellants ("HMRC") disagreed. HMRC considered that the activities of Longridge amounted to carrying on business activities and so the training centre did not meet the conditions in schedule 8.

5. Longridge successfully appealed this determination to the First-tier Tribunal ("FTT"). HMRC then appealed to the Upper Tribunal. Both the FTT and the Upper Tribunal followed domestic authorities where the courts have looked at the wider context in order to determine whether the provision of services for a money payment constituted an economic activity for VAT purposes.

6. The nub of HMRC's case is that this approach is not consistent with EU law. HMRC contend that the Court of Justice of the European Union ("the CJEU", in which expression I also include its predecessor the European Court of Justice) has recently clarified the test for determining whether there is an economic activity and that this now focuses on whether there is a direct link between the service which the recipient

receives and the payment which he makes, not on the wider context in which the payment was made. If the direct link is not present, there is no economic activity.

7. To answer this question, this Court needs to examine many authorities. At the end of the day, and for the detailed reasons given below, I consider that HMRC are correct. The correct test is one of direct link. In this case, the FTT and Upper Tribunal misdirected themselves. In my judgment, the appeal should therefore, be allowed.

8. Unless otherwise stated, paragraph references to authorities of the Court of Justice of the European Union are to paragraph references in the judgment of the CJEUand not to the paragraphs of the opinion of the Advocate General.

9. I shall start by setting out the legislative framework and summarising the decisions of the FTT and Upper Tribunal. I shall then set out the parties' submissions and my reasons for my conclusion that this appeal should be allowed.

LEGISLATIVE FRAMEWORK

10. The relevant EU provisions are set out in the Appendix to this judgment and consists of provisions of the European Community Council Directive 2006/112/EC ("the Principal VAT Directive"). This replaces the VAT directives previously in force, including the Sixth VAT Directive (77/388/EEC). Unless otherwise stated, there is no material change between the Sixth Directive and the Principal VAT Directive so far as this appeal is concerned save for the change in the numbering of Articles.

11. The Appendix also sets out the relevant domestic implementing provisions. These are now to be found in the VATA 1994.

12. Unless it otherwise appears, references in this judgment to Articles are to Articles of the Principal VAT Directive and references to sections are to sections of VATA 1994.

13. This appeal turns on the meaning of economic activity in the definition of "taxable person" in Article 9(1). Article 9(1) is implemented by VATA 1994, section 4.

14. The approach to interpreting the relevant domestic legislation is clear. As Lord Slynn explained in *Institute of Chartered Accountants in England and Wales v Customs & Excise Commissioners* [1999] 1 WLR 701 ("ICAEW"), section 4 must be interpreted in accordance with the Principal VAT Directive:

> There is a difference in the wording between s 4 of the 1994 Act and arts 2 and 4 of the Sixth Directive. Thus the 1994 Act refers to 'taxable supply made by a taxable person in the course or furtherance of any *business* carried on by him [emphasis added]'. The Sixth Directive refers to the supply of services 'effected for *consideration* ... by a taxable person acting as such [emphasis added]' and taxable person means a person who independently carries out *any economic activity*, including 'the activities of the professions'. The 1994 Act must so far as possible be construed so as to give effect to the Sixth Directive (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR 4135). It does

> not seem to me that there is any difficulty here in doing that and one would expect the same result to follow from the application of either approach.
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> If read literally, it can be argued as Mr Andrew Thornhill QC on behalf of the institute has done, that in granting these licences for a fee, the institute is supplying services in the course of a business, or is supplying services for consideration in the carrying on of an economic activity. But so far as the Sixth Directive is concerned, the Court of Justice of the European Communities has made it clear that it is not enough merely to point to the fact that there is a supply of services in return for a money payment and some loose economic connection, but that the activities must be of an 'economic nature' (see *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen, Arnhem* (Case C-60/90) [1993] STC 222 at 238, [1991] ECR I-3111 at 3136–3137, para 11).

DECISION OF THE FTT

15. The FTT made detailed findings of fact about the nature of Longridge's activities. The facilities were used by a very substantial number of people: in the 11 months to 25 November 2012, 27,119 individuals took part in Longridge's courses. There was corporate use of the upper floor of the training centre but this use was not substantial.

16. As to the charges which Longridge made for its facilities, Longridge had a published list of charges but it offered discounts or waived charges entirely where it considered that course was justified, for example, where there were groups of young people with physical disabilities or other special needs. The FTT also found that there was a substantial number of volunteers who contributed with their time and skills without charge for the purposes of Longridge's courses and activities.

17. The FTT concluded on the basis of the authorities shown to it that the principal question was whether in carrying out its activities generally Longridge was carrying on a business. The FTT referred to the decision of the CJEU in Case C-235/85 *Commission v Netherlands* [1987] ECR 1471. In its judgment in that case the CJEU held that the question whether a person is engaged in economic activity is to be decided objectively, without reference to the purposes or results of the activity so that an entity might be carrying out an economic activity even though its activities were charitable.

18. The FTT would have found, if it were crucial to do so, that, whilst by far the greater part of Longridge's activities was directly by way of carrying out its charitable objectives, a small part was not, although they furthered its charitable objectives by raising funds to subsidise its work.

19. The FTT accepted that there might be a presumption by reason of Article 2 and implicit in Article 9(1) of the Principal VAT Directive that, where goods or services were provided for a consideration, the activity was a business. But the FTT went on

to apply the criteria applied in *HMRC v Yarburgh Children's Trust* [2002] STC 207. It noted that the approach of Patten J in that case was followed in *HMRC v St Paul's Community Project Limited* [2005] STC 95 (Evans-Lombe J). It was necessary to identify in objective terms what the activity was in order to determine whether it was an economic activity and to identify what in truth that activity was it was necessary to look, not at purpose or result, but at the entirety of what it was and the context in which it was carried out. The six criteria laid down in *Customs & Excise Commissioners v Lord Fisher* [1981] STC 238 and summarised by Lord Slynn in *ICAEW* provided helpful guidance. I shall refer to these cases in more detail below (paragraphs 79 to 82).

20. In the present case the FTT had regard to the following factors:

i) the fact that Longridge was providing services for consideration. That meant that it had to be presumed that it was engaged in an economic activity unless and until other factors established otherwise. The activities which Longridge carried on were provided by some commercial enterprises, who could be expected to make a profit from them.

ii) Longridge ran its activities in a professional and business-like manner.

iii) it made charges for its courses and activities on terms and conditions which a commercial organisation would recognise.

iv) it had substantial turnover.

21. Nonetheless the FTT concluded that these factors were not factors indicative of a business even if certain of the factors could demonstrate a degree of financial care and prudence aimed at ensuring that Longridge could carry out its activities. In the judgment of the FTT, it was not consistent with the existence of a business activity that charges were set to meet operational costs to the extent that donated and grant income was not available to meet those costs. It was also significant that there were so many volunteers. In sum, there were features of Longridge's activities which were not consistent with sound business principles.

22. On a separate issue, the FTT were not persuaded that Articles 132 and 133 were relevant to the questions which they had to decide.

23. For the purposes of the issues on this appeal, the crucial conclusions of the FTT are in [99] to [103] of its determination:

> 99. As we have already mentioned, by far the greater part of the Appellant's activities are directly carrying out its charitable activities – its principal charitable objective is to provide "a centre of excellence for the advancement of education in water, outdoor and indoor activities for young people" and that objective is achieved by the facilities, courses and activities it provides. For this reason, as the evidence of Mr Fulbrook made clear, the charges which the Appellant makes are determined by the trustees each year with a view to a range of factors balancing the desire to provide those facilities, courses and

activities at the lowest cost possible with the need to maintain financial prudence for the long-term viability of the Appellant for the benefit of future generations of young people. The following are the most significant of those factors: charges are set with a view to their affordability for the young people the Appellant wishes to benefit; charges are set with a view to covering operational expenses after taking account of donated income and taking account also of the contributions of volunteers; discretion is given to permit reducing or waiving charges in particular cases where pursuit of the charitable objects is especially desirable; and all capital projects (with the exception of the Appellant's original acquisition of the site, which was partly funded by borrowing) are financed by donations and grants, so that no part of the charges is directly or indirectly expended on the acquisition or funding of capital assets.

100. In our view these are not factors which are indicative of a business, even if certain of those factors may demonstrate a degree of financial care and prudence aimed at ensuring that the Appellant can continue to carry out its activities. It is not consistent with a business activity that charges are set to meet operational costs to the extent that donated and grant income is not available to meet such costs; nor is it consistent with a business activity that the necessary capital costs of the activity are met by donations and grants so that no part of such costs, or the funding of such costs, is met by those to whom the Appellant provides its activities. The readiness by the Appellant to reduce or waive charges, undertaken not with a view to increasing business, but to ensure that its facilities and activities are made more widely available, is not consistent with a business activity. All these matters inform as to the true nature of the activity carried on by the Appellant, not merely its purpose in carrying that activity.

101. Most significantly in our view is the issue of volunteers whose time and services are donated to the Appellant, and who are essential to the way in which the Appellant carries out its activity. The importance of such volunteers was made clear by Mr Fulbrook, who spoke as an active and committed volunteer engaged with the Appellant since its inception. It is clear that the Appellant could not carry out its activities in the way it operates without the services of the corps of volunteers available to it. Some indication of their financial significance was apparent from Miss Foister's evidence: we have already indicated that the evidence in relation to this matter was not as clear as it could perhaps have been, but it was sufficient for us to see that the scale and effect of volunteer contributions of services is such as to amount to a significant subsidy to the cost of the Appellant's operations. As we record at paragraphs **[**42**]**

> to [47**]** above, taking into account the value of donated volunteer services, the true cost of providing a group kayaking course for a youth group is £114 (against a charge made of £70 or less) and for an adult group is £124 (against a charge of £100). The nature, scope and materiality of this feature of the Appellant's activity indicates, in our judgment, that the Appellant is engaged in an activity different in kind from that of a business or economic activity.
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> 102. Taking these various factors together – in Patten J's words, "the observable terms and features" of the Appellant's activity and "the wider context in which they are carried out" – we conclude that the intrinsic nature of the Appellant's activity or enterprise is not that of a business, even though it is making supplies for a consideration. The intrinsic nature of its activity is providing courses and activities in furtherance of its stated charitable objectives, which it does by raising funds to meet its capital costs, by seeking out, training, and deploying volunteers who bear a significant burden of staffing those courses and activities, by raising funds to defray some of its operational costs, and by making a charge (with a published tariff, but which may be reduced or waived as the Appellant sees fit in particular circumstances and having regard to its aims) to cover its remaining actual operational costs.
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> 103. Expressing the point by reference to the *Lord Fisher* case indicia, it is the case that the Appellant's activity is a serious undertaking earnestly pursued with reasonable continuity; and that the enterprise is substantial in size and value, and the supplies it makes (or something similar) are made by commercial enterprises; and that it adopts and applies prudent financial management. However, there are features of its activities which are not consistent with sound business principles (most obviously its use and reliance upon volunteers and its reliance upon donations to meet part of its operational costs and to meet all its capital costs); and its predominant concern is not to make taxable supplies to consumers for a consideration, but to carry out its activities in a manner which furthers its charitable objectives. The making of supplies for a consideration is incidental to its predominant concern of furthering its charitable objectives in that it is one means (admittedly an important one) by which its predominant concern is achieved.

DECISION OF THE UPPER TRIBUNAL

24. Before the Upper Tribunal HMRC relied on the decision of the CJEU in Case C-246/08 *European Commission v Finland* [2009] ECR 1 – 10605, which HMRC apparently did not cite to the FTT, in which the provision by the state of free or

subsidised legal aid in return for a sum calculated not as a proportion of the true cost but by reference to the person's means was held not to constitute an economic activity. Overall individual contributions of this kind amounted to about 8% of the state's total cost in providing the legal aid in question. The CJEU held that there was no sufficient direct link between the payment and the service provided ([51]). The CJEU held that the mere fact that a person receives income from an activity does not mean that it was carrying on an economic activity ([38]). It further held that as a general rule an activity will be an economic activity where it is "permanent and is carried out in return for remuneration which is received by the person carrying out the activity" ([37]). To use the CJEU's own words, I will call this "the General Rule", rather than, as Mr Beal tended to call it, a presumption.

25. On the basis of *Finland*, HMRC submitted that any analysis of prices charged by Longridge, their method of calculation and their relationship to costs was impermissible because it offended against the principle that activities can be economic even if they are not pursued for profit. The Upper Tribunal rejected this submission. Rose J considered that *Finland* represented an extension of the requirement in VAT law for a direct link between the provision of a service and the payment made for it "because of the closeness of the relationship between the service conferred and the individual payer and between the value of the services and the amount paid." (Judgment, [32]).

26. Rose J held that the test to be applied was more nuanced than HMRC's submission. Having considered the decision of the Court of Session in *Customs and Excise Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1, Rose J distinguished situations as in that case, where the activities did amount to furtherance of a business even though the activities were not aimed at making a profit, from situations akin to that in *Finland* where the activity was not conducted as a business even though payment was made by the recipient for the services provided. The Upper Tribunal found it clear that it was for the FTT to decide, on the basis of all the facts before it, on which side of the line the case fell. The Upper Tribunal considered that there was nothing in the FTT's discussion of the test to be applied or in their application of the test that showed any error of law.

27. HMRC also submitted to the Upper Tribunal that *Yarburgh* and *St Paul's* were now to be read in the light of *Finland.* HMRC submitted that where consideration was paid for services then there was a presumption that there was an economic activity unless there was some unusual feature to rebut the presumption. The Upper Tribunal did not consider that *Finland* narrowed the test that had previously prevailed in a way which led to the conclusion that *Yarburgh* or *St Paul's* were no longer good law. Moreover, the FTT understood that the charitable purpose of Longridge was not relevant to its consideration.

28. The Upper Tribunal did not consider that Articles 132 or 133 threw any light on the issue it had to decide.

DISCUSSION

29. HMRC's approach necessitates a wide-ranging review of EU VAT law, but essentially the key point in HMRC's case is that *Finland* demonstrates that there will be economic activity for VAT purposes unless there is no direct link between the

service and the payment that the recipient of the service makes. This is a narrow approach which means that the FTT and the Upper Tribunal were wrong in law in the tests which they applied.

30. Mr Kieron Beal QC, for HMRC, starts from the proposition that in the CJEU's jurisprudence economic activity is wide in scope and objective in nature, in the sense that the activity was considered per se and without regard to either its purpose or its results. Next Mr Beal submits that there is a presumption that an activity is an economic activity "where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity" (*Finland,* [37]). He also submits that "remuneration" here means consideration which is relevant for VAT purposes, i.e. consideration which is given for the goods and services: Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443 ("*Apple and Pear*"). There has to be a sufficient direct link between the charges and the goods or services.

31. *Apple and Pear* established the well-known principle of VAT law that there must be a direct link between the service provided and the payment received by the provider. That case is a stark example of the principle. The Apple and Pear Development Council was a statutory body with power to levy charges on growers at a flat rate per hectare to fund its activities in the promotion and improvement of the apple and pear growing industry. The CJEU attached primary significance to (1) the benefit to the whole industry from the levy; (2) the fact that the levy bore no relationship to the benefit which each individual grower obtained and (3) the fact that the levy was imposed by statute and was recoverable irrespective of the absence of any benefit. In those circumstances, "the exercise of those functions does not therefore constitute a supply of services effected for consideration within the meaning of Article 2 (1) of the Sixth Directive." ([16]).

32. On Mr Beal's submission the Upper Tribunal erred in holding that *Finland* was to be read as an extension of the principle established in *Apple and Pear*. On his submission, the important point in *Finland* was the presumption mentioned above, which I have called the General Rule. To be relevant for VAT purposes, consideration and the supply of services had to be reciprocal. *Finland* applied that principle and was not the source of it.

33. The question was then: were there any other factors to rebut the General Rule? Mr Beal submits that, for this purpose, it was not relevant that Longridge acted in the public interest and that it had a charitable motive. Nor was it relevant that Longridge had no business or commercial motive or that it relied on grants and donations and set charges by reference to costs not otherwise funded. A person may not be carrying on an economic activity even if he makes charges for his services: see e.g. (Case C-369/04) *Hutchison 3G Ltd v Commissioners of Customs and Excise* [2007] ECR 1-5247, where services were provided as part of a governmental activity.

34. Mr Beal submits that mere receipt of remuneration was enough to establish economic activity, and that the absence of a business or commercial objective was irrelevant. The activities would not be subject to VAT if they were not provided as consideration. Consideration envisaged reciprocal performance for remuneration: "consideration" in EU law presupposes a direct link between the service provided and the consideration received. The part payment in *Finland* should be considered more in the nature of a fee (as in *Apple and Pear*) than consideration as such. The link was

not therefore sufficiently direct to constitute consideration. Since the services were not supplied for consideration, the public offices did not engage in economic activity for VAT purposes.

35. The General Rule refers to continuous activity provided for remuneration (Case C-408/06) *Gőtz* [2007] ECR I-11298, CJEU at [18]. Continuous activity is contrasted in the case law with occasional activity: (Case C-230/94 *Enkler* [1996] ECR I-4517, CJEU at [20], [22]). Remuneration as a concept in VAT law is equivalent to consideration (Case C-16/93 *Tolsma* [1994] ECR I-743, ECJ at [14]. Donations are not consideration.

36. The concept of supply of services for consideration presupposes the existence of a legal relationship between the provider of the service and the recipient by which the reciprocal performance is achieved (Case C- 2/95 *SDC* [1997] ECR I-3017). The identification of the service is by reference to the service provider's customers, not those customers' own clients.

37. The provision of services free of charge does not fall within the scope of Article 2 and is therefore not economic activity: see (Case C-204/13) *Finanzamt Saarlouis v Heinz Malburg* [2014] ECLI:EU:C:2014:147, CJEU at [35], [36]. Moreover, HMRC accepts that remuneration is not enough, since there are certain types of activity which would not constitute economic activity even if money changes hands: (Case C-369/04) *Hutchison 3G and Others* [2007] ECR I 5247, CJEU at [36], [38], [39]. Activity where there is no market is not economic activity: **(**Case C-267/08) *SPÖ Landesorganisation Kärnten v Finanzamt Klagenfurt* [2010] STC 287, CJEU at [22]-[25]. Illegal activity such as selling narcotics is treated as a non-taxable transaction on public policy grounds: see (Case 269/86 *Mol* [1998] ECR 3645 at [15], [16] and [19]).

38. Mr Beal submits that Longridge had an activity which was permanent and which was carried out in return for remuneration and that the Upper Tribunal should therefore have held that it was to be presumed to have an economic activity.

39. Mr Beal submits that the factors relied on by the FTT as demonstrating that Longridge was not carrying on an economic activity in fact showed that it was carrying on such an activity. In this connection, Mr Beal relies on the FTT's findings that Longridge's activities comprised a serious undertaking earnestly pursued and were substantial in size and amount (Determination, [103]); were conducted in a professional and "business-like" manner, with a full-time chief executive, budgets, forecasts and fund-raising programmes (Determination [98] and [103]); and were of a kind provided by commercial enterprises who seek to profit from them (Determination, [97] and [103]).

40. Mr Beal submits that the FTT should not have been influenced by the fact that the conduct by Longridge of its business was not in accordance with sound business principles because, for example, it relied on volunteers.

41. The Upper Tribunal was, Mr Beal submits, wrong to conclude that the FTT could take into account the way in which Longridge made its charges or its reliance on volunteers. Likewise the Upper Tribunal erred in holding that the predominant concern of Longridge was to carry out its charitable activities rather than to make taxable supplies for VAT purposes. The *Fisher* criteria are indicia only and cannot in

any event override the requirements laid down by the CJEU as to what constitutes an economic activity.

42. Mr Beal submits that the *Fisher* criteria have not kept pace with CJEU jurisprudence. This submission was not advanced before the Upper Tribunal and Longridge accepts that it is a matter for this Court to decide whether it can now be raised. The argument is a pure question of law on which Longridge has filed substantial written argument, and in my judgment it was properly argued before us. Mr Beal goes on to submit that, in particular, in *Yarburgh*, the decision of Patten J was wrongly influenced by what he found to be the predominant concern of the taxpayer. Mr Beal submits that the predominant concern approach is no longer valid and therefore this cannot stand with the decision of the CJEU in *Wellcome*. The court should not look to see if there are subsidies. It should simply look at the supply to whom and for what. The fact that it is a co-operative venture is irrelevant. It would subvert the principle of VAT law that the value of a supply is irrelevant.

43. Mr Beal submits that it is not appropriate to follow *Yarburgh* or *St Paul's*. *Finland* and *Apple and Pear* show that there has to be a direct link with economic activity under Article 2. Accordingly, this appeal should be allowed.

44. Mr Roger Thomas QC, for the respondent, submits that the question for the FTT was whether or not Longridge intended to use the building in the course or furtherance of economic activity within the scope of VAT. This question was also relevant to the question whether the services provided in the course of construction of the building were zero-rated.

45. Mr Thomas submits that the decision of the FTT that the activity of Longridge was not a business or economic activity was a finding of fact which it is not open in general to challenge on an appeal. He submits that the decision of the tribunal involved a two stage process. The first stage involved interpreting the word "business" and the second stage was to apply that test to the facts. He submits that unless the FTT makes an error of law in determining what was a business the appeal could only succeed if the only true and reasonable conclusion from the facts as found by them was contrary to their interpretation. In other words he relies on *Edwards v Bairstow* [1956] AC 14.

46. Furthermore, submits Mr Thomas, the decision of the FTT is to be read as a whole and its sense was to be gathered by a fair reading of it: see *HMRC v London Clubs* [2012] STC 388 at [74].

47. As to the meaning of business activity, Mr Thomas accepts that the meaning is an objective one and that it was impermissible to have regard to the motives of the person making the supply. Nonetheless, he submits that the court has to take into account the wider context in which the activity was thus carried out: see *Yarburgh* and *St Paul's* (see paragraphs 80 to 82 below).

48. Mr Thomas accepts the existence of the General Rule and that in general a person would be engaged in an economic activity if he continuously supplies goods or services in return for remuneration. But that is not the end of the matter.

49. The key submission ("Key Submission") of Mr Thomas is as follows: to decide whether a person supplying services is engaged in economic activity one is entitled to take into account those terms and features which lead one to conclude that the manner in which the activities are undertaken is different from that which would be undertaken by someone engaged in activity in that activity in the ordinary course of the market. An important distinguishing feature in this case is the fact that the charges were significantly less than cost.

50. Mr Thomas submits that it was entirely open to the FTT to hold that the level of charges by Longridge having regard to all the factors amounted to a concession in consequence of which it was open to the FTT to conclude that there was no economic activity.

51. Mr Thomas particularly relies on Case 50/87 *EC v France* [1988] ECR 4797 in support of his Key Submission. In *EC v France*, legislation was introduced in France to restrict the right of deduction by a lessor of property at a low rent. The CJEU held that this was incompatible with the right of deduction conferred by EU law and the existence of a special provision in Article 20 of the Sixth Directive. But it went on to say that there might be cases of lettings by a local authority which were to be treated as "involving a concession and as not constituting an economic activity":

> 20. It is true that, as pointed out by the French Republic, such legislation is necessary particularly in order to deal with lettings at low rents granted by local authorities to associations with social objects or to undertakings which have come to their areas in order to establish themselves. The result of such practices would be to allow local authorities to make subsidies which would in part be borne by the State if the principle of total and immediate deduction were upheld in such cases.
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> 21. In that connection, however, it must be stated that in order to deal with situations such as those referred to by the French Republic, Article 20 of the Sixth Directive provides for a system of adjustment. Where, because of the amount of the rent, the lease must necessarily be regarded as involving a concession and not as constituting an economic activity within the meaning of the directive, the deduction initially made is adjusted and the time-limit for that adjustment may be extended up to 10 years.

52. Mr Beal responds by submitting that the word "concession" is a mistranslation for the French word "*libéralité*", which is used in a technical sense to mean gift or voluntary transaction without consideration (as in "*libéralité testamentaire*" or testamentary gift). The danger of that approach is that involves drawing fine and possibly arbitrary lines. I would prefer to say that I consider that the CJEU's observations here are an illustration of the fact that the General Rule can always be rebutted by reference to the full circumstances relevant to the service and the payment.

53. Another example which Mr Thomas gives is *ICAEW*, where the House of Lords held that ICEAW did not carry on an economic activity when it made charges to support its statutory regulatory function. The House took into account the wider context that

ICAEW was essentially carrying out a function on behalf of the state. It will be recalled that the performance of a statutory function was one of the three factors from which, in *Apple and Pear*, the CJEU drew its conclusion that there was no direct link between the charges imposed on growers and the benefits derived from them. Again this case is another example of the General Rule being rebutted.

54. A further example which Mr Thomas gives is Case C-142/99 *Floridienne SA v Belgium* [2000] STC 1044. The CJEU took into account the wider circumstances in which a parent company held shares in its subsidiaries. The management of these shareholdings does not of itself constitute an economic activity but it may do so where for instance the parent company is also making loans at interest to its subsidiary ([28]). It all depended on the facts. This is another example, on Mr Thomas' submission, of the CJEU looking to the wider context.

55. Mr Thomas' key submission (summarised in paragraph 49 above) mandates a comparison with ordinary market activities. In this connection, Mr Thomas refers this Court to the narrower definition of the "economic activity" given by Advocate General Maduro in *BBL* and expressed to be derived from *Floridienne*. He considered that economic activity had to be something which occurred on a market, which might well exclude the activity of a person who as here provided services at a concessionary rate:

> According to [*Floridienne*], "economic activity" must therefore be construed as meaning an activity likely to be carried out by a private undertaking on a market, organised within a professional framework and generally performed in the interest of generating profit.

56. But the CJEU plainly did not accept this definition because in later cases, such as *Götz*, it has reiterated that the criterion for economic activity was the obtaining of income on a continuing basis.

57. *Götz* is another case on which Mr Thomas relies to support his Key Submission. That case concerned milk quota sales points which were remuneration between buyers and sellers for a supply of services. The CJEU refers to purpose but it was clear that this was with the aim of ensuring reciprocity and consideration in return for supply. This is therefore a direct link case. The CJEU gave an account of the purpose of the payment of fees to see what the purpose of the payments was and whether the payments were for economic purposes.

58. On Mr Thomas' submission, *Götz* contains jurisprudence which is inconsistent with *Finland*. In particular, he submits that [38] and [29] of *Finland* run counter to [18] and [21] of *Götz*. I do not consider that these paragraphs are inconsistent. *Götz* deals with the General Rule (and [18] is cited as authority for that in *Finland*) and the function of the national court in determining whether there is economic activity (*Götz*,[21]), which matters are also dealt with in *Finland*. *Finland* [29] merely sets out the submission of the Finnish government.

59. Another example to support his key submission which Mr Thomas gives is that of *Tolsma,* where the CJEU held that busking in return for donations was not an economic activity. Mr Thomas points out that there was no legal relationship between the busker and the donors in that case, whereas there was in *Finland*. Again, submits Mr Thomas, the CJEU had to look at the wider context. It held that in the circumstances there was no direct link between the services and the payments made to the busker. So, too, in *Fisher* Gibson J reached the conclusion (cited with approval by Lord Slynn in *ICAEW*) that regular payments in a social setting did not there amount to an economic activity.

60. Mr Thomas relies on the decision of the CJEU in *Wellcome.* The appellant was a trust which held a large block of shares. It sold a part. It wanted to deduct VAT incurred on the expenses of this sale. The trust was not a dealer in shares and the CJEU held that there was no economic activity. Mr Thomas submits that to reach this conclusion the CJEU had to look at the aims and motivations of the trust. The trust needed to maximise dividends for research work. The CJEU agreed with the Advocate General that the trust was in no different position from a private investor. The Advocate General rejected a test that the sale of shares was not the predominant concern of the trust. However, Mr Thomas submits that the CJEU left the door sufficiently ajar to support his argument that predominant concern is a relevant test in cases not dealing with private investors:

> 39. Furthermore, as the Advocate General observes in point 27 of his Opinion, to treat the Trust's activities as an economic activity within the meaning of the Directive and accordingly allow input VAT to be deducted would place an investor such as the Trust at an advantage vis-à-vis other private investors, who could not deduct input VAT under Article 17(3)(c) of the Directive where their customers are established outside the Community.
>
> 40. Finally, in view of the foregoing, whether or not the sale of shares and other securities is the predominant concern of the activity in the course of which the sales in question took place cannot affect the classification, for the purposes of Article 4 of the Directive, of the investment activity of the claimant in this case.

61. Mr Thomas also relies on *Enkler* as another case where the CJEU accepted that motivation was not to be excluded entirely when determining economic activity.

62. Applying the jurisprudence to the facts of Longridge's case, Mr Thomas submits that the presence of the concessions to those who participate is an indicator that there is no economic activity. The FTT found that the charges made were below cost. Mr Thomas submits that this case falls within the exception to the General Rule. Even if this case falls to be analysed in the same way as in *Finland* as a direct link case, the result, submits Mr Thomas, is the same, namely that Longridge's activities do not amount to an economic activity.

CONCLUSIONS

63. With the benefit of the submissions of counsel I propose to start by summarising the threads in the CJEU case law which seem to me to throw light on the question whether there was economic activity in the sort of situation with which we are concerned, then the domestic authorities. I will then deal specifically with any remaining submissions and then the application of the principles to the detailed facts of this case.

CJEU jurisprudence

64. The starting point is that a taxable person is defined by Article 9 of the Principal VAT Directive (see Appendix). It is well established that the reference in Article 9 to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis applies not only to the exploitation of property but to the provision of goods and services generally (see, for example, *Gőtz*, [18]).

65. The crucial words are "economic activity". The CJEU has held that this entails a permanent activity in return for remuneration, and that it is for the national court to determine whether those conditions have been met (*Gőtz).* The remuneration must be given in return for the service (*SDC* at 45]).

66. What should be the general approach to these words? Mr Beal submits that exemptions should be strictly construed (see, for example, Case C-348/87 *Stichting Uitvoering Financielle Acties v Staatssecretaris van Financien* at [10] and Case C-149/97 *Institute of the Motor Industry v HMRC* at [17]. This also means that the VAT directives pre-empt member states from giving further exemptions: see Case 50/87 *EC v France* [1988] ECR 4797. This approach to exemptions is to ensure tax neutrality between different traders. Mr Beal submits that the same approach applies to economic activity.

67. It is undoubtedly true that the breadth of the term "economic activity" is relevant to tax neutrality and that it would be inconsistent with tax neutrality if persons providing the same goods or services were differently treated for VAT purposes. At the same time, however, it is clear that the EU legislature does not intend that activities should be subject to VAT if they are genuinely not economic activities.

68. For there to be economic activity, certain characteristics must be present. These characteristics are sometimes summarised as a commercial purpose, but that phrase must be used with caution as it is not wholly accurate. In *Floridienne,* the CJEU held that an economic activity had to have a "commercial purpose, characterised by, in particular, a concern to maximise returns on capital investments" ([28]). In *Banque Bruxelles Lambert SA v Belgium,* Advocate General Poiares Maduro at [10] considered "economic activity" to mean "an *activity* likely to be carried on by a private undertaking on a market, *organised* within a professional framework generally performed in the interest of generating profit" (italics in original). In *Enkler,* Advocate General Cosmas at [18] opined that the assessment of an economic activity is a multi-factorial exercise to be conducted in all the circumstances. One of the relevant questions is whether the activity is being carried out with a view to obtaining income on a continuing basis. In this context "with a view to" means "for the purpose of" (see *EDM* [48]). It is also helpful to compare circumstances in which a corresponding economic activity is usually carried out.

69. Mere passive ownership of an asset is not enough (see *Polysar* and *Wellcome* (sale of shares to fund charitable activities)). Likewise the activity of a holding company managing a portfolio of investments and subsidiaries in the same way as a private investor is not carrying an economic activity (see *Floridienne* [28]). Making loans to subsidiaries is not of itself enough but the making by a holding company of loans at interest to subsidiaries may constitute an economic activity (see *EDM*).

70. There is no special rule for a charity. A charity does not enjoy blanket relief from VAT for its activities. Its liability to VAT will depend on whether its activities are economic activities. It may not be able to claim relief simply because it is carrying out a charitable activity. A profit motive is not required: see *Floridienne.*

71. There must also be relevant activity. Passive ownership of shareholdings in subsidiaries will not cause the parent company to be engaged in economic activity. In reaching this conclusion in *Floridienne,* the CJEU held that there was no direct link between dividends and the investment in the shares because the former depended on the profits of the subsidiary ([23]). A holding company may, however, be engaged in economic activity if it lends money to its subsidiaries at interest.

72. A person can be engaged in economic activity even if he is not making a profit (see, for example, *Finland,* Opinion of Advocate General Ruiz-Jarabo at [38]). In that case the state provided the services of a private lawyer to a person entitled to legal aid and that person only paid a proportion of the cost, if anything, and that proportion was based on an assessment of his resources.

73. The concept of economic activity is objective in nature. To ensure legal certainty, the court must have regard to the objective character of the transaction and not to the intention of the taxable person (see *BLP* at [24]). The purpose or result of the transaction is irrelevant as such for the purpose of determining whether an activity is within the scope of the Sixth Directive (see *Enkler* at [25]).

74. In *Finland*, the state had effectively decided to grant free legal aid but it required a beneficiary of the scheme to contribute if his means permitted him to do so. The CJEU held that this was not an economic activity because the aim was to provide free legal aid, and the beneficiaries' contributions did not come near to meeting the cost. The fact that the beneficiary made a contribution in some cases did not change the character of the scheme which was to provide free legal aid not to carry on a business activity. All the factors which generally make a payment to the supplier of a service consideration for it, were present. There was a link in terms of reciprocity but the charge bore little relation to the actual cost, so the link was not sufficiently direct for there to be an economic activity for VAT purposes.

75. An activity is in general categorised as economic where it is permanent and is carried out in return for remuneration received by the person carrying out the activity (*Finland,* [37])

76. The activity must be carried out in return for remuneration and there must be a direct link between the service and the money received by the service-provider (*Finland* [44] to [45]). The CJEU held in *Finland* that there was no link between the services provided and the paying party.

Domestic jurisprudence

77. The next step is to see whether the domestic authorities give effect to EU law principles. I take the four leading domestic cases in chronological order. The primary issue that I want to consider here is whether the domestic case law correctly reflects the CJEU case law.

78. In *Morrison's Academy*, the Inner House of the Court of Session had to consider whether boarding fees charged for accommodating pupils were within the scope of VAT. The Inner House held that the activity amounted to the carrying on of a business because it was carried on in a business-like way and with reasonable continuity. It did not matter that there was no profit motive. As Lord Cameron held at page 10:

> If the question is put another way, how would this activity be properly described without any reference to the issues of tax liability? I think the answer would be that it is essentially a business activity of a very usual and normal kind. It has every mark of a business activity: it is regular, conducted on sound and recognised business principles, with a structure which can be recognised as providing a familiar constitutional mechanism for carrying on a commercial undertaking, and it has as its declared purpose the provision of goods and services which are of a type provided and exchanged in course of everyday life and commerce. Not only so, but to some extent the association is necessarily competing in the market with other persons and concerns offering precisely similar services to the same clients or customers, i e the parents of pupils of Morrison's Academy who may seek or require residential and boarding accommodation.

79. In *Fisher,* the issue was whether a host, who provided a shoot for friends on the basis that they contributed to the costs, was carrying on a business activity. The shoots were regular events. They were conducted in a business-like way and on a basis similar to that on which shoots were run commercially. Gibson J held that it was open to the VAT tribunal to conclude that this activity was not a business activity. The activity was carried on for pleasure and not as a business. The fact that the participants made substantial contributions to the shoot did not make it a business activity. Gibson J set out six factors which the Crown contended were relevant to determining whether an activity involving remuneration for services amounted to an economic activity. He cross-referenced the factors by reference to passages in *Morrison's Academy* so it can be taken as a useful collation of indicators of economic activity:

> Counsel's detailed submissions for the Crown were, to a large extent, advanced by reference to the principles set forth in the judgments of their Lordships in the *Morrison's Academy* case, and I shall append the references to those judgments in explaining the submissions made.

Firstly, went the submission, it will never be possible or desirable to define exhaustively the word 'business' within the meaning of s 2(2)(*b*) of the 1972 Act. By providing in s 45(1) that 'business' includes any trade, profession or vocation it is clear that a wide meaning of 'business' is intended: per the Lord President (see [1978] STC 1 at 6).

Secondly, in determining whether any particular activity constitutes a business it is necessary to consider the whole of that activity as it is carried on in all its aspects: again per the Lord President (at 5). The relevant activity, said counsel for the Crown, for scrutiny in this way is the organising of his shooting by the taxpayer.

Thirdly, the aspects of that activity which are to be considered, as being indicia or criteria for determining whether the activity is a business, are six in number and were listed by counsel for the Crown as follows: (a) whether the activity is a 'serious undertaking earnestly pursued', a phrase derived from the judgment of Widgery J in *Rael-Brook Ltd v Minister of Housing and Local Government* [1967] 1 All ER 262 at 266, [1967] 2 QB 65 at 76, or 'a serious occupation, not necessarily confined to commercial or profit-making undertakings', a phrase derived from the speech of Lord Kilbrandon in *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813 at 835, [1978] AC 359 at 402, both of them cited to and referred to by the tribunal in their decision; (b) whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity: per Lord Cameron in *Morrison's Academy* [1978] STC 1 at 8; (c) whether the activity has a certain measure of substance as measured by the quarterly or annual value of taxable supplies made: again per Lord Cameron (at 8); (d) whether the activity was conducted in a regular manner and on sound and recognised business principles: again per Lord Cameron (at 10); (e) whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration: per the Lord President (at 6); (f) lastly, whether the taxable supplies are of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them: per the Lord President (at 6) and per Lord Cameron (at 10).

Fourthly, in this submission, certain aspects of the activity are not to be considered as relevant for determining whether the activity is a 'business', or are not decisive of that question, namely whether the activity is pursued for profit or whether pursued for some other private purpose or motive.

Fifthly and finally, if (as was submitted) all, or, alternatively a sufficient number, of those indicia or criteria were satisfied in sufficient measure to override any contraindications which

> might be seen in the facts, then as a matter of law the activity must be held to be a business.

80. Gibson J made it clear that these factors were "useful tools" but did not of themselves determine whether there was an economic activity. Mr Beal suggested that factor (e) had been overtaken by later authority and that (f) was not determinative, but the list remains valid to achieve what it set out to achieve, namely to identify those factors which ought to be considered.

81. In *Yarburgh*, the issue was whether the acquisition of a lease by a charity or its provision at the premises it leased of day care facilities for children in need of those facilities was a business activity. In making charges for the facilities, the charity drew a balance between keeping the facilities affordable and meeting its operating costs. The VAT tribunal found in favour of the charity. Patten J held that neither activity was a business where, looking at the transaction in its wider context and considering its "observable terms and features", the landlord was not motivated by profit. The charitable purposes of the taxpayer were part of those observable terms and features. The fact that the charity made charges was not determinative and its motive was not relevant. Patten J expressed his key conclusion as follows:

> [30] Although it might be said in the present case that the playgroup was a serious undertaking earnestly pursued with reasonable continuity and that it was conducted regularly it is evident to me as it was to the tribunal that it is not predominantly concerned with the making of taxable supplies for a consideration. The overwhelming impression which one gets from considering the evidence before the tribunal is that this is a co-operative venture run by trained staff with the benefit of help provided by parents under the control of a committee on which parents predominate. The evidence before the tribunal included a pre-school information sheet which states that the playschool is not profit led and struggles to maintain the balance between remaining affordable and meeting its operating costs. Playschool fees are fixed on this basis. This seems to me to be a very different arrangement from that subsisting in the case of a commercial playgroup run for a profit which was an example which Miss Whipple put to me. An intention to trade at a profit is not of course an essential feature of a business but it is relevant to a consideration of whether the organisation in question can seriously be regarded as doing anything more than the carrying out of its charitable functions. I think that the tribunal was entitled to conclude from the evidence before it that no business user was involved in this case.

82. In *St Paul's*, another case involving a charity providing nursery places at concessionary rates, Evans-Lombe J applied the approach of Patten J in this passage and determined by reference to the charity's predominant concern that it did not conduct a business.

83. In the present case, Rose J held that in considering the wider context of the transaction or activity, it was possible and necessary to take into account the charitable nature of the activity as part of its "observable terms and features" while avoiding the "twin heresies" of, on the one hand, taking account of the purpose for which the activity is conducted and, on the other, regarding an activity as not "economic" because it is non-profit making (Judgment, [38]).

84. In determining whether a person carries on economic activity, there is no doubt that there is no exception for activities carried out for the benefit of the public. Likewise the fact that the provider does not seek to make a profit is also irrelevant. There is no doubt that the courts must give effect to CJEU law and must do so despite domestic authorities or practice to the contrary.

CJEU and domestic case law compared

85. In my judgment, the domestic authorities have developed in a way which means that they now diverge in some respects from the test to be applied in determining whether an activity of providing services to a recipient who makes a payment constitutes an economic activity resulting in a liability to VAT. In *Finland*, for instance, the focus was on whether there was a sufficiently direct link between the payment and the service. The *Fisher* criteria (see paragraph 79 above) by contrast omit reference to the connection or proportionality of the payment to the service.

86. The *Fisher* criteria direct attention to (a) seriousness of the enterprise (b) the regularity of the activity (c) the substantiality of the activity (d) the organisational features or the enterprise (e) the predominant concern of the activity and (f) a comparison with commercial providers of the same service. These factors may have a role to play but they cannot displace the approach required by CJEU jurisprudence.

87. It follows that I do not consider that Mr Thomas's argument based on *Wellcome* is correct. It amounts to an argument there is a separate thread of CJEU case law that a person's predominant concern alone may mean that he is not carrying on an economic activity. It seems to me that this is excluded by implication by the direct link test, where that test is in point, because it is inconsistent with it.

88. It is clear that even under the direct link test there will be cases where the activities of an organisation, such as a charity, providing services at a concessionary rate, do not amount to economic activity. It was certainly the case in *Finland* that the activities at a concessionary rate did not constitute economic activity for VAT purposes. I do not accept Mr Beal's submission that *Finland* does not extend the ratio in *Apple and Pear*. In my judgment, it is probable that it did so because the CJEU decided the *Apple and Pear* case on the basis of the combination of three factors set out in paragraph 31 above. It has not been suggested that it would have decided that case on the basis of any one of those factors alone. In *Finland*, the facts were different and not all the three *Apple and Pear* factors were present. In particular there was a benefit to the person paying the charge. So the CJEU had to concentrate on one only of the factors present in *Apple and Pear*, namely the relationship of the amount charged to the benefit received.

89. The differences between the test of direct link and the *Fisher* criteria are material. This can be seen in relation to the use of volunteers. In its determination, the FTT

considered that a critical distinction between Longridge's business and that of an economic activity for VAT purposes was that Longridge uses volunteers to a significant extent. It was one of the matters which enabled the FTT to conclude that Longridge's predominant concern was to fulfil its charitable objects and not to carry on an economic activity (see Judgment of the FTT, [103] set out in paragraph 23 above). But this feature of Longridge's business, praiseworthy that it no doubt is, has little or no bearing on the direct link test.

90. I now turn to consider how the differences in approach in CJEU jurisprudence to that to be found in the domestic authorities impacts on this case.

Application of the CJEU case law to this case

91. The starting point has to be the General Rule, as Mr Thomas accepts. The General Rule can be displaced by evidence that there was no direct link between the service and the payment or by other evidence which shows that there was no economic activity. I agree with Mr Thomas that, as his various examples show, that evidence can be of varying kinds and involves the FTT when making its factual findings looking widely at the circumstances of the case.

92. As to direct link, the FTT made clear findings of fact about the charges which neither party challenges. Even after deductions were made (save in cases with which we are not concerned) for available grants and donations, the amount of the charge was more than nominal in amount and was directly related to the cost of the activity being provided. In those circumstances, in my judgment, the charges did not prevent the application of the direct link test leading to the result that there was an economic activity in this case.

93. As to other evidence, in [103] of its determination, the FTT referred to a number of factors. It referred to the internal systems of Longridge: it described Longridge as conducting and seriously pursuing its activities on a regular basis and having prudent financial management. It also referred to the scale of its activities, which was substantial, and the fact that it operated in a market where similar services were supplied on a commercial basis. I accept Mr Beal's argument that none of these matters can rebut the General Rule. On the contrary they support the impression of economic activity. The concessionary charges were also not an indicator against the existence of an economic activity because the economic activity springs from the receipt of income, not profit.

94. That leaves the FTT's final point in [103] that Longridge's predominant concern was to further its charitable objectives. That was demonstrated by its considerable use of volunteers (see paragraph 89, above). But economic activity is assessed objectively and so the concern of Longridge, which is its reason for providing the services which it does provide, is not enough to convert what would otherwise be economic activity into an activity of a different kind for VAT purposes. The reduction in costs due to the work of unpaid volunteers would also not lead to that conclusion.

95. In my judgment, because of these material differences, the conclusion that there was a misdirection of law which vitiates the decisions below is inevitable. There is no room in this situation for Mr Thomas' invocation of the principle that an appellate tribunal

should not in general set aside an evaluation made by the tribunal which made the findings of fact.

96. Accordingly in my judgment, Longridge conducted an economic activity for VAT purposes and the right order in this case would be to allow the appeal of HMRC and to dismiss Longridge's appeal against HMRC's determination that it was carrying on economic activity or business for VAT purposes.

Three final matters

97. I mention three final matters. First, HMRC relies on the principle of fiscal neutrality, and submits that this applies to the assessment of economic activities. It is an important principle of VAT law that similar transactions should be taxed in a similar way to prevent giving competitive advantages to certain traders. On the face of it, this principle would apply to Longridge's activities, if as I assume they compete with other commercial activities of the same description. However, the CJEU has in general held that there must be economic activity before questions of fiscal neutrality arise: see *Wellcome* at [25] and [38] and *Finland* at [52]. I therefore leave open the question whether it is appropriate to place any reliance on this principle in coming to my conclusion above.

98. Second, HMRC have placed reliance on Articles 132 and 133. They submit that it would be odd to have Articles 132 and 133 if economic activity had the meaning for which Longridge contends. The FTT did not consider that these Articles were relevant to the issues which it had to decide. The Upper Tribunal held that Article 132 showed that some non-profit supplies of educational services to young people were economic activities. However, the Upper Tribunal rejected the argument that every organisation meeting that description was carrying on an economic activity. In the light of the conclusions which I have reached I do not consider that I need to decide whether HMRC is right on this point or not, and in reaching my conclusion I have not placed any reliance on those Articles. It may be, therefore, that closer examination of this argument may show that the EU legislature recognised the possibility of liability to VAT for bodies such as Longridge who seek to provide activities for public benefit at a subsidised rate and sought to regulate that possibility by laying down certain conditions which would to some extent protect other traders who did not have the benefit of being able to provide similar services without a charge to VAT. I leave that question open.

99. Third, in my judgment, this Court can give effect to CJEU jurisprudence without the need for any preliminary ruling by the CJEU. Neither party pressed this Court to make a reference. Accordingly I conclude that we should not make an order for a reference for such a ruling.

Disposition

100. For these reasons I would allow the appeal. On the findings of the FTT and the application of CJEU jurisprudence Longridge's activities amounted to an economic activity for the purposes of VAT.

LORD JUSTICE TOMLINSON

101. I agree that the appeal should be allowed for the reasons given by Arden LJ.

MR JUSTICE MORGAN:

102. I agree with Arden LJ that the appeal should be allowed.

103. As the issue in this appeal is of some importance, in particular in relation to charities, I will explain the principal considerations which have persuaded me to allow the appeal. I gratefully adopt Arden LJ's summary of the facts and the abbreviations which she has used. As her judgment also contains a full citation of the many authorities relied upon by the parties, it will not be necessary for me to carry out the same exercise in this judgment.

104. The issue before the FTT was whether the activities of Longridge amounted to "economic activity" for the purposes of Article 9 of the Principal VAT Directive and amounted to a "business" for the purposes of sections 4 and 94 of VATA 1994. As the word "business" in VATA 1994 has the same meaning as "economic activity" in the Principal VAT Directive, the issue can be simply stated as being whether the activities of Longridge amounted to "economic activity".

105. Although the issue concerns the activities of Longridge, the case is not directly concerned with the imposition of VAT on a supply of services by Longridge nor on Longridge's ability to reclaim input tax which it might have paid. The issue arises in the context of the provision of services to Longridge which Longridge says should be zero-rated under Items 2 and 4 of Group 5 of schedule 8 to VATA 1994, these provisions being read in accordance with Note (6) thereto. The relevant services were supplied in the course of the construction of a building. On the findings of the FTT, the building was to be used for the general activities of Longridge. Longridge will be able to establish that the services should be zero-rated if the building was intended to be used for a relevant charitable purpose and, in particular, used "otherwise than in the course or furtherance of a business".

106. Although it has been held that provisions concerned with the zero-rating of goods and services are to be narrowly construed, the particular part of the zero-rating provisions which is to be interpreted and applied in this case relates to the activities of Longridge and the result turns on whether those activities are a business or an economic activity. The concept of economic activity is central to the operation of VAT and generally has a wide scope. I approach the issue in this case without any inclination to construe the meaning of economic activity in a particularly narrow way. The phrase is to be given its ordinary meaning, even in the present context which involves zero-rating. Indeed, because the relevant zero-rating in this case does *not* apply where the building is intended to be used for economic activity, giving the concept of economic activity its usual wide scope serves to narrow the operation of the relevant provision as to zero-rating.

107. In order to interpret the phrase "economic activity" it is necessary to place it in the context of other provisions of the Principal VAT Directive. Article 2 refers to the supply of goods and services for consideration by a taxable person. Article 9 defines a "taxable person" as a person who carries on any economic activity "whatever the

purpose or results of that activity". Article 9 states that "any activity of … persons supplying services … shall be regarded as "economic activity"". Article 9 adds that "[t]he exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity". These provisions in Article 9 indicate the width of the phrase but the fact remains that Article 9 does not contain an exhaustive definition of the phrase.

108. The meaning of economic activity has been considered in a large number of decisions of the CJEU, dealing with a wide range of different activities. The various CJEU judgments contain many statements as to the meaning of the phrase "economic activity" and how it is to be applied to different combinations of facts. It is possible to pick out phrases from some of the CJEU judgments which appear to be in conflict. However, any inconsistencies in the expressions used may be more apparent than real and are the result of the court in a particular case reacting to the particular version of the issue which is before it.

109. It is possible to distil certain propositions, relevant to this case, from the terms of the Principal VAT Directive and from the decisions of the CJEU. I consider that the following general propositions are established:

i) It is only supplies, of goods or services, "for consideration" which are subject to VAT: Article 2;

ii) There must be a direct link between the supply and the consideration before it is right to hold that the supply is "for consideration": *Finland* at [44]-[45];

iii) Indeed, if there is no direct link between the supply and the consideration, the question of economic activity does not strictly arise as there is no consideration to form the basis of an assessment to VAT: *Finland* at [43];

iv) VAT is charged on the amount of the consideration; it is irrelevant for the purpose of calculating the VAT payable whether the consideration for the supply is above or below the market value of the supply: *Finland* at [44] refers to "the value actually given";

v) It is irrelevant for the purpose of calculating the VAT payable whether the consideration for the supply is at a concessionary rate; whatever precisely was meant by the word "concession" in *EC v France* at [21], it cannot be taken to mean that any reduction in price by way of a concession takes the supply outside the scope of economic activity; indeed, in *EC v France* at [20], the CJEU obviously thought that lettings by local authorities at subsidised rents were an economic activity;

vi) Article 9 states that a taxable person is a person who carries on any economic activity, whatever the purpose of that activity: *Finland* at [37];

vii) If a person supplies goods or services "for consideration", i.e. satisfying the test of direct link referred to in (2) above, and the activity is "permanent", then there is a rebuttable presumption, or a general rule subject to possible exceptions, that the supply for consideration is an economic activity: *Finland* at [37];

viii) The character of the activity (i.e. whether it is an economic activity) is to be judged objectively: *Finland* at [37];

ix) The subjective motive of the person making the supply does not influence the identification of the objective character of the supply; this follows from the proposition that the character of the activity is to be judged objectively;

x) A charitable activity can be an economic activity: see *EC v Netherlands,* discussed at paragraph 17 above;

xi) A non-profit making activity can be an economic activity: *Finland* at [40].

110. In addition to the CJEU cases, there have been several decisions of the courts of England and Wales, and indeed of Scotland, which illustrate the application of the phrase "economic activity" to various sets of facts. Arden LJ has referred to the United Kingdom cases which are of principal relevance. They are *Morrison's Academy*, *Fisher*, *ICAEW*, *Yarburgh* and *St Paul's*. The actual decisions in the first three of these cases are not controversial. The last two of these cases involved the supply of services by charities and the decisions (and the reasoning) in those two cases have been criticised by HMRC as out of line with the propositions to be derived from the CJEU decisions.

111. Arden LJ has quoted (at [79] above) the six indicia or criteria which were put forward by way of counsel's submission in *Fisher*. Those indicia or criteria have been given considerable attention in the domestic decisions although it is right to point out that in *Fisher* itself, the court did not find them particularly helpful when reaching its decision and I do not read the speech of Lord Slynn of Hadley in *ICAEW* as a positive endorsement of these indicia or criteria. Lord Slynn referred to the indicia or criteria because they had been relied upon by the first instance tribunal in that case and Lord Slynn held that that tribunal had not committed any error of law.

112. There is one of the indicia or criteria which has caused difficulty in the past and which has the potential to be misleading. I refer to the criterion that the making of taxable supplies for consideration is the "predominant concern" of the activity of the supplier.

113. A reference to "predominant concern" first appeared in the judgment of the Lord President (Lord Emslie) in *Morrison's Academy* [1978] STC 1 at page 6. What Lord Emslie was there referring to was the predominant subject matter or content of the activity in question.

114. The criterion of "predominant concern" was specifically considered by the Advocate General (Lenz) and the Court in *Wellcome Trust Ltd v Commissioners of Customs and Excise* [1996] ECR I-3013. The activity in that case, which involved the purchase and sale of securities in the course of management of a charitable trust, was held not to be an economic activity. Four questions had been referred to the Court. The first three related to different features of the circumstances of that case. The fourth question was:

> "… is it relevant to consider whether the sale of shares and securities is the predominant concern of the activity in the course of which the sales take place; and, if so, how should such activity and its extent be defined?"

115. In the opinion of the Advocate General, the fourth question was dealt with as follows:

> "38. According to the appellant, this question relates to national case law on the issue whether an activity is of predominant concern. Thus, the United Kingdom also submits in its written observations that it is useful to consider, in all the questions submitted in this case, whether the activity to be assessed is of predominant concern.
>
> 39. The Commission, in contrast, points out that the notion of "predominant concern" is not used in the VAT directive. Under the directive, it is the inherent nature of the activity itself that is the vital consideration not whether the activity is or is not predominant. I also take the view that, in order to determine whether an activity is an economic activity for the purposes of art 4(2), it is not appropriate to consider whether the activity is of predominant concern. To illustrate this point, I would refer to the activities of the Wellcome Trust in respect of which it is registered as a taxable person. These relate to the sale of books, photographs and so forth, none in any event an activity which is of predominant concern. That notwithstanding, these activities must be regarded as being economic activities for the purpose of the Sixth Directive, whereas the principal occupation of the trust, namely the management of assets, cannot be regarded as an economic activity within the meaning of the Sixth Directive."

116. In *Wellcome*, the Court held that the relevant activity was not an economic activity and it dealt with the fourth question briefly at [40] in this way:

> "40 Finally, in view of the foregoing, whether or not the sale of shares and other securities is the predominant concern of the activity in the course of which the sales in question took place cannot affect the classification, for the purposes of Article 4 of the Directive, of the investment activity of the claimant in this case."

117. The decision in *Wellcome* shows that the use of a test of "predominant concern", in accordance with the approach of Lord Emslie in *Morrison's Academy*, may be unhelpful. It may be misleading to look at a range of activities and settle on a single classification for all of them by reference to their predominant concern or predominant subject matter. Instead, it may be appropriate to look at a range of activities and identify some which amount to an economic activity (for example, the sale of books in *Wellcome*) and others which do not (for example, the dealing in shares in *Wellcome*).

118. Notwithstanding the adverse comment on the test of "predominant concern" in *Wellcome*, the test has continued to be referred to in domestic cases, in particular in two cases concerning charities, *Yarburgh* and *St Paul's*.

119. In *Yarburgh*, Patten J referred to the six indicia or criteria which first appeared in *Fisher* and at [30] he held that the activity of the charity in that case was not predominantly concerned with the making of taxable supplies for a consideration. He held that it was a relevant, but not a decisive, factor that the activity was not profit led.

120. In *St Paul's Community Project Ltd*, Evans-Lombe J also referred to the six indicia or criteria. He regarded the indicia (see [31] and [49]) as having been approved by the House of Lords in *ICAEW*. He suggested that the passage (quoted above) from the Advocate General in *Wellcome* was not entirely clear and that paragraph [40] of the judgment of the Court in that case was not the basis on which the case was decided. He held that the first instance tribunal in that case had made no mistake of law in holding that the criterion of predominant concern was not satisfied. At [54], he stated that the matters which weighed heavily with him in that case were: (1) the social reasons for carrying on the activity; (2) the low fees charged; (3) the intention that the fees only covered the costs; and (4) the fees amounted to a concession. It can be seen that this approach is not compatible with the propositions I have summarised above, derived from the decisions of the CJEU. The judge in *St Paul's* based his decision on the motive of the supplier or the purpose of the supply and on the fact that the consideration involved a concession.

121. I consider that it should now be recognised that the test of "predominant concern" is unhelpful and may be misleading. For the reasons given in *Wellcome*, it is generally not helpful to look at a range of activities and settle on a single character for them by reference to their predominant content or subject matter. The test of predominant concern is positively misleading if it is understood as a reference to the predominant concern of the supplier of the service (as it was understood by the FTT in the present case). The CJEU decisions make it clear that the motive of the supplier is not material in this context.

122. The propositions summarised in [109] above contain the correct legal test for the determination of the issue in this case. I consider that the result of applying those propositions to the facts as found by the FTT is as follows:

i) Longridge supplies services for consideration;

ii) Longridge's supplies are "permanent" as part of an established activity, regularly carried on;

iii) There is a direct link between the supplies and the consideration;

iv) The supply of services for consideration on a permanent basis is presumed to be an economic activity;

v) Even if Longridge's motive in supplying the services is more concerned with the benefit of the services to those to whom they are supplied, rather than obtaining the consideration for the services, any such motive would not alter the objective character of the supply;

vi) It is irrelevant in this case that the consideration for the supply of services is below the market value of the supply and, in some cases, involves a concession;

vii) There is no factor (or combination of factors) which rebuts the presumption that Longridge's supply of services is an economic activity; the facts that Longridge is a charity and its activities are non-profit making are not of any significance for this purpose;

viii) In all the circumstances, the supply of services by Longridge for consideration is an economic activity;

ix) Accordingly, Longridge does not satisfy Note (6) to Items 2 and 4 in Schedule 8 to VATA 1994 and the construction works in this case were not zero-rated.

123. The FTT did not apply the propositions summarised in [109] above. Instead, it sought to apply the indicia or criteria identified in *Fisher* and applied in *Yarburgh* and *St Paul's*. In particular, when the FTT considered the question of "predominant concern", it considered the predominant concern of Longridge: see paragraph [103] of the FTT decision quoted by Arden LJ at [23] above. The FTT took into account: (1) Longridge's motive in providing the services; (2) the fact that the consideration for the services was at a concessionary rate; and (3) the fact that Longridge was non-profit making. I consider that the FTT erred in law. If the FTT had applied the correct legal test, it should have held that the activities of Longridge constituted an economic activity for the purposes of the Principal VAT directive and a business for the purposes of VATA 1994. It should therefore have held that the construction works were not zero-rated. It follows that the Upper Tribunal was wrong in law to hold that the FTT had not committed an error of law.

APPENDIX TO JUDGMENTS OF ARDEN LJ

Relevant provisions of the Principal VAT Directive

1. Article 2 provides, so far as relevant, that "the supply of goods for consideration within the territory of a Member State by a taxable person acting as such" shall be a transaction which is subject to VAT.

2. Article 9(1) (formerly Article 4(2) of the Sixth Directive) defines "taxable person":

> 1 "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

3. Article 132 sets out exemptions for certain activities in the public interest:

> 1 Member States shall exempt the following transactions:
>
> ...
>
> (h) the supply of services and goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social wellbeing;
>
> (i) the provision of children's or young people's education, school or university education; vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;
>
> ...
>
> (m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education.

4. Article 133 permits a Member State at its discretion, to qualify, or make subject to certain specified conditions, the exemption which otherwise it is mandatorily required by Article 132 to apply to certain of the transactions specified in that Article:

> Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points ...(h), (i) ...(m)... of Article 132(1) subject in each individual case to one or more of the following conditions:

> (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;
>
> (b) ...
>
> (c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;
>
> (d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

VATA 1994

1. Section 4 implements within the UK the terms of Articles 2 and 9. It provides:

> **4 Scope of VAT on taxable supply**
>
> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

2. A "taxable person" is a person who is required to be registered for VAT purposes (broadly, a person whose supplies on which VAT is chargeable exceed in value the registration threshold):

3. Section 94, VATA 1994 defines "business" as including "any trade profession or vocation*"*.
4. Section 30 provides for certain supplies by a taxable person to be taxable at the zero rate. Schedule 8 specifies such supplies, and Group 5 of Schedule 8, headed *Construction of Buildings, etc* is relevant for this appeal, and in particular Items 2 and 4:

> 2. The supply in the course of the construction of –
>
> (a) a building ... intended for use solely for ... a relevant charitable purpose; or
>
> (b) ... ,
>
> of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

> 4 The supply of building materials to a person to whom the supplier is supplying services within item 2 ... of this Group which include the incorporation of the materials into the building (or its site) in question.

5. The Notes to Group 5 make further provision, and for this appeal Notes (6), (10) and (12) are relevant:

> (6)Use for a relevant charitable purpose means use by a charity in either or both the following ways, namely –
>
> (a) otherwise than in the course or furtherance of a business;
>
> (b) as a village hall or similarly in providing social or recreational facilities for a local community.
>
> (10)Where –
>
> (a) part of a building that is constructed is ... intended for use solely for a ...relevant charitable purpose (and part is not); or
>
> (b) ... then in the case of –
>
> (i) a grant or other supply relating only to the part so ... intended for that use (or its site) shall be treated as relating to a building so ...intended for such use;
>
> (ii) a grant or other supply relating only to the part [not] so ... intended for such use (or its site) shall not be so treated; and
>
> (iii) any other grant or other supply relating to, or to any part of, the building (or its site), an apportionment shall be made to determine the extent to which it is to be so treated.
>
> (12)Where all or part of a building is intended for use solely for a ... relevant charitable purpose –
>
> (a) a supply relating to the building (or any part of it) shall not be taken for the purposes of items 2 and 4 as relating to a building intended for such use unless it is made to a person who intends to use the building (or part) for such a purpose; and
>
> (b) a grant or other supply relating to the building (or any part of it) shall not be taken as relating to a building intended for such use unless before it is made the person to whom it is made has given to the person making it a certificate in such form as may be specified in a notice published by the Commissioners stating that the grant or other supply (or a specified part of it) so relates.